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 APPLICATION FOR REHEARING OF THE ARBITRATOR'S ISSUES A AND B DISMISSAL ORDER

Comes now Respondent T-Mobile USA, Inc. ("T-Mobile") and submits this application for rehearing of the Arbitrator's January 9, 2006 Order Regarding Dismissal of Issues A and B Between T-Mobile and Petitioners pursuant to 4 CSR 240-2.160.

I. THE ORDER VIOLATES T-MOBILE'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

T-Mobile respectfully submits that the Arbitrator's January 9, 2006 order reinstating the Petitioners' claims for past compensation is unconstitutional for contravening T-Mobile's right to due process of law, as guaranteed by the 14th Amendment to the U.S. Constitution.

A. BACKGROUND FACTS

In their October 4, 2005 arbitration petition, the Petitioners sought compensation for mobile-to-land traffic sent before the date they requested negotiations from T-Mobile. *See* Arbitration Petition, TO-2006-0468, at 5-8 (Oct. 4, 2005)(Issues A and B). The Petitioners made this request even though the Commission, only two months earlier, had denied the identical relief in the Alma/T-Mobile arbitration. *See Order Regarding Motions in Limine*, IO-2005-0468 (Aug. 3, 2005).

T-Mobile moved to dismiss Issues A and B on November 28, 2005. After the receipt of a full round of pleadings, the Arbitrator dismissed Issues A and B on December 30, 2005, concluding the claims for past compensation were "not relevant":

> The compensation concerns presented in issues A and B are not relevant to the above standards for arbitration. The standards set out above concern only the contemplated interconnection agreement, and the provisions to be included therein. The Commission's consideration of issues related to the interconnection agreement is therefore prospective. Neither issue A nor B has to do with interconnection agreements or arbitration under the Telecommunications Act. They are therefore not properly before the Commission in this arbitration proceeding and shall be dismissed. *Order Granting Motion to Dismiss*, TO-2006-0147, at 2 (Dec. 30, 2005).

On January 5, 2005, the Petitioners filed an application for rehearing of this order. Although Commission rules permit parties up to 10 days to respond to such applications, *see* 4 CSR 240-2.080(15), the Arbitrator granted this motion only two business days later, on January 9, 2006 – *without* giving T-Mobile any opportunity to submit a response.[1]

The Arbitrator did not grant the motion for the reasons the Petitioners asserted (and understandably so, as explained in Part I.E below). Rather, the Arbitrator read Section 252(b)(4)(C) of the Telecom Act for the proposition that State commissions have "a federal mandated obligation to consider *all* the issues presented" in an arbitration petition. Order at 1 (emphasis in original). In reaching this conclusion, however, the Arbitrator never explained why the very claims that were "not relevant" on December 30, 2005 suddenly became relevant on January 9, 2006.

It is too late to address Issues A and B in the direct testimony, as that testimony was filed on January 6, 2006. The arbitration petition failed to identify clearly the basic facts underlying the past compensation claims. In Issue A, the Petitioners seek recovery of 2,207,943 minutes of traffic that T-Mobile supposedly sent to 28 rural LECs (although there are only 23 Petitioners) between an unspecified date in "February of 1998" to an unspecified date in "2001." Petition at

[1] Commission Rule 240.2080(16) permits parties like Petitioners to seek expedited relief. The Petitioners here, however, did not invoke this provision. It is thus unclear why the Arbitrator felt compelled to act on the Petitioners' motion before T-Mobile was given an opportunity to submit an opposition—a right guaranteed by the Commission's rules.

5. In Issue B, the Petitioners seek recovery of 29,609,088 minutes of traffic that T-Mobile supposedly sent to 28 rural LECs (although again, there are only 23 Petitioners) between an unspecified date in "2001" to a more recent date that Petitioners do not even bother identifying. *Id.* at 7. The arbitration petition does not, however, identify the volume of traffic that T-Mobile supposedly sent to the 23 Petitioners, much less the volume of traffic that T-Mobile sent to each of them over this seven-year period. In addition to the Petition's deficiencies in establishing Issues A and B, it is too late for T-Mobile to conduct any discovery on Issues A and B, given that the hearing begins in only two weeks (on January 25, 2006).[2]

