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 With T-Mobile USA, Inc.	))))	Case No. IO-2005-0468, *et al.* Consolidated

PRE-HEARING LEGAL MEMORANDUM AND STATEMENT OF DISPUTED ISSUES

Comes now T-Mobile USA, Inc. ("T-Mobile"), by its undersigned attorneys, and in accordance with the Procedural Schedule Order in this proceeding, presents the following legal memorandum, attached to which is a proposed Disputed Points List, containing the issues which T-Mobile believes are disputed and properly before the Arbitrator.

PROCEDURAL HISTORY

1. This arbitration proceeding arises out of a series of Petitions filed by the four petitioning LECs on June 7, 2005. However, to place this case in proper context, it is appropriate to understand that each of these companies has also participated in a series of complaint cases filed three years ago, in 2002, and consolidated as Case No. TC-2002-57. In these complaint cases, the four LECs involved in this arbitration asserted claims against several wireless carriers, including T-Mobile and its predecessors, for compensation due for completion of mobile-to-landline traffic.

2. The complaint proceeding is still pending, after several years of litigation and numerous hearings. Although the Petitioners have resolved their complaints against some of the wireless carriers, the claims against T-Mobile are still unresolved, including claims relating to the volume, jurisdiction, and rates for traffic delivered by T-Mobile customers to the LEC customers. However, in January, 2005, the Petitioners initiated interconnection negotiations

with T-Mobile. Those negotiations were unsuccessful, largely due the Petitioners' insistence that the issues in the complaint proceeding be settled as part of the Traffic Termination Agreements.

3. The Petitions giving rise to this arbitrations raise a number of issues which are already before the Commission in the complaint proceeding. As a consequence of that fact, T-Mobile file an application to dismiss those issues from this arbitration, and that application is now pending before the Arbitrator for decision.

LEGAL ARGUMENT

Federal law governs in interconnection arbitrations

4. The 1996 Telecommunications Act established and provides the context for a uniform approach to arbitrating interconnection issues before state commissions when incumbent LECs and wireless telecommunications carriers cannot reach agreement during interconnection negotiations. Such is that case in this proceeding. Specifically, Section 252 of the Communications Act and the implementing rules adopted by the Federal Communications Commission ("FCC") grant the Commission authority to conduct this arbitration. Accordingly, the applicable law for this arbitration is the Telecom Act.[1]

[1] *See Southwestern Bell* v. *FCC,* 225 F.3d 942,946-47 (8th Cir. 2000)("We must defer to the FCC's view . . . . The new regime for regulating compensation in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state law*.") (emphasis added; internal citations omitted); *AT&T* v. *Southwestern Bell,* 86 F. Supp. 2d 932, 946 (W.D. Mo. 1999) ("Absent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication companies."). *See also AT&T* v. *Iowa Utilities Board,* 525 U.S. 366, 381 n.8 (1999)("Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."); *Iowa Network Services* v. *Qwest,* 363 F.3d 683, 686 (8th Cir. 2004)("The 1996 Act also thrust the federal government into the local exchange telephone market regulatory arena, which had previously been the exclusive domain of the states."); *id.* at 690 ("There can be no doubt that in the 1996 Act Congress greatly expanded the federal government's involvement in the telecommunications industry, even into areas such as local exchange service that previously had been left to state regulation."); *AT&T* v. *Southwestern Bell,* 86 F. Supp. 2d 932, 946 (W.D. Mo. 1999)(Federal court rejects MoPSC's 11th Amendment immunity defense). Arbitration orders are subject to the review of federal courts. *See* 47 U.S.C. § 252(e)(f)("In any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in the appropriate Federal district court.")

Final Offer Arbitration

5. Commission rules specify that the Arbitrator "shall use final offer arbitration" in deciding the unresolved issues raised by the parties.[2] "Final offer arbitration shall take the form of issue-by-issue offer arbitration, unless all of the parties agree to use of the entire package final offer arbitration."[3] The parties have not agreed to "entire package final offer arbitration" in this arbitration. Accordingly, T-Mobile respectfully asks the Arbitrator to conduct "issue-by-issue final offer arbitration" in this proceeding.

