

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

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

**PETITIONERS' REPLY IN OPPOSITION TO T-MOBILE'S MOTION  
TO DISMISS THE CLEC PETITIONERS**

**I. INTRODUCTION AND SUMMARY**

On November 16, 2005, T-Mobile filed a motion to dismiss the four competitive local exchange carrier (CLEC) Petitioners from this case. T-Mobile argues that the Commission lacks authority to resolve disputes involving CLECs and wireless carriers, but Sections 251(d)(3), 252(e)(3), and 261 of the Act expressly grant the Commission such authority under these circumstances. Moreover, as a practical matter, T-Mobile's reasoning would prevent the CLEC Petitioners from ever completing arbitrated agreements because T-Mobile would be the only carrier that could request negotiations. As a result, the CLEC Petitioners would be held hostage to T-Mobile's demands. T-Mobile's motion is nothing more than an attempt to exploit a "void in the law" through what the Missouri Court of Appeals – Western District has described as "calculated inaction."<sup>1</sup> The Commission should deny T-Mobile's motion immediately and move forward in resolving all of the issues between Petitioners and T-Mobile in this proceeding. Alternatively, the Commission should direct T-Mobile to answer whether it will consent to arbitration under Section 386.230 RSMo.

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<sup>1</sup> *State ex rel. Sprint Spectrum v. Public Serv. Comm'n*, 112 S.W.3d 20, 26 (Mo. App. W.D. 2003)("[W]ireless tariffs reasonably fill a void in the law where **the wireless companies routinely circumvent payment to the rural carriers by calculated inaction.**")(emphasis added).

## **II. DISCUSSION**

### **A. The CLEC Petitioners**

The CLEC Petitioners are all affiliates of incumbent local exchange carriers (“ILECs”) that are also requesting arbitrated agreements in this case. Specifically, Fidelity Communications Services I and Fidelity Communications Services II are both affiliates of Fidelity Telephone Company. Green Hills Telecommunications Services is an affiliate of Green Hills Telephone Corporation, and Mark Twain Communications Company is an affiliate of Mark Twain Rural Telephone Company. The CLEC Petitioners all serve rural areas with similar cost characteristics to those of the ILEC Petitioners, and the CLEC Petitioners have all submitted cost studies in this case. Like the ILEC Petitioners, the CLEC Petitioners are all indirectly connected with T-Mobile and are receiving wireless calls from T-Mobile in the absence of an agreement. Like the ILEC Petitioners, T-Mobile has failed to compensate the CLEC Petitioners for calls that were delivered in violation of the wireless termination service tariffs approved by the Commission.

The CLEC Petitioners are obligated by Section 251(a)(1) of the Act to accept indirect traffic from T-Mobile. The CLEC Petitioners are also obligated by Section 251(b)(5) of the Act to establish reciprocal compensation arrangements with T-Mobile. Missouri’s other major wireless carriers such as Cingular, Sprint PSC, and Verizon Wireless have all negotiated agreements with rural CLECs.<sup>2</sup>

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<sup>2</sup> See e.g. *Fidelity Communications Services I’s Application for Approval of a Traffic Termination Agreement with Cingular Wireless*, Case No. TO-2004-0446, *Order Approving Interconnection Agreement*, issued Mar. 26, 2004; *Fidelity Communications Services II’s Application for Approval of a Traffic Termination Agreement with Cingular Wireless*, Case No. TO-2004-0447, *Order*

Thus, there is no additional burden on the Commission or T-Mobile to include the CLEC Petitioners in this arbitration.

## **B. The Missouri Commission's Federal Authority**

T-Mobile argues that the Commission “lacks the legal authority to arbitrate disputes between two competitive carriers (i.e., a CLEC and a wireless carrier like T-Mobile).”<sup>3</sup> T-Mobile’s narrow interpretation of the Act and the FCC’s rules is nothing more than gamesmanship seeking to exploit what T-Mobile views as a “void in the law” that would allow it to continue its course of “calculated inaction” with the CLEC Petitioners. Fortunately, the Act expressly provides the Missouri Commission with authority to address and resolve this dispute.

