

**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 REPLY IN SUPPORT OF ITS
MOTION TO DISMISS PETITIONERS' ISSUES A AND B**

Comes now Respondent T-Mobile USA, Inc. ("T-Mobile") and submits this reply to the Opposition the Petitioners filed on November 28, 2005 in response to T-Mobile's motion to dismiss Petitioners' Issues A and B, which involve claims for compensation prior to the date they requested to negotiate an interconnection agreement.

I. THE ARBITRATOR SHOULD DISMISS ISSUES A AND B FOR THE SAME REASON THAT THE ALMA ARBITRATOR DISMISSED THE SAME CLAIMS

T-Mobile in its motion urged the Arbitrator to dismiss Issues A and B for "the same reason that the Arbitrator in the Alma/T-Mobile Arbitration dismissed the past compensation issues in that proceeding."¹ The Arbitrator dismissed the Alma rural LEC claims for past compensation by ruling:

Instead of the arbitrator's ruling on pre-January 13, 2005 traffic under the extremely compressed schedule the Communications Act sets for arbitration costs, 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 positions.²

In response, the Petitioners state that the two arbitration cases are "entirely different":

In the Alma Arbitration case, Alma Telephone still had a complaint case pending before the Commission. Here, the Commis-

¹ T-Mobile Motion to Dismiss at 3.

² Arbitrator Order Regarding Motions in Limine, IO-2005-0468, at 2-3 (Aug. 3, 2005).

sion has already completed the complaint case and issued a Report and Order sustaining Petitioners' complaint against T-Mobile.³

Although the Petitioners recite the procedural posture of the two complaint cases, the Petitioners do not explain how the current arbitration is "entirely different" than the Alma Arbitration case. Nor do they explain how they view Issues A and B in this arbitration proceeding as falling within the scope of a Section 252 arbitration.

It is quite unclear what the Petitioners hope to accomplish by attempting to bring Issues A and B before the Commission in the current proceeding. The Petitioners acknowledge that the Commission has "already sustained" their separate complaint and that the matter is currently pending in federal court.⁴ Further, the Commission is "without authority to award money damages."⁵ Moreover, the Petitioners cannot seek to re-litigate the issues the Commission already decided in its BPS Complaint Order.

The arbitrator in the Alma/T-Mobile arbitration properly limited the scope of the Section 252 arbitration to the going-forward issues of a disputed interconnection agreement. The arbitrator in that proceeding identified the practical reasons for this approach: Given the "compressed schedule" under which the Arbitrator and Commission must act in a Section 252 arbitration, a new complaint case (to the extent the Petitioners believe their prior complaint case was inadequate) would be "the better vehicle for resolving" issues of past compensation.

II. FEDERAL LAW PROHIBITS THE PETITIONERS FROM TYING THE RESOLUTION OF ISSUES INVOLVED IN THIS ARBITRATION PROCEEDING TO ISSUES PENDING IN OTHER PROCEEDINGS

The FCC has ruled that an incumbent LEC acts in bad faith if it attempts to tie the resolution of interconnection negotiations to another proceeding:

³ Petitioners' Opposition at 20.

⁴ *Id* at 2 and 9.

⁵ *See, e.g., Shurin v. Xspedius*, TC-2005-0266 (June 2, 2005).

We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding quid pro quo concessions in another proceeding.⁶

T-Mobile observed in its motion that, if it is “unlawful (i.e., constitutes bad faith) for an incumbent LEC to demand in interconnection agreement negotiations that T-Mobile resolve matters involved in a different proceeding, it necessarily is unlawful for an incumbent LEC to ask a State commission to grant the same relief in an arbitration proceeding. And, a State commission certainly cannot grant relief to a petitioner seeking relief that is unlawful.”⁷

The Petitioners contend in response that T-Mobile is “completely wrong” in stating that it is “‘bad faith’ or unlawful for Petitioners to seek resolution of T-Mobile’s past due bills in this case.”⁸ This is because, the Petitioners’ claim, T-Mobile took the FCC’s pronouncement “entirely out of context.”⁹

T-Mobile submits there is no merit to the Petitioners’ assertion that it quoted the FCC “entirely out of context.” So the Arbitrator can make his own independent conclusion, T-Mobile below quotes in full paragraph 153 of the FCC’s Local Competition Order:

We decline to find that other practices identified by parties constitute per se violations of the duty to negotiate in good faith. Time Warner contends that we should find that a party is not negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. On its face, the hypothetical practice raises concerns. Time Warner, however, did not present specific examples of how linking two independent negotiation proceedings would undermine good faith negotiations. We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding quid pro quo concessions in another proceed-

⁶ *Local Competition Order*, 11 FCC Rcd 15499, 15576 ¶ 153 (1996).