Petitioners' Issue Nos. 1-5 Relating to Traffic Exchanged Prior to the Date of the Negotiation Request Should Be Dismissed from this Arbitration

6. As noted above, T-Mobile has already moved to dismiss certain issues from this arbitration. The majority of those issues relate to the delivery of traffic from T-Mobile customers to the Petitioners' customers prior to the commencement of interconnection negotiations.

7. The federal courts have uniformly held that unresolved issues in interconnection agreements, such as the reciprocal compensation requirements in the Act, apply only after a request for negotiations is made.[4] State commissions have reached the same result.[5]

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[2] MoPSC Rule 240.36.040(5).

[3] MoPSC Rule 240.36.040(5)(A).

[4] *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).

[5] *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."

8. The Petitioners here requested negotiations from T-Mobile on January 13, 2005, yet they now ask the Commission to decide compensation issues for traffic exchanged reaching back to February, 1998. This Commission has no authority to consider in this arbitration proceeding the reciprocal compensation obligations of the parties prior to January 13, 2005. Indeed, state commissions and federal courts have already rejected the Petitioners' argument that past compensation issues should be including in an arbitration proceeding.[6] As already argued in T-Mobile's Application to Dismiss, the Arbitrator should dismiss from this arbitration proceeding the Petitioners' first five issues – all of which address traffic for the period prior to the proposed effective dates of the going-forward Traffic Termination Agreements.

9. It is important to emphasize that inclusion (and resolution) of the complaint issues for past traffic will have little or no bearing on the decision rendered in this arbitration proceeding in the sense that it will not change the arbitration decision in any material way. This is because the arbitration proceeding is clearly limited to requirements imposed by Sections 251/252 of the Act and the FCC's implementing rules. In contrast, while the issues of past compensation raised in the complaint proceeding may raise these same federal law issues, they add the complexity (not involved in this arbitration proceeding) of the interplay of this federal law with state tariffing law.

10. There are additional reasons to dismiss Issue Nos. 1-5 from this proceeding:

- Petitioner Alma Telephone filed a complaint for past traffic against T-Mobile and other wireless carriers, but it withdrew its complaint against T-Mobile. Alma has thus waived its right to seek past compensation from T-Mobile.

[6] *See Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 309 F. Supp. 2d 1299 (W.D. Ok. 2004), *aff'd*, 400 F.3d 1256 (10th Cir. 2005); *Petition of Great Plains Communications for Arbitration to Resolve Issues Relating to an Interconnection Agreement with WWC License*, Application No. C-2872 (Neb. PSC, Sept. 23, 2003), *affirming in part, vacating in part on other grounds, WWC License* v. *Boyle*, No. 4:03CV3393 (D. Neb., Jan. 20, 2005).

- The three other Petitioners – Chariton Valley, Mid-Missouri and Northeast – have also filed complaints against T-Mobile relating to compensation for traffic prior to January 13, 2005 (TC-2002-57). The record in that complaint proceeding is complete and the parties are awaiting a Commission decision. There is, therefore, no reason for the Arbitrator to consider this extensive record in this multi-party proceeding.[7]

11. It also bears noting that the record in Case No. TC-2002-57 is voluminous, and review of that record here would materially increase the Arbitrator's workload – to consider issues which do not belong in this arbitration in the first place. In this regard, T-Mobile notes that the Arbitrator's draft report in this arbitration proceeding is due less than two months from now, on September 9, 2005.[8]

12. Even if past compensation issues were a proper subject for a going-forward interconnection negotiation arbitration, T-Mobile disagrees that the "interests of efficiency" would be served by including the complaint issues here.[9] The Petitioners may believe that it is "preferable" from their perspective to resolve "all issues in this single arbitration proceeding."[10] Indeed, the Petitioners may find it preferable to negotiate a global settlement of their claims for

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[7] *See, e.g., Investigation into the Provision of Community Optional Calling Service*, Case No. TW-97-333, 1997 Mo. PSC LEXIS 97 (Dec. 30, 1997)(Commission refuses to open new docket where Public Counsel had submitted the same question in an existing docket).