B. THE ARBITRATOR'S ORDER CONTRAVENES FUNDAMENTAL NOTIONS OF DUE PROCESS

If the due process clause of the 14th Amendment means anything, it means at minimum that a defendant (here, T-Mobile) must be able to understand the charges made against it. Here, under the Arbitrator's January 9 reversal order, T-Mobile apparently is expected to defend itself for a seven-year period of time when the Petitioners have not asserted how much traffic it supposedly sent to each of them over this period – and when Petitioners do not even specify the precise dates at issue. The Petitioners bear the burden of proof on these claims, yet the Arbitrator's ruling denies T-Mobile its right to respond to and rebut the Petitioners' evidence on these claims, for the simple reason that they have presented no evidence. Simply put, the Arbitrator's order precludes T-Mobile from defending itself at the hearing.

A federal court will entertain any appeal of the Commission's arbitration report. *See* 47 U.S.C. § 252(g)(6). *See also id.* at § 252(g)(4)("No State court shall have jurisdiction to review the action of a State commission in approving or rejected an agreement under this section."). The Eighth Circuit has already "caution[ed] the PSC to be more circumspect in the process it

[2] Under 4 CSR 2.090(2), the Petitioners need not respond to discovery for 20 days - in other words, *after* the hearing commences.

employs," noting that the next entity alleging due process infirmities "may well be able to demonstrate that the procedures employed . . . either were inherently lacking in due process or resulted in prejudice to the aggrieved party." *Southwestern Bell v, Missouri Public Service Comm'n*, 236 F.3d 922, 925 (8th Cir. 2001). Does the Arbitrator, or the Commission, really believe that the January 9 reversal order will survive federal court review when, as a result of the order, T-Mobile has no opportunity to defend itself against the Issue A and B claims?

C. TRAMPLING ON T-MOBILE'S DUE PROCESS RIGHTS IS COMPLETELY UNNECESSARY

For the sake of argument only, the January 9 reversal order could perhaps be defended if the Petitioners had no other remedy to recover their claims for past compensation. But the Petitioners have other remedies to pursue these claims, and in fact have already done so in complaint cases against T-Mobile and other wireless providers. Indeed, as the Alma arbitrator concluded in dismissing the LEC petitioners' claims for past compensation:

> Instead of the Arbitrator's ruling on pre-January 13, 2005 traffic under the extremely compressed schedule the Telecommunications 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 position. *Order Regarding Motions in Limine*, IO-2005-0468, at 2-3 (Aug. 3, 2005).

Given that a complaint case "would be a better vehicle for resolving" the claims for past compensation, there is utterly no reason for the Arbitrator to trample on T-Mobile's right to due process by expanding at the 11th hour the issues T-Mobile must attempt to address at the hearing.

D. THE ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE IT CONSTITUTES AN UNEXPLAINED DEPARTURE FROM PRECEDENT

"It is well established" in federal law (and this case is governed by federal law) that "where an agency departs from its prior cases, it must do so pursuant to reasoned decision-

making."[3] "It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent."[4]

> An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.[5]

Simply put, "[w]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."[6]

The January 9 order constitutes a departure from Commission precedent, and the Arbitrator's failure to explain this departure results in the order being arbitrary and capricious. In reversing itself, the Arbitrator never explains why Issues A and B are relevant to this arbitration proceeding when, only 10 days earlier, he concluded that Issues A and B are "not relevant."

The January 9 order is also inconsistent with orders in the Alma arbitration proceeding.[7] As noted above, the Alma arbitrator precluded the LEC petitioners from litigating in the arbitration their claims for past compensation. In reaching this result, the Alma arbitrator necessarily concluded that the Commission is not required under Section 252 of the Act to address all the issues contained in an arbitration petition.

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[3] *IRS v. Federal Labor Relations Authority*, 963 F.2d 429, 434 (D.C. Cir. 1992).
[4] *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995). *See also Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989)("Divergency from agency precedent demands an explanation.").
[5] *Greater Boston Telephone v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1071).
[6] *Ramaprakash v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003). *See also Pontchartrain Broadcasting v. FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994)("[A]n unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious."); *Northpoint v. FCC*, 312 F.3d 145, 156 (D.C. Cir. 2005)("[A]n unexplained departure from prior Commission policy and practice is not a reasonable one . . . [and] is unauthorized.").
[7] The January 9 order is also inconsistent with every other state commission order and federal court decision addressing the same issue.

