BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

COMMENTS OF RESPONDENT T-MOBILE, USA, INC. ON
ARBITRATOR'S DRAFT REPORT

Comes now T-Mobile, USA, Inc. ("T-Mobile"), and pursuant to the Commission's Scheduling Order, provides its Comments on the Arbitrator's Draft Report.

In these Comments, T-Mobile addresses only those points which it believes the Arbitrator should reconsider in preparing the Final Report to the Commission. Neither the Arbitrator nor the Petitioners should construe T-Mobile's decision not to address every point in the Draft Report as an admission that it agrees with the Draft Report's decision on the unaddressed points. T-Mobile reserves its right to address additional points in Comments to the Commission on the Arbitrator's Final Report.

T-Mobile will address the Draft Report's ruling on Issue 7, concerning the rate to be charged for intraMTA traffic exchanged between T-Mobile and the Petitioners. The Draft Report adopts the Petitioners' proposed rate of 3.5 cents per minute, rather than T-Mobile's proposal of 1.5 cents per minutes. T-Mobile believes that the Draft Report relies on evidence which is, as a matter of fact and law, not consistent with the requirement that Commission orders be founded on substantial and competent evidence on the record as a whole.

In reviewing the Draft Report's discussion on Issue 7, it appears that the Draft Report relies on (1) the cost evidence proffered by the Petitioners in the form of Mr. Schoonmaker's testimony concerning application of the Hatfield cost model, (2) the Petitioners' agreement to the 3.5 cent rate in negotiated (not arbitrated) traffic termination agreements with other wireless

carriers, and (3) T-Mobile's agreement to the 3.5 cent rate in traffic termination agreements with three Missouri rural ILECs that are not parties to this arbitration proceeding. As these Comments demonstrate, the evidence on which the Draft Report relies is simply not sufficient to support the finding that the 3.5 cent rate is appropriate. On the other hand, the evidence introduced by T-Mobile fully supports the 1.5 cent rate it proposed, and the Arbitrator should reconsider his preliminary finding and recommend that the Commission adopt the T-Mobile position on the compensation rate.

As an initial matter, reliance on negotiated compensation rates voluntarily agreed to by carriers not parties to this proceeding is misplaced. The Draft Report cites such agreements as two of the three evidentiary bases for its preliminary conclusion. As T-Mobile demonstrated in its post-hearing brief, evidence related to negotiated agreements between *other* carriers, or even between Respondent and *other* Missouri LECs, is simply not relevant to a determination of forward-looking cost-based rates in an arbitration proceeding. (*See* T-Mobile Post-Hearing Brief, at 11-12). The Draft Report correctly notes that federal law controls in this arbitration (*see* page 16), and federal law points out that negotiated agreements do not have to follow the standards which the Commission must observe in this case, which will result in an arbitrated agreement: negotiated agreements include provisions "without regard to the standards set forth in subsections (b) and (c) of section 251…" 47 U.S.C. § 252(a)(1).

Further, the give-and-take of negotiation can result in agreement terms which are far different from terms in arbitrated agreements. The parties to negotiations do not engage in "final offer" negotiation, unlike the procedure which is followed in this arbitration proceeding. Parties may yield on one issue because they receive beneficial concessions from the other party on other, unrelated issues or because the cost of arbitration cannot be justified given the traffic volumes involved. In short, the terms of negotiated agreements should not be considered as evidence that

identical terms are appropriate in arbitrated agreements. As the Petitioners pointed out at the hearing, the Petitioners have long offered the 3.5 cent rate to T-Mobile in negotiations. The mere fact that they offered that rate in negotiation is not evidence that the rate is appropriate and is fully supported by the cost evidence which the Commission must consider. The Arbitrator should not give the Petitioners what they were unable to obtain in negotiation, for the simple reason that they were able to persuade other wireless carriers to accept that rate in earlier, unrelated negotiations. Nothing was presented at the arbitration hearing to explain why the other carriers voluntarily accepted that rate, nor was there any evidence presented as to why T-Mobile chose to accept that rate in negotiations with other rural ILECs. The Arbitrator cannot and should not speculate as to why those voluntary agreements were made, yet that is what the Draft Report does when it finds that the existence of those agreements is evidentiary support for the selection of that rate in this arbitration.

The Draft Report also engages in speculation when it concludes that T-Mobile reached a 3.5 cent rate in negotiated agreements "with other Missouri ILECs with similar forward-looking costs as developed by Mr. Schoonmaker." (*See* page 13). T-Mobile negotiated agreements with Ozark Telephone Company, Goodman Telephone Company, and Seneca Telephone Company two years ago. There is absolutely no evidentiary support for any conclusion concerning the costs of any rural ILEC other than the Petitioners. They presented no evidence concerning the costs of other rural ILECs, and certainly Mr. Schoonmaker did not testify about the costs of any carrier other than the four carriers he was representing, although Mr. Schoonmaker did admit that none of their agreements with CMRS carriers were based on arbitrated rates. Thus, the Final Report should not base any conclusion that the 3.5 cent rate is appropriate on any alleged similarity in the costs incurred by the Petitioners and any other Missouri ILEC because there is

no evidence in the record to support this assertion – much less that TELRIC costs were considered in those other negotiations.