[8] *See* Order Setting Procedural Schedule, Case No. IO-2005-0468, at 2 (June 30, 2005).

[9] Petitioners' Reply at 3 (July 7, 2005).

[10] Petitioners' Reply at 3 (July 7, 2005). The Petitioners' additional argument that Section 252(b)(4) requires the Arbitrator to address every issue raised in an arbitration petition – no matter how irrelevant to the arbitration proceeding (*id.* at 2) – is absurd on its face. As federal courts have held, "If the [state commission] must arbitrate *any* issue raised by a moving party, then there is effectively no limit on what subjects the [parties] must negotiate. This is contrary to the scheme and text of the" Act. *MCI* v. *BellSouth*, 289 F.3d 1269, 1274 (11th Cir. 2002)(emphasis in original). Petitioners' argument is also not credible. If, as Petitioners claim, the Arbitrator is required by law to address every issue raised in the petition and response, they would have never filed their motion in limine, which asks the Commission not to address the scope of their reciprocal compensation obligation during the time period relevant to the arbitration.

past compensation and the terms of a prospective Traffic Termination Agreement, and that they may offer different terms to reach such a settlement than they might otherwise offer in an arbitration. It is entirely within T-Mobile's prerogative to decide not to enter into a settlement and to proceed to a hearing in this arbitration. As noted above, resolution of the complaint issues that stretch back 7 years would implicate tariff issues that likely will have little or no effect on resolution of the forward-looking arbitration issues. This arbitration proceeding involves a different period of time (which may have an impact on the relevant facts[11]). Inclusion of the complaint issues here would dramatically increase the size of the record, dramatically increase the number of issues that the Arbitrator would need to address, and dramatically increase the complexity of the legal issues.

13. For the foregoing reasons, T-Mobile requests that the Arbitrator dismiss Issue Nos. 1-5 from this arbitration proceeding. T-Mobile further asks that the Arbitrator act expeditiously on this request so the parties are not forced to address in this proceeding (*e.g.*, direct testimony, which will be filed on July 21, 2005) issues that are not relevant to this arbitration, but that have already been addressed in another pending docket.

Petitioners' Issue No. 6 – the InterMTA Factor

14. Establishing an "interMTA factor" between T-Mobile and each Petitioner is important because, as discussed more fully below, the FCC's reciprocal compensation rules apply to intraMTA traffic, with tariffed access charges applying to interMTA traffic.

15. Alma and T-Mobile agree that all of their traffic shall be considered intraMTA and that they exchange no interMTA traffic by way of the LEC transit relationship involved in

[11] For example, the interMTA factors that were appropriate in 2000 may not be pertinent for traffic exchanged in 2005 or 2007, given continued network expansion and growth in traffic volumes.

this arbitration. There is, therefore, no "unresolved issue" for the Arbitrator to address between these two parties.

16. With respect to the other Petitioners, however, T-Mobile has disputed, and continues to dispute, the interMTA factors which they propose. T-Mobile does not believe that these factors are supported by reliable empirical studies. Until the Petitioners come forward with studies based on reliable traffic allocation data, T-Mobile will continue to oppose their position.

Petitioners' Issue No. 7 – the Rate for the Exchange of IntraMTA Traffic

17. One of the principal issues in this arbitration proceeding is the rate the Petitioners may charge T-Mobile for terminating intraMTA traffic originating on T-Mobile's network. Under FCC "symmetrical compensation" rules, T-Mobile would use this same rate when it terminates intraMTA traffic originating on one of the Petitioner's networks.[12]

18. Under the Communications Act, "a State Commission *shall not* consider the terms and conditions for reciprocal compensation to be just and reasonable, unless . . . (ii) such terms and conditions determine such [incumbent LEC] costs on the basis of a reasonable approximation of the *additional costs* of terminations such calls."[13] The FCC has adopted implementing rules that specify how an incumbent LEC (like each Petitioner) is to calculate its rates for terminating calls originating on other networks (like T-Mobile's network). These rules provide, among other things:

[12] *See* 47 C.F.R. § 51.711(a)("Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.").