E. THE PETITIONERS' REHEARING ARGUMENTS LACK ALL MERIT

It appears that that the Arbitrator, in rendering his January 9 order, did not rely on the reasons the Petitioners advanced in their January 5 rehearing petition. Nevertheless, the Commission must understand that the Petitioners' stated reasons lack all merit.

1. "Due Process." The Petitioners contended that the Arbitrator in dismissing their past claims "deprived" them of their "due process and statutory right to seek review of the decision" because he supposedly used an "unlawful" and "improper procedure" in issuing and making the order effective on the same date, "thereby depriving Petitioners of a reasonable opportunity to prepare an application for rehearing before the effective date of the order as required by §386.500.2, RSMO." Rehearing Application at 1 ¶ 1. But the State statute upon which the Petitioners rely has no relevance to this proceeding because this arbitration is being conducted pursuant to federal law, not State law. Indeed, the Commission has already ruled that an interconnection arbitration proceeding does "not fall within Section 386.500, and, therefore, the Commission has no jurisdiction to grant rehearing." *Order Denying Petitioners' Rehearing Petition*, IO-2005-0468, at 1 (Oct. 13, 2005); *Order Denying T-Mobile's Rehearing Petition*, I)-2005-0468, at 1 (Oct. 18, 2005).[8] Notably, the Petitioners never attempted to demonstrate that these Commission orders are legally erroneous.

2. Commission vs. Arbitrator. The Petitioners asserted—without reciting any authority in support[9]—that the Commission, rather than the Arbitrator, should have decided the motion to dismiss because the order could have a "substantial financial impact" on "many" of the

[8] *See also AT&T v. Southwestern Bell*, 86 F. Supp. 2d 932, 957 (W.D. Mo. 1999)("Because the PSC's arbitration was a *sui generis* proceeding, no state procedural law was controlling.").

[9] Commission Rule 4 CSR 240-36.040(15) makes clear than an arbitrator "shall have the same authority in conducting the arbitration as a presiding officer . . . has in conducting hearings under the commission's rules and procedure." It is therefore understandable that the Petitioners do not allege that the Arbitrator lacked authority to decide T-Mobile's motion to dismiss.

Petitioners. Application at 1 ¶ 2. However, the challenged order cannot possibly have a "substantial financial impact" because it does not preclude Petitioners from attempting to recover past claims; the order held only that the Petitioners may not seek recovery of old claims in this federally-established arbitration proceeding.

3. "Factual Inaccuracy." The Petitioners contended that the dismissal order is based upon "an erroneous view of the facts" because it "suggests" they had "no tariffs in place to govern wireless traffic T-Mobile delivered in the absence of an agreement." Application at 2 ¶ 3. The Petitioners make this assertion even though the order explicitly noted that "issue B concerns compensation for mobile-to-land traffic while wireless termination tariffs are in effect."

The Petitioners apparently are referring to their "intrastate access tariffs" that predated their wireless termination tariffs. The Missouri Supreme Court put this issue to rest on January 10, in *State ex rel. Alma Telephone Company v. Public Service Commission*, Case No. SC86529 (Jan. 10, 2006), in which the court unanimously upheld the Commission's decision that local exchange carriers such as the Petitioners may not impose access charges, or charges equivalent to access charge levels, on intraMTA wireless traffic. (See attached copy of the decision).

4. State Court Decisions. The Petitioners claimed that State courts have "upheld Petitioners' position on this matter." Application at 2 ¶ 3. Not only does yesterday's Supreme Court decision in *Alma Telephone* belie that claim, but the State court decisions cited by Petitioners did not address the question raised by T-Mobile's motion to dismiss: whether State commissions have the authority under federal law to address in Section 252 arbitrations claims arising before a request for negotiations is made. In any event, it would not matter if State courts had reached this question because, as the Commission has already determined, it possesses "only

that authority to which the Congress has expressly delegated to it. The obligation to apply federal law applies even if state law precedent differs from federal law." *Alma/T-Mobile Arbitration Report*, IO-2005-0468, at 15 (Oct. 6, 2005). The Petitioners again failed even to allege that this Commission's decision is legally erroneous. And, their Application conveniently ignored the fact that the Commission's decision is consistent with every State commission and federal court decision addressing the same subject. See T-Mobile Motion to Dismiss at 5-6.

