

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

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

APPLICATION TO DISMISS CERTAIN ISSUES AND FOR RULINGS IN LIMINE

Comes now T-Mobile USA, Inc. ("T-Mobile"), by its undersigned attorneys, and pursuant to 4 CSR 240-2.080 and 240-36.040(11), applies for a determination of the Arbitrator limiting the issues to be tried in this arbitration. In support of this Application, T-Mobile states the following:

Procedural History

1. This arbitration was commenced on June 7, 2005, by the filing of four separate Petitions. By order dated June 8, 2005, the Arbitrator consolidated the cases for hearing and resolution. The parties appeared before the Arbitrator on June 29, 2005, for an initial arbitration meeting. As a result of the discussion at the meeting, the Arbitrator issued the Procedural Schedule governing the proceeding. *Inter alia*, the Procedural Schedule allows for the filing of motions to limit the issues in this proceeding.

2. As required by the Procedural Schedule, T-Mobile files herewith its motion to dismiss certain issues raised by the Petitioners in their arbitration petitions. Specifically, T-Mobile requests that the Arbitrator rule that issues related to traffic volumes and compensation for completion of traffic prior to the January 13, 2005, the date on which the Petitioners requested that T-Mobile enter into negotiations for Traffic Termination Agreements, are irrelevant and not proper subjects for consideration and resolution in this arbitration. Further, T-

Mobile requests that the Arbitrator rule *in limine* that those issues will not be proper subjects of discovery, prefiled testimony, and cross examination in this proceeding.

Argument

A. This Commission Does Not Have the Authority under Federal Law to Consider in This Arbitration Proceeding Reciprocal Compensation Obligations that Predate the Request for Negotiations.

3. In the Petitions initiating these proceedings, the Petitioners identified five issues which relate directly to issues which have no bearing on the terms of the Traffic Termination Agreements which will govern the parties' relationship on a going-forward basis. Listed below, these issues arise out of the relations between T-Mobile and the Petitioners prior to the request for negotiations in January, 2005:

Issue 1: coordinated resolution of past compensation issues with prospective traffic termination agreement;

Issue 2: past traffic volumes;

Issue 3: past traffic jurisdiction;

Issue 4: rates for past traffic volumes; and

Issue 5: compensation for past traffic exchange.

4. The Petitioners necessarily filed their Petitions for arbitration pursuant to federal law – specifically, Section 252 of the Communications Act and the FCC implementing regulations. As this Commission's authority to arbitrate disputes is based on federal law, this Commission possesses only that authority which Congress has delegated to it. Federal law is clear that the reciprocal compensation obligations imposed by the Act and the FCC implementing rules are triggered only when one carrier requests compensation from another carrier in the form of a Section 252 negotiation request – and not before. For example, FCC Rule 20.11(f) specifies that “[o]nce a request for interconnection is made” by a rural LEC of a

wireless carrier, “the interim transport and termination pricing described in § 51.715 shall apply.”¹ 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*.”²

5. Federal courts have uniformly held that unresolved issues in interconnection agreement negotiations, such as the reciprocal compensation requirements in the Act apply only after a request for negotiations is made.³ State commissions have reached the same result in applying federal law.⁴ Indeed, state commissions have already rejected the very argument made by the Petitioners here – and federal courts affirmed both state commission decisions. For example, in an arbitration with a wireless carrier, a Nebraska rural LEC argued that it was entitled to compensation back to March, 1998, even though the wireless carrier did not make its negotiation request until August, 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 Plans a bona fide request for the commencement of negotiations for purpose of § 252 of the Act. As such, the Commission finds that the applicable rate per MOU

¹ 47 C.F.R. § 20.11(f).

² FCC Rule 51.715(d) authorizes a state commission to “true up” interim rates once it establishes rates in its arbitration order.