[13] 47 U.S.C. § 252(d)(2)(A)(emphasis added).

- An incumbent LEC may recover in its rate for call termination only its traffic sensitive costs (*e.g.*, switching), and may not include costs pertaining to its loops or other non-traffic sensitive costs;[14]
- An incumbent LEC may not use embedded costs, retail costs, lost opportunity costs and/or revenues to subsidize other services;[15]
- Incumbent LEC call termination rates must be based on (a) the total element long-run incremental cost of call termination, and (b) a reasonable allocation of forward-looking common costs; and[16]
- The incumbent LEC must use in its cost study, among other things, the "most efficient telecommunications technology currently available and the lowest cost network configuration,"[17] forward looking cost of capital,[18] forward looking economic depreciation rates,[19] and a forward-looking economic cost per unit.[20]

19. Finally, FCC rules make clear that the incumbent LEC has the burden of proving that its proposed rate has been calculated in compliance with FCC rules. FCC Rule 51.505(e) provides:

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[14] *First Local Competition Order*, 11 FCC Rcd 15499, 16025 ¶ 1057 (1996)("The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered 'additional costs' when a LEC terminates a call that originated on the network of a competing carrier."); *First Local Competition Reconsideration Order*, 11 FCC Rcd 13042, 13045 ¶ 6 (1996)("[T]he "additional cost" to the incumbent LEC of terminating a call that originates on another network includes only the usage-sensitive costs, including the switching matrix and the trunk ports, but not the non-traffic sensitive costs of local loops and line ports associated with the local loops. Such non-traffic-sensitive costs, by definition, do not vary in proportion to the number of calls terminating over the LEC's facilities and, thus, are not 'additional costs.'").

[15] *See* 47 C.F.R. § 51.505(d).

[16] *See id*. at § 51.505(a).

[17] *Id.* at § 51.505(b)(1).

[18] *See id.* at § 51.505(b)(2).

[19] *See id.* at § 51.505(b)(3).

[20] *See id.* at § 51.511.

> *Cost study requirements*. An incumbent LEC must prove to the state commission that the rates . . . do not exceed the forward-looking economic cost per unit . . . using a cost study that complies with the methodology set forth in this section and § 51.511.[21]

As this Commission has recognized, "[t]his [FCC] regulation means that SWBT, as the incumbent LEC, has both the burden of production and the burden of persuasion on the issue of whether its proposed rates comply with the forward-looking TELRIOC methodology prescribed by the FCC. The regulation further requests that SWBT meet its burden through the use of a cost study."[22]

20. The Petitioners want the Arbitrator to order T-Mobile to pay them a uniform 3.5 cents ($0.035) per minute for call termination.[23] However, the Petitioners have utterly failed to meet their burden of proof. They have not submitted an appropriate cost study to support their proposed rate, much less a study that complies with the FCC's TELRIC rules.[24] Although T-Mobile pointed out this deficiency in its response to the arbitration petition,[25] the Petitioners ignored this subject altogether in their reply, suggesting that they acknowledge they have not meet their burden of proof.

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[21] 47 C.F.R. § 51.505(e). *See also First Local Competition Order*, 11 FCC Rcd at 15852 ¶ 695 ("[I]n the arbitration process, incumbent LECs shall have the burden to prove the specific nature and magnitude of these forward-looking common costs.").

[22] *Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements*, Case No. TO-2001-438, 2002 Mo. PSC LEXIS 1066, *239 (Aug. 2, 2002). *See also Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 309 F. Supp. 2d 1299, 1310 (W.D. Ok. 2004)("[T]he burden of proof is on the RTCs [Rural Telephone Companies] to show that a proposed rate meets the required standards, a contention which the RTCs do not dispute in their reply brief.").