5. Ignore Federal Law. The Petitioners contended that the Arbitrator should have "decide[d] whether T-Mobile should get the prospective benefit of an agreement to exchange local traffic where it has failed to pay its past due bills." Application at 2 ¶ 4. But as T-Mobile has previously pointed out, "Congress has not delegated to the Commission the authority to disregard its explicit directives." T-Mobile Motion to Dismiss at 8. Thus, the Commission lacks the authority to do precisely what the Petitioners want the Commission to do (*i.e.*, create a new exemption from, or precondition to, their statutory reciprocal compensation obligation).

6. Relevance. The Petitioners argued that their claims for past compensation are relevant to this arbitration because T-Mobile sent traffic to the Petitioners "in the absence of an approved interconnection agreement." Application at 3 ¶ 5.[10] But Petitioners understandably cite no federal law for the proposition that a wireless carrier cannot send traffic to another carrier until the two carriers have secured "an approved interconnection agreement" – because no such authority exists.[11] Indeed, one of the Petitioners does not even agree with this position. Specifically, Fidelity Telephone, in seeking to dismiss itself from this arbitration proceeding, has

[10] T-Mobile disagrees with the Petitioners' additional assertion that it has sent traffic in "violation of specific Commission orders." *See, e.g.*, T-Mobile Reply in support of Its Motion to Dismiss, at 10-11 (Dec. 7, 2005).

[11] Historically, when indirect interconnection is used, carriers have generally exchanged traffic without any agreement (approved or not) - because if traffic volumes are so small that a direct connection cannot be justified, often the costs of an agreement exceed the benefits.

obviously determined that it can exchange traffic with T-Mobile without "an approved agreement."

7. Section 252(c)(3) Scheduling Authority. The Petitioners complained that the dismissal order "suggests" that the Commission "cannot establish a 'schedule for implementation of the terms and conditions by the parties to the agreement.'" Application at 3 ¶ 6. The order made no such suggestion. Besides, this scheduling authority applies to "terms and conditions . . . in the agreement." But, as the Arbitrator has correctly determined, matters pertaining to issues that predate the request for negotiations are not relevant to a Section 252 interconnection agreement.

8. Industry Practice. The Petitioners finally contended it is "standard practice" for agreements to address the payment of past due obligations, further noting that the Commission has approved negotiated agreements containing such provisions. Application at 3-4 ¶ 6.[12] But as T-Mobile has explained again and again, terms that parties agree to voluntarily have no relevance in an arbitration proceeding, where the Commission is required to follow federal law in every respect. *Compare* 47 U.S.C. § 252(e)(2)(A) *with* § 252(e)(2)(B).

II. IF ISSUES A AND B ARE "OPEN ISSUES" AS THE ARBITRATOR HAS DETERMINED, THEN THESE ISSUES MUST BE DISMISSED AS A MATTER OF LAW

In its January 9 reversal order, the Arbitrator interpreted Section 252(b)(4)(C) for the proposition that State commissions have "a federally mandated obligation to consider all issues

[12] The Commission did not, as Petitioners suggest, "approve" particular "language" in the recent Sprint/MNA negotiated agreement. It bears emphasis that parties to an agreement negotiated voluntarily can agree to terms "without regard to" federal law requirements (*see* 47 U.S.C. § 252(a)(1)), flexibility the Commission does not possess in rendering its arbitration decisions. Moreover, in reviewing negotiated agreements, unlike in arbitration proceedings, the Commission performs the "limited" function of determining whether the agreement as a whole is "not discriminatory toward nonparties and is not against the public interest." *Sprint/Missouri Network Alliance Agreement Approval Order*, IK-2006-0054 (Sept. 21, 2005).

presented" (emphasis in original). If this reading of this statute is correct (and T-Mobile submits it is not), then the very next subsection of the statute becomes relevant. Section 252(c) provides unequivocally:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, *a State commission shall –*
>
> (1) *ensure that such resolution* and conditions *meet the requirements of section 251 of this title*, including the regulations prescribed by the [FCC] pursuant to section 251 of this title; [and]
>
> (2) *establish any rates* for interconnection, services, or network elements *according to subsection (d) of this section*. 47 U.S.C. § 252(c)(emphasis added).