First, Section 251(d)(3) of the Act expressly grants the Commission the authority to approve and enforce the “access and interconnection obligations of **local exchange carriers**” (i.e. both CLECs and ILECs). Second, Section 252(e)(3) of the Act allows the Missouri Commission to establish or enforce “other requirements of State law” when it reviews an arbitrated agreement. Third, Section 261 of the Act allows the Missouri Commission to impose such “requirements on a telecommunications carrier for intrastate services that are necessary to further competition” so long as those requirements are not inconsistent with the Act.

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*Approving Interconnection Agreement*, issued Mar. 26, 2004; *Fidelity Communications Services I, Inc.'s Application for Approval of its Traffic Termination Agreement with Sprint PCS*, Case No. TK-2003-0541, *Order Approving Interconnection Agreement*, issued Aug. 20, 2003; *Fidelity Communication Services I, Inc.'s Application for Approval of a Traffic Termination Agreement with Verizon Wireless*, Case No. CK-2003-0287, *Order Approving Interconnection Agreement*, issued Mar. 27, 2003; *Fidelity Communication Services II, Inc.'s Application for Approval of a Traffic Termination Agreement with Verizon Wireless*, Case No. CK-2003-0285, *Order Approving Interconnection Agreement*, issued Mar. 25, 2003.

<sup>3</sup> T-Mobile *Motion*, p. 1.

## 1. Section 251(d)(3) of the Act

The Telecommunications Act expressly grants the PSC with authority to approve and enforce access and interconnection obligations of local exchange carriers such as the Petitioners in this case:

### **PRESERVATION OF STATE ACCESS REGULATIONS.**

In prescribing and enforcing regulations to implement the requirements of this section, **the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that—**

(A) **establishes access and interconnection obligations of local exchange carriers;**

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part

(47 U.S.C. §251 et seq.)

47 U.S.C. §251(d)(3)(emphasis added). Section 251(d)(3) of the Act expressly grants the Commission the authority to approve and enforce the “access and interconnection obligations of **local exchange carriers.**” Because this provision addresses “local exchange carriers” or “LECs”, it applies equally to both incumbent LECs (i.e. “ILECs”) and competitive LECs (i.e. “CLECs”). Thus, the Commission has express statutory authority under the Act to address the access and interconnection obligations of both CLECs and ILECs.

In Case No. TT-97-524, the Commission prohibited wireless carriers from sending wireless calls to small rural LECs in the absence of a compensation agreement.<sup>4</sup> Nevertheless, some wireless carriers such as T-Mobile violated this Commission order and sent wireless calls to the CLEC Petitioners in the absence of an approved agreement:

Despite the fact that no such agreements were ever obtained, the wireless companies continued to send, and SWBT continued to transmit, wireless calls to the networks of the rural carriers without compensation. . . . The inability of the rural carriers to refuse these calls left the wireless companies with no incentive to make compensation arrangements when they could continue to terminate their calls at no cost.<sup>5</sup>

\* \* \*

[T]he wireless companies routinely circumvent payment to the rural carriers by calculated inaction.<sup>6</sup>

T-Mobile has refused to establish an agreement with the CLEC Petitioners and now seeks to exploit a “void in the law” and continue its course of “calculated inaction” with the CLEC Petitioners. The PSC has express authority under Section 251(d)(3) of the Act to enforce its order in Case No. TT-97-524 that prohibited wireless calls from being sent to small rural LECs in the absence of an agreement.

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<sup>4</sup> *Sprint Spectrum*, 112 S.W.3d at 23 (The Commission “prohibited the wireless companies from sending calls through SWBT that terminated with the rural carriers, unless the wireless companies had an agreement to compensate the rural carriers.”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 26.

Federal courts recognize that the Act expressly preserves a state commission's right to enforce its own interconnection obligations on carriers:

When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell*, 323 F.3d at 358. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* Specifically, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. §251(d)(3).<sup>7</sup>

Therefore, the Commission should reject T-Mobile's claim that the Commission lacks authority to enforce its requirement for wireless carriers to establish agreements and arbitrate this dispute involving Missouri's small rural CLECs and T-Mobile.