[23] *See* Alma Arbitration Petition at 6 (June 7, 2005).

[24] As but one example, FCC Rule 51.505(b)(1) requires an incumbent LEC to use in its cost study the "most efficient telecommunications technology currently available." Many rural LECs are today replacing their current Time Division ("TDM") switches with so-called "soft switches." Reports are that the cost of these soft switches is a small fraction of the cost of traditional TDM circuit switches. It would thus appear that the Petitioners in their cost study would be required to calculate their costs based on soft switches. *See* AMERICA'S NETWORK, *Yukon Telephone Blazes VoIP Trail* (April 1, 2005)(Rural LEC serving 1,100 lines installs soft switch that "cost one-fifth the cost of legacy switches."). This same article states that 150 rural LECs in Iowa have installed, or are installing, soft switches. *See* Walnut Communications ("The switch that we are using now is a Taqua model OCX Soft Switch."), *available at* www..walnutcommunications.net/company/switching.asp.

[25] *See* T-Mobile Consolidated Reply at 6-7 (July 5, 2005).

21. In fact, the Petitioners have violated the express requirements of the Communications Act. Section 252(b)(2)(A) specifies that a party submitting an arbitration petition "*shall, at the same time as it submits the petition,* provide the State commission *all relevant documentation.*"[26] Further, the Petitioners violated the Commission's own rule, 240.36.040(3)(E), because they failed to provide with their Petitions "all relevant documentation that supports the petitioner's position on each unresolved issue," because they failed to provide cost studies supporting the rates they wish to include in the Agreements. This failure has deprived T-Mobile of its right to prepare a case in response to the Petitions.[27] T-Mobile submits that the Commission [should impose T-Mobile's rate suggestion of $.004 as compensation to the Petitioners. Once again, the Petitioners ignored this deficiency in their reply,[28] suggesting that they concede that they did not comply with the Act or the Commission's rules and have no defense to a dismissal of their arbitration petition.

22. The only justification the Petitioners make for their proposed rate of 3.5 cents/minute is that this is the rate that *other* wireless carriers agreed to pay them in voluntary negotiations (that likely addressed multiple issues and not merely the intraMTA rate),[29] and the rate that T-Mobile agreed in voluntary negotiations (which definitely covered various issues) to

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[26] 47 U.S.C. § 252(b)(2)(A)(emphasis added). The petitioner is also required to serve a "copy of the petition and any documentation" to the other carrier. *See id.* at § 252(b)(2)(B). *See also* MoPSC Rule 240-36.040(3)(E), which specifies that an arbitration petition "must contain . . . [a]ll relevant documentation that supports the petitioner's position on each unresolved issue."

[27] The evidentiary hearing is scheduled to begin less than four weeks from now (on Aug. 11, 2005). Had the Petitioners complied with the Act by including their cost study with their petitions, T-Mobile would have had over five additional weeks to analyze the cost study, retain experts, conduct discovery, *etc.* Given the Petitioners' delay in sharing its cost study, they have effectively prevented T-Mobile from conducting important discovery.

[28] T-Mobile specifically pointed out this deficiency. *See* T-Mobile Consolidated Response at 7 ¶ 20 (July 5, 2005).

[29] *See* Alma Arbitration Petition at 6 (June 7, 2005).

pay to certain *other* Missouri rural LECs[30] – although the Petitioners concede that the rate T-Mobile agreed to pay other rural LECs is less than they claim T-Mobile should pay them.[31]

23. The rate that one party agrees in *voluntary negotiations* to pay another party has absolutely no relevance to the rate that is appropriate between ***different*** parties in an *arbitration proceeding*. The Communications Act specifically allows carriers to agree voluntarily to rates and terms "without regard to" federal law requirements.[32] As the Eighth Circuit has explained:

> For example, the parties may agree to rates or terms that would not otherwise comply with the law or be required under the act, as long as the state commission ultimately approves. "But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject of § 251 and the FCC regulations promulgated thereunder.[33]

24. There are many reasons why a competitive carrier like T-Mobile may agree in negotiations to pay a higher rate than what the incumbent LEC could likely prove in arbitration. For example, the amount of traffic exchanged may be relatively small, and it may be cheaper to agree to pay a non-TELRIC rate than to arbitrate the issue. Or, a competitive carrier may agree to pay a non-TELRIC rate prospectively as part of an overall settlement with the incumbent that resolves claims for traffic exchanged in the past.

25. Here, the Petitioners chose to take unreasonable positions in their negotiations with T-Mobile, and it was they who further decided to arbitrate the issues (as is their legal right). But having chosen arbitration as their preferred procedure for resolving open issues, the Petitioners must now live by the rules developed for arbitration – including the preparation,

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30 Petitioners' Motion in Limine at 3 (July 11, 2005)

31 *See id.* at 10-11 (T-Mobile agrees to pay $0.025/minute to Choctaw and MoKan).

32 *See* 47 U.S.C. § 252(a)(1).

33 *Southwestern Bell* v. *Missouri Public Service Comm'n*, 236, F.3d 922, 923 (8th Cir. 2001), *quoting AT&T, supra*, 525 U.S. at 373.

presentation, and defense of documented rural LEC-specific TELRIC cost studies, and proving that each of their proposed call termination rates complies with governing federal law.

26. In summary, the Petitioners have categorically failed to show that their proposed rates comply with the FCC's TELRIC rules. They additionally do not dispute that they violated both the Act and Commission rules in failing to attach a cost study to their arbitration petitions and that their inaction has now irreparably harmed T-Mobile's ability to frame a cogent response. It would be fundamentally unfair to impose pricing terms in this case which T-Mobile has not had proper opportunity to challenge. And that is what is happening. Even if the Petitioners were to provide TELRIC-compliant cost studies at this stage -- many weeks after they were supposed to have provided them with their arbitration petitions -- T-Mobile would simply not have time to analyze those cost studies and prepare appropriate responses, given the compressed timeline afforded by federal law. Accordingly, the Commission should dismiss Issue No. 7 from this proceeding and, as discussed more below, order use of bill-and-keep for the exchange of all traffic between the parties.

T-Mobile Issue No. 8 – the Scope of Reciprocal Compensation – Traffic that the Petitioners Send to an Intermediary Carrier[34]

27. Petitioners are required to compensate T-Mobile for all traffic that originates on the Petitioners' network and terminates in the same Major Trading Area ("MTA"), including intraMTA traffic that the Petitioners may send to an intermediate carrier such as an interexchange carrier ("IXC").[35] The scope of the Petitioners' statutory reciprocal compensation

[34] To minimize potential confusion, T-Mobile begins numbering its additional arbitration issues as Issue 8 rather than Issue 1.

[35] The Petitioners have filed a motion in Limine asking the Arbitrator to "exclude any and all consideration of such traffic in ruling on the arbitration requests." Petitioners Motion in Limine at 6 (July 11, 2005). Petitioners make this request even though the week earlier, they argued that Section 252(b)(4) requires the Commission to address all issues raised in the petition and the response. *See* Petitioners' Reply at 2 July 7, 2005).

obligation – 47 U.S.C. § 251(b)(5) – is defined in FCC Rule 51.701(b) as including intraMTA traffic:

> For purposes of this subpart, telecommunications traffic means: . . . (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.[36]

As the Tenth Circuit Court of Appeals held recently, "the mandate in these provisions is clear, unambiguous, and on its face admits of no exceptions":

> The RTCs [Rural Telephone Companies] in the instant case have a mandatory duty to establish reciprocal compensation agreements with the CMRS providers for calls originating and terminating within the same MTA. . . . *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.*[37]

Other federal courts that have addressed this issue have reached the same result as the Tenth Circuit.[38]

28. The Petitioners assert that FCC Rule 51.701(b) does not apply to traffic that an "IXC provisions."[39] In support, they rely on "the FCC's Interconnection Order" and the "FCC interconnection and reciprocal compensation rules" – but they do <u>not</u> cite to any particular

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[36] 47 C.F.R. § 51.701(b)(2).