⁷ T-Mobile Motion to Dismiss at 4.

⁸ Petitioners’ Opposition at 14.

⁹ *Id.* at 13.

ing. Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive.¹⁰

In addition, the current proceeding presents a specific example of how “linking two independent negotiation proceedings would undermine good faith negotiations.” The Petitioners seek to limit T-Mobile’s negotiation and arbitration options for the forward-looking interconnection agreement, by dragging into this arbitration the separate, past compensation issues that are the subject of a separate proceeding and by asking the Arbitrator to tie T-Mobile’s hands until the past compensation issues are fully resolved.

III. THE COMMISSION’S AUTHORITY IN THIS ARBITRATION PROCEEDING ARISES ONLY FROM THE DATE THE PETITIONERS REQUESTED NEGOTIATIONS

T-Mobile demonstrated in its motion that federal law is clear that Congress delegated to State commissions only the authority to adjudicate claims for compensation for traffic exchanged “starting on the date the Petitioners requested negotiations”:

Congress did not grant state commissions the authority to arbitrate compensation claims for traffic exchanged before the date interconnection negotiations were requested.¹¹

In support, T-Mobile cited decisions by the Nebraska and Oklahoma Commissions that ruled they lacked delegated authority to arbitrate compensation issues prior to the request for negotiations.¹²

In response, the Petitioners assert that these decisions are “not on point” because the facts of this case are “entirely different” (i.e., involve tariffs rather than FCC interim compensation).¹³

¹⁰ *Local Competition Order*, 11 FCC Rcd 15499, 15576 ¶ 153 (1996)(emphasis added).

¹¹ T-Motion Motion to Dismiss at 5.

¹² *Id.* at 5-6.

¹³ *See* Petitioners’ Opposition at 18.

T-Mobile submits that it is the Petitioners who have missed the point of these State commission rulings. The legal issue is whether Section 252 empowers a State commission to decide in an arbitration proceeding compensation issues that predate the request for negotiations. In deciding this legal question, it does not matter whether the source of a claim for past compensation is based on State tariffs, the FCC’s interim compensation rules or other theories.

The Petitioners’ additionally assert that different provisions of the Communications Act permit the Commission to do what the arbitration statute, Section 252(b), does not permit – namely, arbitrate issues of past compensation. Specifically, they claim that “Sections 251(d)(3) and 252(e)(3) of the Telecommunications Act expressly grant the Commission the authority to approve and enforce ‘requirements of state law.’”¹⁴ There are numerous flaws with this argument. First, Section 251(d) has no relevance to this case because it simply limits FCC authority and, in any event, this statute is limited to obligations imposed in Section 251, which does not encompass the scope of the dispute resolution procedures specified in Section 252(b).¹⁵ Second, Section 252(e)(3), which recognizes that State commissions may impose “other requirements” (e.g., service quality standards) “in its review of an agreement,” is likewise irrelevant to this arbitration proceeding.¹⁶ Section 252(e) is clear that a State commission may “review an agreement” only after negotiations or an arbitration have been completed.¹⁷ Neither of these events has occurred here.

¹⁴ Petitioners’ Opposition at 10-13 and 18-19.

¹⁵ See 47 U.S.C. § 251(d)(3) (“In prescribing and enforcing regulations to implement the requirements of *this section*, the [FCC] shall not preclude”) (emphasis added).

¹⁶ See 47 U.S.C. § 252(e)(3).

¹⁷ See 47 U.S.C. § 252(e)(1).

More fundamentally, the statutes upon which the Petitioners rely are savings clauses.¹⁸ Federal savings clauses do not grant authority to a State commission, as the Petitioners assert (notably, without any support for this proposed departure of the savings clause function). Rather, savings clauses recognize, or preserve, whatever authority a State commission may independently possess.¹⁹ The Commission does not have independent authority here. As the Commission has previously recognized, under Missouri law wireless carriers are “not subject to the general regulatory jurisdiction of the Commission.”²⁰ If the Commission has no general regulatory authority over wireless carriers under State law, it obviously cannot compel a wireless carrier to participate in State arbitration over its objection.²¹