## **2. Section 252(e)(3) of the Act**

Section 252(e)(3) of the Act states that “**nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law** in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.” *See also Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F.Supp. 2d 1104, 1115 (W.D. Mich. 2000)(holding that §252(e)(3) “expressly allows state

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<sup>7</sup> *BellSouth Telecomms. Inc. v. Cinergy Communs. Co.*, 297 F. Supp. 2d 946 (ED Ky. 2003).

commissions to establish and enforce other requirements of state law in reviewing an agreement.”).

In 1998, the Commission prohibited wireless carriers from sending wireless calls to small rural LECs in the absence of a compensation agreement.<sup>8</sup> In 2001, the Commission approved wireless termination service tariffs for each of the CLEC Petitioners,<sup>9</sup> and these tariffs were upheld by both the FCC and the Missouri Court of Appeals. T-Mobile has violated both of these Commission orders and sent wireless calls to the CLEC Petitioners without payment and in the absence of an approved agreement. Section 252(e)(3) of the Act allows the Commission to enforce its prior orders and put an end to T-Mobile’s free ride.

### **3. Section 261 of the Act**

Section 261 of the Act authorizes state commissions to address issues and impose requirements that are necessary to further competition. Specifically, Section 261(c) provides:

Nothing in this part precludes a State from **imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access,** as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.

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<sup>8</sup> *Sprint Spectrum*, 112 S.W.3d at 23 (The Commission “prohibited the wireless companies from sending calls through SWBT that terminated with the rural carriers, unless the wireless companies had an agreement to compensate the rural carriers.”).

<sup>9</sup> *In the Matter of Mark Twain Communications Company’s Wireless Termination Service Tariff*, Case No. TT-2001-646, *Report and Order*, issued Oct. 16, 2001.

47 U.S.C. §261(emphasis added). Thus, as long as state regulations “do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.” *Michigan Bell Tel. Co. v. MCI Metro Access*, 323 F.3d 348, 359 (6<sup>th</sup> Cir. 2003). In fact, the Act recognizes and specifically preserves state authority to regulate locally, as long as the regulations do not conflict with the stated goals and requirements of the Act on its face or as interpreted by the FCC. *Id.*; see also *Sprint Spectrum v. Public Service Comm’n*, 112 S.W.3d 20, 25-26 (Mo. App. W.D. 2003).

Neither the Act nor the FCC’s *T-Mobile Order* prohibit the Commission from enforcing its decision in Case No. TT-97-524 and establishing an agreement through arbitration between the CLEC Petitioners and T-Mobile to achieve its directive in Case No. TT-97-524. Indeed, the FCC stated “we find it necessary to ensure that **LECs** have the ability to compel negotiations and arbitrations, as CMRS [i.e. wireless] providers may do today.”<sup>10</sup> Accordingly, Section 261 provides the Commission with authority to arbitrate this dispute.

#### **4. T-Mobile’s “Calculated Inaction”**

Since 1996, T-Mobile has had the right to connect indirectly with the CLEC Petitioners under §251(a)(1) of the Act and establish agreements under §251(b)(5) of the Act. But T-Mobile has consciously chosen not to pursue agreements. Instead, T-Mobile has used the CLEC Petitioners’ facilities and services without paying the CLEC Petitioners. The Missouri Court of Appeals found that wireless carriers had employed a strategy of “calculated inaction” by

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<sup>10</sup> *T-Mobile’s Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, rel. Feb. 24, 2005, ¶16 (emphasis added).



sending calls in the absence of an agreement. Specifically, the court recognized that the wireless carriers were the only ones at that time with the right to compel negotiations, and they would employ “calculated inaction” for as long as they could receive free call termination.<sup>11</sup> This is clearly T-Mobile’s goal in dismissing the CLEC Petitioners, and the Commission should deny T-Mobile’s bad faith effort to prevent these small rural CLECs from establishing agreements.