[37] *Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 400 F.3d at 1264 (emphasis added; internal citations omitted).

[38] *See, e.g., Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 309 F. Supp. 2d at 1309-10 ("The court also agrees with the wireless providers that "[This] [rural LEC] argument is directly contradictory to FCC rule 51.701(b). . . . The court concludes that the Oklahoma Corporation Commission did not err when it ruled that reciprocal compensation obligations apply to *all calls* originated by an RTC and terminated by a wireless provider within the same major trading area, *without regard to whether those calls are delivered via an intermediate carrier*.")(emphasis added); *WWC License* v. *Boyle*, No. 4:03CV3393, slip op. at 5-6 (D. Neb., Jan. 20, 2005) ("Under this [FCC] rule, reciprocal compensation obligations apply to *all calls* originated by Great Plans and terminated by Western Wireless within the same MTA, *regardless of whether the calls are delivered via an intermediate carrier such as Qwest*. . . . 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).

[39] Petitioners' Motion in Limine at 2 (July 11, 2005).

"Interconnection Order" or "reciprocal compensation rule."[40] T-Mobile obviously cannot respond to an argument based on a vague reference to authority that the Petitioners decline to identify. T-Mobile does note that when addressing this point, the Court in *Atlas* held that reciprocal compensation is due "without regard to whether those calls are delivered via an intermediate carrier [IXC]".

29. T-Mobile understands that this Commission may have determined in prior orders that the reciprocal compensation of incumbent LECs does not extend to traffic sent to an intermediary carrier.[41] Nevertheless, federal law is clear, and T-Mobile respectfully suggests that this federal law conflicts with the Commission's prior rulings. But as noted at the outset of this memorandum, in the context of this arbitration proceeding the Commission is required to apply federal law.[42]

T-Mobile Issue No. 9 – the Scope of Reciprocal Compensation – Calls to T-Mobile Customers with a Ported Number

30. The Petitioners in their proposed Traffic Termination Agreement want to exclude from reciprocal compensation calls to customers with ported numbers:

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[40] Petitioners' Reply at 3-4 (July 7, 2005). Petitioners attempt to obfuscate this intraMTA issue by referring to "local" traffic rather than intraMTA traffic. *See, e.g.*, Petitioners' Proposed Traffic Termination Agreement at 3 (distinguishing between "Local Traffic" and "Non-Local Traffic"). In fact, the FCC has eliminate the word "local" from its Rule 51.701(b). *See Reciprocal Compensation Remand Order*, 16 FCC Rcd 9151 (2001)("We also refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).")

[41] *See* Petitioners' Motion in Limine at 3-6 (July 11, 2005).

[42] *See, e.g., Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 400 F.3d 1256, 1263 (10th Cir. 2005)("These FCC determinations have since been codified as regulations *binding on* the industry and *state commissions*.")(emphasis added.); Southwestern *Bell* v. *FCC*, 225 F.3d 942,946-47 (8th Cir. 2000)("We must defer to the FCC's view . . . . The new regime for regulating compensation in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state law*.") (emphasis added; internal citations omitted); *AT&T* v. *Southwestern Bell*, 86 F. Supp. 2d 932, 946 (W.D. Mo. 1999) ("Absent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication companies.").

> This Agreement shall not apply to traffic or calls completed by either Party in compliance with any obligation to port numbers of the former customers of one Party when that customer takes service from the other Party.[43]

31. T-Mobile pointed out in response that there is "no exception in FCC rules for calls to wireless customers that utilize a ported telephone number,"[44] and federal appellate courts have held that the FCC's intraMTA rule "is clear, unambiguous, and on its face admits of no exceptions."[45] The Petitioners did not respond to this T-Mobile point in their reply. T-Mobile can only assume that the Petitioners have abandoned their argument.