Similarly, the Final Report cannot base its conclusions on any intuition concerning the comparison of costs between the Petitioners and SBC. Petitioners did not introduce any evidence of arbitrated or negotiated agreements between SBC and T-Mobile. Instead, they merely alluded to the fact of the existence of such an agreement. Even if the rate between T-Mobile and SBC was close to, or higher than, the rate T-Mobile proposes in this arbitration, no evidence was introduced in this proceeding concerning SBC's costs, so the Arbitrator cannot draw any conclusion concerning SBC's costs. However, that is precisely what the Draft Report does in page 14, where it intuits that SBC's costs must be greater than the costs incurred by the Petitioners. There is simply no evidence to support that conclusion.

T-Mobile asks the Arbitrator to review the arguments T-Mobile presented on pages 11 and 12 of its Post-Hearing Brief, as well as those presented in the immediately preceding paragraphs, and to reconsider his finding that the presence of the 3.5 cent rate in negotiated agreements (involving other wireless carriers and other rural ILECs) is of evidentiary relevance to the adoption of the same rate in this arbitration.

Second, with respect to the cost support presented by the Petitioners and cited by the Draft Report, T-Mobile notes that the HAI Model on which the Arbitrator bases his conclusion that 3.5 cents is an appropriate rate is, by admission of the Petitioners' own cost witness, significantly flawed.

The Draft Report states at page 13 that the HAI model is a widely-accepted method of determining forward-looking economic cost per unit, but there is no record evidence as to where the Hatfield model has ever been accepted, such as a listing of States in which the Hatfield model is accepted. Mr. Schoonmaker stated in his testimony that the model has been widely used, but

again provides no citations to cases in which HAI results were accepted. And, as noted in T-Mobile's Post-Hearing Brief, Mr. Schoonmaker expressed real concerns about the validity of the model. In fact, it appears that the only citation in the record to proceedings in another State in which the HAI model was at issue was provided by Mr. Conwell on T-Mobile's behalf, in his reference to the Oklahoma case in which the arbitrator flatly rejected the model. If the Arbitrator's decision, particularly his view that the proposed rate "is between 1.82 to 5.72 cents less than the rate that their cost studies show," is grounded at all on his conclusion that the Hatfield Model as a "widely-accepted method," there is no evidence in the record that supports that finding.

The Draft Report states that some of the adjustments to the HAI Model suggested by Mr. Conwell on T-Mobile's behalf were based on inputs or standards used by Regional Bell Operating Companies and were "not necessarily" representative of the Petitioners' business practices. There is no evidence for this conclusion concerning Mr. Conwell's suggested adjustments. The Draft Report provides no examples to demonstrate the difference of costs between RBOCs and the Petitioners. Moreover, this impacted a small number of factors; the majority of adjustments were made based upon other criteria.

The Draft Report fails to address the unrebutted testimony of Mr. Conwell that although each of the Petitioners stated that its current network is forward-looking and least cost as required by the FCC rules (interoffice distances, cable sizes, transport system sizes, *etc*.), the HAI Model does not model these networks. Since the Model does not accurately represent the Petitioners' networks, its results cannot be consistent with the FCC rules.

Finally, the Draft Report suggests on page 15 that T-Mobile failed to discharge its burden of proof. However, as stated in the controlling FCC rules, the burden is squarely on the ILECs to demonstrate that their costs (a) meet the FCC rules and (b) are reasonable. The relevant federal

regulation is 47 C.F.R. § 51.505(e). The Draft Report is wrong in concluding that "both parties have an equal burden to prove …" In the case of evidence concerning the costs the Petitioners incur to support the intraMTA compensation rate they are advocating, there is no dispute that the Petitioners must come forward with that evidence.

The Commission simply may not choose a final offer rate that is greater than the rate proposed by T-Mobile's cost expert. It simply defies common sense to have a baseball arbitration designed to bring the parties closer together and then rely on that structure to penalize one of those parties for making the very concessions called for by the Commission in this process.

T-Mobile also notes that the Draft Report does not deal with its request that the Petitioners' cost information be stricken for their failure to comply with Section 252(b)(2) of the Federal Act and the Commission's own arbitration rule, 4 CSR 240.36.040(3)(E), which require the Petitioners to provide all relevant documentation in support of their petitions. These regulations do not contain any exception; they are clear and mandatory. The Petitioners failed to comply with those regulations when they failed to include the Schoonmaker cost study with the initial arbitration filing.

In short, the Arbitrator should reconsider his preliminary ruling that a 3.5 cent per minute rate is appropriate for mobile-to-land calls between T-Mobile and the Petitioners. There is simply no adequate evidentiary support for the adoption of the Petitioners' offer.

Respectfully submitted,

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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 September, 2005, to the following counsel of record:

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