

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

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

**T-MOBILE REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY DETERMINATION ON ISSUE E**

Comes now Respondent T-Mobile USA, Inc. and submits this brief reply to the opposition filed on December 16, 2005 by the Petitioners in response to T-Motion's motion for summary determination on Issue E, involving the Petitioners' reciprocal compensation for intraMTA traffic.

A. The Petitioners admit the accuracy of the two material facts relevant to T-Mobile's motion. There are two facts that are material to Issue E: (1) persons served by their networks originate intraMTA calls to T-Mobile customers, and (2) the Petitioners send some of this traffic to IXC's. See Opposition at 5, Nos. 1 and 2. As the relevant facts are admitted, Issue E is solely a question of law.

B. The Petitioners have made no attempt to demonstrate that the Arbitrator can ignore the Commission's decision in the Alma/T-Mobile Arbitration Report. The Commission ruled only two months ago that the "MTA's geographic boundary, and nothing else, determines whether reciprocal compensation applies":

Although federal appellate courts have held that the "mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions," Petitioners nonetheless ask the Commission to create a new exception. Specifically, they claim that they should be excused from paying reciprocal compensation for intraMTA traffic they deliver to interexchange carriers ("IXCs"). But the Commission may not rewrite or ignore FCC rules. Arbitration Report at 16 and 17.

T-Mobile cited additional support for this Commission decision, including additional FCC rules and decisions and additional federal court decisions, in its memorandum supporting its motion for summary determination. See Mem. at 3-7.

The Petitioners in their opposition make no attempt to challenge this legal authority (which is understandable, because they cannot make such a showing); nor do they challenge the Commission's conclusion that it may "not rewrite or ignore FCC rules." Instead, they only "identify" additional authority for their desire that the Commission to create a new exception to the intraMTA rule. See Opp. at 1. However, the Commission in the Alma/T-Mobile arbitration has already considered – and rejected – the very authority that the Petitioners repeat in this proceeding. Unless the Commission wants to re-litigate the identical legal issues it decided so recently, T-Mobile is entitled to a summary determination on Issue E as a matter of law.

Moreover, T-Mobile respectfully submits that the Arbitrator does not possess the flexibility to render a decision that is incompatible with Commission rulings on point. And, nowhere in their opposition do Petitioners even contend that the Arbitrator possesses such authority.

C. The additional "issues of fact" the Petitioners recite are not material to T-Mobile's motion. The Petitioners devote most of their opposition to "identifying" additional issues of fact. See Opp. at 1. But none of the "identified" facts are material to the legal issue raised by T-Mobile motion. To the contrary, all of the "facts" cited relate to Petitioners' attempt to create an exception to the intraMTA rule, which would first require an exception to be established as a matter of law. But given the Commission's ruling that it may "not rewrite or ignore FCC rules" (a proposition the Petitioners do not challenge), such an exception does not exist. Therefore, the facts they "identify" have no relevance to Issue E.

D. Petitioners' claim that T-Mobile is engaged in "inappropriate and unlawful" activity is frivolous. The Petitioners accuse T-Mobile of engaging in "inappropriate and unlawful" activity:

It is both inappropriate and unlawful for T-Motion to seek to graft the factual record from another case upon the companies participating in this arbitration. Opp. at 2.

They additionally accuse T-Mobile of engaging in a "transparent litigation strategy" (Opp. at 11) in asking the Arbitrator to follow the legal conclusions the Commission made in its Alma/T-Mobile Arbitration Report.

In fact, T-Mobile has not attempted to "graft the factual record" from the Alma/T-Mobile arbitration proceeding. The facts in that case, involving different parties, have no relevance to this proceeding, and the Petitioners are not being asked to be "held to the factual record of the Alma Arbitration case." Opp. at 10. Rather, T-Mobile has relied only on the legal conclusions the Commission made in the prior proceeding, as it made apparent on page 1 of its motion:

The Commission rejected [the Petitioners'] very legal argument in this October 6, 2005 [Alma/T-Mobile Arbitration] Report T-Mobile demonstrates in the accompanying brief that the Petitioners' claim – that the Commission erred in finding as a matter of law that LECs such as Petitioners must pay compensation for all landline to mobile traffic – lacks all merit. Motion at 1 (emphasis in original).

E. Petitioner's due process arguments do not apply. Petitioners claim they possess "the right to present their case at hearing":

Under both state and federal law, due process requires that Petitioners be allowed an opportunity to try these issues at hearing. Summary judgment cannot be used here to deprive Petitioners of a full hearing on these fact issues. Opp. at 2 and 11.

Because there are no genuine issues of material fact presented with this issue, due process is served here. The Petitioners cannot create a genuine issue of material fact by claiming unsupported exceptions to legal rules and then asserting "facts" that might support such exceptions. In

the current state of the law, in which the Petitioners' desired exceptions do not exist, the facts the Petitioners seek to categorize as genuine issues of material fact are simply irrelevant.

Commission rules permit T-Mobile to file its motion for summary determination in order to streamline the issues in this proceeding. The Petitioners were required in response to "show their cards." In their opposition, however, the Petitioners merely advocate for an exception to the federal rules--Rules that the Commission in Alma determined were controlling. The Commission rejected these arguments two months ago, and it should do so again.

Last week, the Commission consolidated the arbitration proceedings involving four wireless carriers even though not all of the issues are identical. Given the sheer number of parties and issues involved, reviewing all the pre-filed testimony and managing the hearing will be a challenge. Summary determination is warranted, here, where the Petitioners have admitted the relevant material facts and the Commission has settled the issue of law. If there ever has been a case where summary determination is appropriate, this is that case.

Wherefore, for the foregoing reasons, T-Mobile respectfully submits that the Arbitrator rule in its favor on Issue E, consistent with the Commission's decision in the Alma/T-Mobile Arbitration Report.

Respectfully submitted,

By: /s/ Mark P. Johnson
Mark P. Johnson, MO Bar No. 30740
Roger W. Steiner, MO Bar No. 39586
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: 816.460.2400
Facsimile: 816.531.7545
mjohnson@sonnenschein.com
rsteiner@sonnenschein.com

ATTORNEYS FOR T-MOBILE USA, INC.

Certificate of Service

I hereby certify that a true and final copy of the foregoing was served via electronic transmission on this 20th day of December, 2005, to the following counsel of record:

W.R. England, III
Brian T. McCartney
Brydon, Swearengen & England P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456

Paul Walters, Jr.
15 E. 1st Street
Edmond, OK 73034

Paul S. DeFord
Lathrop & Gage LC
2345 Grand Boulevard
Suite 2800
Kansas City, MO 64108

/s/ Mark P. Johnson

Mark P. Johnson