³ See, e.g., *U S WEST v. Anderson*, No. CV 97-9-H-CCL, 1999 U.S. Dist. LEXIS 22159, at *15 (D. Mont., Sept. 14, 1999)(“WWC [Western Wireless] was entitled to mutual compensation from the date it issued its demand letter.”); *U S West v. Utah Public Service Comm’n*, 75 F. Supp. 2d 1284 (D. Utah 1999); *U S WEST v. Serna*, No. 97-124 JP/JHG, 1999 U.S. Dist. LEXIS 21774 (D.N.M., Aug. 25, 1999); *U S WEST v. Reinbold*, No. A1-97-025, 1999 U.S. Dist. LEXIS 20067 (D. Mont., May 14, 1999).

⁴ See, e.g., *Petition of AT&T Wireless Services for Arbitration of Interconnection, Rates, Terms, and Conditions Pursuant to the Telecommunications Act of 1996*, Oregon ARB 16, 1997 Ore. PUC LEXIS 1, at *25 (July 3, 1997)(“The reciprocal compensation obligation arose on October 3, because the request for interconnection was filed on that date.”); *Petition of AT&T Wireless Services for Arbitration of an Interconnection Agreement with U S WEST Communications Pursuant to 47 U.S.C. § 252(b)*, Minn. Docket No. P-421/EM-97-371, 1997 Minn. PUC LEXIS 118 (July 30, 1997)(“[T]he effective date for beginning reciprocal compensation is October 3, 1996,” which was the date the interconnection request was made.”)

determined by this Commission with regard to Issue 3 shall apply to such MOUs beginning on August 25, 2002.⁵

The local federal district court affirmed this portion of the Nebraska Commission's order.⁶

6. 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 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."⁷ Once again, the local federal district court rejected the rural LEC appeal of this issue and affirmed the Oklahoma Commission's decision.⁸

7. The Petitioners here requested negotiations from T-Mobile on January 13, 2005. This Commission certainly can in this arbitration proceeding establish the rate of reciprocal compensation (consistent with federal law) for the period from the effective date of the arbitrated agreement (January 13, 2005, or such other date as the parties may agree) through the end date of that agreement. But as demonstrated above, the Commission has no authority in federal law to decide in this arbitration proceeding the compensation obligations of the parties prior to January 13, 2005. Thus, the past traffic and compensation issues are not relevant to the forward-looking issues and accordingly, the Arbitrator should dismiss from this arbitration proceeding the first

⁵ *Petition of Great Plains Communications for Arbitration to Resolve Issues Relating to an Interconnection Agreement with WWC License*, Application No. C-2872 (Sept. 23, 2003).

⁶ *See WWC License v. Boyle*, No. 4:03CV3393, slip op. at 7-8 (D. Neb., Jan. 20, 2005). However, the court vacated that portion of the Nebraska Commission order which held the rural LEC's reciprocal compensation obligations extended only to calls that terminate in its local exchange. *See id.* at 5 ("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*. Therefore, this Court directs that the agreement between Great Plains and Western Wireless be modified to reflect that reciprocal compensation obligations apply to *all calls* originated by Great Plains and terminated by Western Wireless within the same MTA.") (emphasis added).

⁷ *Atlas Telephone v. Oklahoma Corporation Comm'n*, 309 F. Supp. 2d 1299, 1312 n.22 (W.D. Ok. 2004).

⁸ *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). Notably, the 10th Circuit affirmed the Oklahoma Commission's decision that a rural LEC's reciprocal compensation obligations extend to all intraMTA calls that originate in its service area. *Id.* 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.").

five issues raised in the Petitions – all of which address traffic for the period prior to the proposed effective date(s) of the going-forward Traffic Termination Agreement(s).

B. Consideration of Issues Relating to Past Traffic Volumes and Compensation Between T-Mobile and the Petitioners in this Arbitration is Inappropriate, as Past Traffic Volumes and Compensation are the Subject of a Pending Proceeding.