IV. THE COMMISSION MAY NOT DECLINE TO ENFORCE OBLIGATIONS THAT FEDERAL LAW IMPOSES ON INCUMBENT LECS

The Petitioners alleged in their arbitration petition that “until” T-Mobile pays “in full” past amounts allegedly due, T-Mobile should “not get the benefit of any agreement,” although their petition did not identify the “benefit” that T-Mobile supposedly should be denied.²²

¹⁸ The Arbitrator should be aware that the Supreme Court has “declin[ed] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.” *United States v. Locke*, 528 U.S. 89, 106 (2000). See also *Bastien v. AT&T Wireless*, 205 F.3d 983, 987 (7th Cir. 2000) (“To read the [savings] clause expansively would abrogate the very federal regulation of mobile telephone providers that the act intended to create. Therefore, we have to read the savings clause narrowly to avoid swallowing the rule.”)(internal citations omitted).

¹⁹ See, e.g., *Gorbach v. Reno*, 219 F.3d 1087, 1094 (9th Cir. 2000)(en banc)(A “saving clause protects such powers as the Attorney General has But this clause does not expressly grant any power. Absence of implied repeal does not amount to creation of some new power. Under the savings clause, what authority the Attorney General has, she keeps, but it does not give her more.”).

²⁰ See *Application of Missouri RSA No. 7 Limited Partnership*, Case No. TO-2003-0531 (Nov. 30, 2004), citing Section 386.020(53)(c).

²¹ Missouri law does empower the Commission to arbitrate disputes between two parties if “all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators.” Section 386.230 RSMo. T-Mobile does not consent to State arbitration of issues beyond that specified in Section 252(b) of the Communications Act, including issues that pre-date the request for negotiations.

²² See Arbitration Petition at 6 and 7.

T-Mobile demonstrated in its motion that the Commission does not possess the delegated authority to deny T-Mobile “benefits” that federal law guarantees.²³

In response, the Petitioners assert that it is “standard practice” in Missouri for agreements to address the payment of past due obligations, and “the PSC should expressly rule that the arbitrated agreements resulting from this case are not effective until T-Mobile’s past due bills have been paid.”²⁴ But the agreements to which the Petitioners refer are to negotiated agreements where the parties can agree to terms “without regard to the standards set forth in” the Act.²⁵ The terms contained in a negotiated agreement have no relevance to an arbitration proceeding, given the Congressional directive that an Arbitrator “shall” comply with the Act and the FCC’s implementing rules.²⁶

The Petitioners’ reliance on Section 252(c)(3), which addresses implementation schedules, is misplaced. This provision applies to “operational issues” such as the date the incumbent LEC begins providing unbundled network elements or access to operations support systems.²⁷ This statute does not empower a State commission to relieve an incumbent LEC of its statutory reciprocal compensation obligation – that is, ignore the requirement that Congress imposed on State commissions in Section 251(c)(1). In this regard, it is noteworthy that the FCC has held that incumbent LECs must comply with their reciprocal compensation obligations (including implementing FCC rules) even if a wireless carrier does not have an agreement (negotiated or arbitrated) with the incumbent LEC.²⁸

²³ See T-Mobile Motion to Dismiss at 6-8.

²⁴ Petitioners’ Opposition at 20.

²⁵ See 47 U.S.C. § 252(a)(1).

²⁶ See *id.* at § 252(c).

²⁷ See, e.g., *Third Advance Services Order*, 14 FCC Rcd 20912, 20988 ¶ 177 (1999); *U S WEST OSS Waiver Order*, 12 FCC Rcd 17437, 17439 (1997).

²⁸ See, e.g., *TSR Wireless v. U S WEST*, 15 FCC Rcd 11166 (2000), *aff’d*, *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

V. THE PETITIONERS' CLAIMS FOR PAST COMPENSATION CONFLICT WITH FEDERAL LAW AND ARE THEREFORE PREEMPTED AND VOID AS A MATTER OF LAW

T-Mobile demonstrated its motion that the source of the Petitioners' claims for past compensation (State tariffs) is invalid because those tariffs conflict with federal law substantive requirements. T-Mobile specifically demonstrated that that the Petitioners' tariffs are void under and preempted by federal law because they do not provide for reciprocal compensation and do not include rates based on the FCC's TELRIC rules.²⁹

In response, the Petitioners assert that their tariffs have been "expressly upheld by the FCC, and it is both misleading and 'bad faith' for T-Mobile to claim otherwise."³⁰ They additionally assert that "T-Mobile fails to mention the most recent FCC decision on the issue which is directly on point"³¹ – yet another allegation that is factually inaccurate.³²