Under T-Mobile’s reasoning, the CLEC Petitioners are unable to initiate negotiation or arbitration, so as a practical matter the CLEC Petitioners must either: (1) forego an agreement; or (2) accept what T-Mobile unilaterally offers. The PSC should reject this absurd Catch-22. The FCC sought to encourage agreements when it denied T-Mobile’s *Petition for Declaratory Ruling*.<sup>12</sup> Again, the FCC stated, “we find it necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS [i.e. wireless] providers may do today.”<sup>13</sup> Granting T-Mobile’s motion would effectively prevent such agreements and encourage continued abuse. Thus, in the absence of a comprehensive scheme to address T-Mobile’s “calculated inaction” in this case, the Commission may proceed with this matter under both the Act and its state law authority.

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<sup>11</sup> *Sprint Spectrum*, 112 S.W.3d at 25 (“The Act requires “local exchange carriers” -- such as the rural carriers -- to negotiate in good faith and establish compensation arrangements for the termination of traffic, but it does not impose the same obligation on wireless carriers. The term “local exchange carriers” is expressly defined in the Act to *exclude* providers of “commercial mobile service,” such as the wireless companies. 47 U.S.C. section 153(26). The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers. In the absence of a comprehensive scheme to address the wireless companies’ conduct, the Commission did not use its tariff-approval authority to supplant federal law.”)(emphasis added).

<sup>12</sup> *T-Mobile’s Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, rel. Feb. 24, 2005, ¶14 (The FCC “intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act.”).

<sup>13</sup> *Id.* at ¶16 (emphasis added).

The Commission rejected a strategy similar to the one that T-Mobile seeks to employ in this case when it approved the CLEC Petitioners' wireless termination service tariffs in Case No. TT-2002-646:

Furthermore, Mark Twain points out in its briefs that it would be fundamentally inequitable to allow ILECs to recover termination costs through termination service tariffs, but to deny a CLEC the same opportunity. The Commission agrees. **The intent of the Telecommunications Act is to encourage competition, and preventing one of the few CLECs that is trying to compete outside of urban areas from using the same method of collecting termination costs used by ILECs would frustrate that intent. A level playing field for competition requires that a CLEC be able to use the same tools to recover costs that ILECs use.**<sup>14</sup>

The same rationale applies in this case, so the Commission should exercise its authority under the Act to: (1) establish interconnection obligations under 251(d)(3); (2) enforce state law under 252(e)(3); and (3) "impose requirements that are necessary to further competition" under 261(c) by arbitrating the dispute between T-Mobile and the CLEC Petitioners.

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<sup>14</sup> *In the Matter of Mark Twain Communications Company's Wireless Termination Service Tariff*, Case No. TT-2001-646, *Report and Order*, issued Oct. 16, 2001.

### **C. The Missouri Commission's State Law Authority**

Although the Commission clearly has authority under the Act to arbitrate the CLEC Petitioners' dispute with the wireless carriers, the Commission also has authority under state law to arbitrate a dispute for a Missouri public utility such as the CLEC Petitioners where both parties agree to arbitration. Specifically, §386.230 RSMo. 2000 provides:

Whenever any public utility has a controversy with another public utility or person and all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators, the commission shall act as such arbitrators, and after due notice to all parties interested shall proceed to hear such controversy, and their award shall be final. Parties may appear in person or by attorney before such arbitrators.

If T-Mobile wanted to resolve its dispute with the CLEC Petitioners before the Commission in this proceeding, then T-Mobile could easily do so with a simple agreement in writing. Therefore, if the Commission does not deny T-Mobile's motion in its entirety, then it should direct T-Mobile to advise the Commission whether or not it is willing to submit this dispute to the Commission under §386.230 RSMo.

### III. CONCLUSION

WHEREFORE, the CLEC Petitioners respectfully request that the Commission DENY T-Mobile's motion to dismiss the CLEC Petitioners and move forward to resolve this dispute through its clear authority under the Act. In the event that the Commission does not deny T-Mobile's motion in its entirety, then Petitioners request that the Commission issue an order directing T-Mobile to advise the Commission in writing whether or not it is willing to submit this dispute to the Commission for arbitration under §386.230 RSMo.

RESPECTFULLY SUBMITTED,

**/s/ Brian T. McCartney**

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or via electronic mail, or hand-delivered on this 28<sup>th</sup> day of November, 2005, to the following parties:

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