8. The four Petitioners filed complaints against T-Mobile and several other mobile carriers in 2001, claiming that the respondent carriers had failed to pay compensation for completion of wireless to wireline traffic. These cases were consolidated as Case No. TC-2002-57. *Inter alia*, the Petitioners sought in the Complaint Proceeding a determination by the Commission with respect to the allocation of traffic between the interMTA and intraMTA jurisdictions and the amount of compensation for past delivery of traffic by T-Mobile to the Petitioners -- identical to the first five issues raised by the Petitioners herein in their arbitration Petitions.

9. The Commission has held numerous hearings in Case No. TC-2002-57, the latest hearing less than a year ago, on September 8, 2004, at which some of the parties in this proceeding presented evidence concerning the interMTA-intraMTA traffic allocation. The issues presented in that hearing have been fully briefed and argued, are still pending decision by the Commission.

10. Two of the complainants in that proceeding, Alma Telephone and MoKan Dial, Inc., withdrew their complaints against T-Mobile, and thereby eliminated any claim they might have against T-Mobile for compensation relating to past traffic. For that reason alone, the issues raised in Alma's arbitration Petition (Case No. IO-2005-0468) relating to past traffic volumes and past compensation should be dismissed, because Alma has already admitted that it has no such claims. Failing to dismiss those issues with respect to Alma Telephone from this arbitration

would simply reopen issues which have already been resolved, which would be improper in light of Missouri's policy that precludes reopening settled issues in subsequent proceedings.⁹

11. With respect to the past traffic volume and past compensation issues raised by Petitioners Northeast, Chariton Valley, and Mid-Missouri Telephone, those issues are squarely up for determination in the Complaint Proceeding. In short, the issues of past traffic volumes and past compensation have either been withdrawn or fully litigated in Case No. TC-2002-57. Further consideration of those issues in this arbitration proceeding raises the danger of violation of 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. Although the Arbitrator should dismiss the issues on any of these grounds taken in isolation, when considered in combination it becomes clear that there is absolutely no reason that this proceeding should consider the asserted issues of past traffic volumes and past compensation for Petitioners.

12. Indeed, there is every likelihood that if the Arbitrator determined that issues relating to past traffic and compensation should be included in this arbitration and the resulting Traffic Termination Agreements, T-Mobile would ask the Arbitrator and the Commission to take official notice of, and review for purposes of determining the past traffic and compensation issues, the entire record in the pending Complaint Proceeding, Case No. TC-2002-57. That case has involved many wireless carriers, including Western Wireless (formerly associated with T-Mobile), and T-Mobile's predecessors VoiceStream and Aerial Communications. The record in

⁹ See, e.g., *In re Investigation into the Provision of Cmty. Optional Calling Service in Missouri*, Case No. TW-97-333, 1997 Mo. PSC Lexis 97 (December 30, 1997). ("The collateral estoppel doctrine, designed to further judicial economy by avoiding continual trials on the same issue, precludes parties from relitigating issues that have been previously adjudicated."). In that decision, the Commission refused to open a new docket where Public Counsel had submitted the same question in an existing docket.

that case is voluminous. It would be a gross understatement to say that review of that case's record in this arbitration would materially increase the Arbitrator's workload -- to consider issues which do not belong in this arbitration in the first place.

13. Thus, the Arbitrator should determine that Issues 1 through 5 raised in the Petitions will not be considered in the arbitration, and that he should announce *in limine* that the Parties may not conduct discovery, present prefiled testimony, or conduct cross-examination on these issues at the hearing.

Conclusion

Wherefore, T-Mobile respectfully requests that the Arbitrator find that issues relating to past traffic volumes and compensation shall not be considered in this arbitration and instead shall remain in the Complaint Proceeding where they are currently under consideration. These issues are not proper for arbitration, as they are not among the issues specified for arbitration in 47 U.S.C. §251(b) and (c), and they are already the subject of a pending Complaint Proceeding with T-Mobile and should be decided there. Further, to promote efficient resolution of this arbitration, T-Mobile requests that the Arbitrator prohibit the parties from conducting discovery about these issues, filing testimony addressing these issues, and conducting cross-examination at the hearing concerning these issues.

Respectfully submitted,

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Certificate of Service

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