To be sure, the FCC in its Wireless Termination Tariff Order did rule that the procedure of using wireless termination tariffs prior to April 29, 2005 was not unlawful per se. However, the Petitioners misstate the facts by asserting that the FCC "expressly upheld" their tariffs. To the contrary, the FCC stated unequivocally:

Although a tariffed arrangement would not be unlawful per se under the current rules, we make no finding regarding specific obligations of any customer of any carrier to pay tariffed charges.³³

The FCC additionally ruled that it was not "decid[ing] whether such tariffs satisfy the statutory requirements of that section" – namely, Section 251(b)(5).³⁴ In support of this statement, the FCC cited a July 9, 2004 T-Mobile letter demonstrating that State tariffs of the sort the Petition-

²⁹ See T-Mobile Motion to Dismiss at 8-12.

³⁰ Petitioners' Opposition at 16.

³¹ See *id.* at 15 (original emphasis deleted).

³² See T-Mobile Motion to Dismiss at 9 n.17, quoting *Wireless Termination Tariff Order*, 20 FCC Rcd 4555 (2005).

³³ *Wireless Termination Tariff Order*, 20 FCC Rcd at 4861 n.40.

³⁴ See *id.* at 4862 n.49.

ers had filed contravened federal substantive law, even if the tariff procedure was lawful under federal law.³⁵

VI. CONSIDERATION IN THIS ARBITRATION OF ISSUES RELATING TO PAST TRAFFIC VOLUMES AND PAST COMPENSATION IS INAPPROPRIATE BECAUSE SUCH ISSUES ARE THE SUBJECT OF PENDING PROCEEDINGS

T-Mobile demonstrated in its motion to dismiss that Issues A and B, which Petitioners apparently wish to re-litigate here, are currently the subject of court appeals and that parallel re-litigation of these issues would be “a wasteful and unnecessary expenditure of the limited time and resources of the Arbitrator, Advisory Staff, the parties, and the members of the Commission.”³⁶ The Petitioners acknowledge the pendency of these court appeals,³⁷ but they do not challenge T-Mobile’s demonstration that re-litigation of these claims would be a wasteful and unnecessary expenditure of time and resource of all involved parties. Accordingly, T-Mobile assumes that Petitioners agree with T-Mobile’s position.

VII. MANY OF THE ARGUMENTS THE PETITIONERS MAKE IN THEIR OPPOSITION ARE IRRELEVANT OR SIMPLY INACCURATE

T-Mobile below responds to miscellaneous assertions and arguments that the Petitioners make in their lengthy (23-page) opposition.

- Petitioners assert T-Mobile seeks a “free ride” on their networks.³⁸ Admittedly, T-Mobile has not paid to date the Petitioners for terminating mobile-to-land calls that originate on its wireless network. But by the same token, however, the Petitioners have not paid T-Mobile for the costs it has incurred in terminating land-to-mobile calls that originate on their landline networks. Congress has imposed on LECs the “duty to establish reciprocal compensation

³⁵ See *id.*

³⁶ T-Mobile Motion to Dismiss at 12-13.

³⁷ See Petitioners’ Opposition at 9 and 17.

³⁸ See Petitioners’ Opposition at 15. See also *id.* at 3 (“free use”), 4 (“free pass”), and 21 (“free pass”).

arrangements,”³⁹ and this duty applies even if carriers exchange traffic without an interconnection agreement.⁴⁰ Bill-and-keep, where neither party pays the other for call termination, is one form of reciprocal compensation.⁴¹ The “mutual and reciprocal recovery by each carrier of the costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier,”⁴² which will occur at the conclusion of this arbitration proceeding, is another form of reciprocal compensation. What is unlawful is the non-reciprocal regime that Petitioners’ advocate: T-Mobile pays them for terminating mobile-to-land calls, but they do not pay T-Mobile for terminating land-to-mobile calls that originate on their networks. T-Mobile’s request that the Petitioners comply with their unequivocal “duty to establish reciprocal compensation arrangements” can hardly be considered action taken in “bad faith.”⁴³

- The Petitioners repeatedly accuse T-Mobile of “violating” the Commission’s 1997 order in TT-97-524 by sending traffic to them without an agreement.⁴⁴ In fact, every wireless carrier in Missouri has “violated” this order because most, if not all, wireless carriers have sent mobile-to-land traffic to Petitioners without an agreement. It appears that wireless carriers did not participate in the TT-97-524 docket. Had wireless carriers participated in that docket, they surely would have advised the Commission that it lacked the authority to enter the order it did. Wireless carriers are “not subject to the general regulatory jurisdiction of the Com-

³⁹ 47 U.S.C. § 251(b)(5).