T-Mobile demonstrates below that the requirements of Section 252(c) compel the Arbitrator to dismiss Issues A and B for two independent reasons.

A. THE PETITIONERS HAVE FAILED TO COMPLY WITH THEIR STATUTORY DUTY TO PROVIDE FOR RECIPROCAL COMPENSATION

Although the Petitioners expect T-Mobile to pay them for mobile-to-land traffic over a seven-year period, they refuse to pay T-Mobile for terminating intraMTA land-to-mobile traffic over this same period of time. This refusal is incompatible with their statutory duty to pay reciprocal compensation. Section 251(b)(5) provides:

> Each local exchange carrier has the following duties:
>
> * * *
>
> (5) The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5).

Congress has defined reciprocal compensation to mean that "each carrier" recovers its costs of transporting and terminating calls that "originate on the network facilities of the other carrier." *Id.* at § 252(d)(2)(A)(i).

Section 252(c) makes clear that in resolving "any open issues," this Commission "shall ensure" that its decision "meet[s] the requirements of section 251." Section 251(b)(5) imposes on the Petitioners the "duty to establish reciprocal compensation arrangements." Thus as a matter of law, the Commission lacks the authority to enter an order in this arbitration proceeding that is not reciprocal—this is, require T-Mobile to pay the Petitioners for mobile-to-land traffic but relieve the Petitioners of their statutory duty to pay T-Mobile for land-to-mobile traffic.

B. THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEIR PROPOSED PRICES FOR PAST TRAFFIC COMPLY WITH SECTION 252(D) AND FCC TELRIC RULES

Section 252(c)(2) specifies unequivocally that this Commission "*shall* . . . establish any rates . . . according to subsection (d) of this section." 47 U.S.C. § 252(c)(2)(emphasis added). FCC implementing rules require that LEC rates for reciprocal compensation be based on TELRIC, and the FCC has further specified that LECs must submit a cost study to prove their proposed rates are TELRIC-compliant:

> Cost study requirements. 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. 47 C.F.R. § 51.505(e).

The Petitioners want the Commission to order T-Mobile to pay for the seven-year period (1997-2005) a rate of $0.035 per minute. However, the Petitioners have made no attempt to show that this rate complies with the TELRIC rules, nor have they submitted a cost study in the record concerning rates prior to April 2005, when they first requested negotiations from T-Mobile. Under the clear commands of Section 252(c)(2), the Commission has no choice but to dismiss the Petitioners' claim for past compensation because of their complete failure to satisfy their burden of proof.

C. THE PETITIONERS RELIANCE ON THE FCC'S WIRELESS TERMINATION ORDER IS UNAVAILING

The Petitioners undoubtedly will rely on the *Wireless Termination Tariff Order*, 20 FCC Rcd 4855 (2005) for the proposition that the FCC has affirmed the validity of their tariffs. This argument lacks all merit.

While the FCC did rule in this decision that the ***procedure*** of using tariffs had not been unlawful *per se*, it did not address the separate question of whether State tariffs had to comply with Sections 251-252 as a matter of federal ***substantive*** law. To the contrary, the FCC was very clear in stating that "we need not decide whether such tariffs satisfy the statutory requirements of that section" 251(b)(5):

> Although a tariffed arrangement would not be unlawful *per se* under the current rules, we make no findings regarding specific obligations of any customer of any carrier to pay any tariffed charges. *Id.* at 4861 n.40 and 4862 n.49.

Moreover, adoption of the Petitioners' argument would require the Commission to disregard the plain commands of Section 252(c): it "shall ensure" that its resolution of "any open issue" meets the requirements of Sections 251(b)(5) and 252(d). Obviously, in exercising federal authority that the U.S. Congress has delegated to the Commission, the Commission cannot ignore the explicit requirements that the Congress has imposed on the Commission.

III. CONCLUSION

Wherefore, for the reasons set forth above, T-Mobile requests the Arbitrator (or the Commission) to vacate the January 9 reversal order and to reinstate is December 30 dismissal order.

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 10th day of January, 2006, to the following counsel of record:

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