⁴⁰ See, e.g., *TSR Wireless v. U S WEST*, 15 FCC Rcd 11166 (2000), *aff’d*, *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

⁴¹ See 47 U.S.C. § 252(d)((2)(B)(i).

⁴² See *id.* at § 252(d)(A)(i).

⁴³ See Petitioners’ Opposition at 14, 15, 16 and 17.

⁴⁴ See *id.* at 2, 3 and 11.

mission,”⁴⁵ and thus the Commission lacked authority in State law to prohibit wireless carriers from sending their mobile-to-land traffic in the absence of an interconnection agreement – because in entering such an order, the Commission necessarily would be exercising regulatory authority over wireless carriers. Further, the Commission may not enforce its TT-97-524 order even if it possessed regulatory authority over wireless carriers. Congress has determined that “no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service.”⁴⁶ A Commission order prohibiting wireless carriers from sending mobile-to-land calls unless they satisfy certain conditions (e.g., execute an interconnection agreement with each LEC in the State) would clearly constitute entry regulation that is prohibited by federal statute. Accordingly, the TT-97-524 order is preempted by federal law (even assuming independent authority existed in State law).

- Petitioners assert that T-Mobile’s federal court appeal of the BPS Complaint Order is invalid because, they say, the “exclusive” remedy for appeals of Commission decisions under State law is in State court.⁴⁷ But the Petitioners overlook the fact the T-Mobile raises federal law issues in that appeal, not State law issues. The U.S. Supreme Court has held that federal courts have a duty to entertain appeals of State commission orders where, as here, federal preemption is at issue.⁴⁸
- The Petitioners assert that T-Mobile is “barred by the principles of res judicata and collateral estoppel from contesting the wireless tariffs and its past due amounts.”⁴⁹ The Petitioners are

⁴⁵ See *Application of Missouri RSA No. 7 Limited Partnership*, Case No. TO-2003-0531 (Nov. 30, 2004), citing Section 386.020(53)(c).

⁴⁶ 47 U.S.C. § 332(c)(3)(A).

⁴⁷ Petitioners’ Opposition at 8 and 17.

⁴⁸ See *Verizon v. Maryland Public Service Comm’n*, 535 U.S. 632, 642 (2002).

⁴⁹ Petitioners’ Opposition at 22. See also *id.* at 17 and 21.

mistaken. These doctrines apply only if one is a party to prior litigation,⁵⁰ and T-Mobile is not a party to any of the State court litigation over the Petitioners' various State tariffs.⁵¹ If anything, these kinds of arguments help make the case that the Arbitrator should not include past compensation issues in this arbitration proceeding because none of these issues are relevant to the chief question before the Arbitrator: whether the Petitioners' proposed rate for reciprocal compensation in a going-forward interconnection agreement complies with the FCC's TELRIC rules.

- The Petitioners assert that the Act “prohibits the Commission from approving agreements that discriminate against another telecommunications carrier not a party to the agreement”:

Specifically, Section 252(e)(2)(i) [sic] states that it is grounds for rejection if an “agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement.”⁵²

There are many flaws with this argument.⁵³ But a major flaw is that the statute the Petitioners cite has no relevance to this proceeding. The Section 252(e)(2)(A)(i) anti-discrimination clause they quote applies to negotiated agreements only. Congress, however, adopted very different requirements in Section 252(e)(2)(B) to govern arbitrated agreements.

⁵⁰ See, e.g., *Kremer v. Chemical Construction*, 456 U.S. 461 (1982); *GTE Sylvania v. Consumers Union*, 445 U.S. 375 (1980).

⁵¹ Nor is T-Mobile foreclosed from raising its federal law claims as applied to the Petitioners' State tariffs. Federal law is settled that a carrier can challenge an order or tariff not only at the time the order or tariff takes effect, but also when the order or tariff is applied to the carrier. See *Functional Music v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), and its progeny.

⁵² Petitioners' Opposition at 21, quoting 47 U.S.C. § 252(e)(2)(A)(1).

⁵³ For example, under the Petitioners' interpretation of this discrimination provision, every negotiated agreement would have to be identical because any difference among agreements would be discriminatory.

VIII. CONCLUSION

Wherefore, for the reasons set forth in this reply and in its motion to dismiss, T-Mobile respectfully requests the Arbitrator to dismiss Issues A and B in the Petitioners' arbitration petition.

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 7th day of December, 2005, to all counsel of record:

/s/ Mark P. Johnson
Mark P. Johnson