T-Mobile Issue No. 10 – Bill-and-Keep

32. T-Mobile has taken the position that use of "bill-and-keep is appropriate for two independent reasons":

> First, the Rural LECs have not demonstrated that the traffic they exchange with T-Mobile is out of balance when all intraMTA traffic is considered (*see* Issues 8 and 9 above). Second, as discussed in Issue 7 above, the Rural LECs have utterly failed to support their 3.5-cent rate with a TELRIC study and have further failed to comply with Commission rules requiring the submission of such a study with their arbitration petitions.[46]

33. In response, the Petitioners assert that bill-and-keep is inappropriate because there is "no balance of traffic justifying 'bill-and-keep' under the FCC's rules": "[T]here is no landline to mobile reciprocal compensation traffic at issue, there is only mobile to landline traffic that is at issue here."[47] The Petitioners' position is based on the assumption that the intraMTA traffic they send to an IXC is not encompassed within the scope of their reciprocal compensation obligation. But as T-Mobile demonstrates above, the Petitioners not only fail to support their

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43 *See* Petitioners' Proposed Traffic Termination Agreement at 2 ¶ 1.1.

44 T-Mobile Consolidated Response at 6 ¶ 25 (July 5, 2005).

45 *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d 1256, 1264 (10th Cir. 2005).

46 T-Mobile Consolidated Response at 8-9 ¶ 27 (July 5, 2005)..

47 Petitioners' Reply at 4 (July 7, 2005).

argument with any authority, but their argument has been rejected by every federal court to consider the matter.

34. FCC rules permit this Commission to assume that traffic is balanced and that bill-and-keep is appropriate "unless a party rebuts such a presumption."[48] In an Oklahoma arbitration proceeding involving rural LECs and wireless carriers, the arbitrator found that the rural LEC cost study was flawed and that bill-and-keep was therefore appropriate, because the rural LECs failed to meet their burden of proof. The federal court rejected the rural LEC appeal on this issue and affirmed the state commission imposition of bill-and-keep.[49]

35. In stark contrast, the Petitioners here have submitted no cost study to justify their proposed rates. In addition, they have made no attempt to show that the intraMTA traffic they exchange with T-Mobile is not roughly balanced, when all intraMTA traffic is considered. Accordingly, this Commission should likewise order that the Petitioners and T-Mobile exchange traffic on a bill-and-keep basis, given the Petitioners' utter failure to meet their burden of proof.

36. T-Mobile has made an alternative proposal for the Arbitrator's consideration. Contained in language proposed for Section 5.1.3 of the Traffic Termination Agreements, the concept, called net-billing, embodies the simple principle that although reciprocal compensation is mandated by law, for administrative efficiency the parties should not engage in cross-billing. T-Mobile proposes a formula which will allow the Petitioners' full compensation for all traffic sent by T-Mobile to them, with the amount included in the bill sent by the Petitioners' to T-Mobile reduced by a formula which yields a reliable estimate of the number of minutes of traffic

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[48] *See* 47 C.F.R. § 51.713(c)("Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.").

[49] *See Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 309 F. Supp. 2d 1299, 1309-11 (W.D. Ok. 2004), *aff'd,* 400 F.3d 1256 (10th Cir. 2005).

sent by the Petitioners to T-Mobile. Only one bill each month. Net-billing makes sense and merits the Arbitrator's serious consideration.

T-Mobile Issue No. 11 – Future Traffic Studies

37. The physical location of a wireless customer cannot be determined based on the customer's telephone number, given the inherent nature of mobile service. The FCC has therefore ruled that the location of the serving cell site should be used to separate intraMTA traffic from interMTA traffic.[50] The Petitioners propose to comply with this FCC ruling – at least at the beginning of the proposed Traffic Termination Agreement:

> For TMUSA [T-Mobile], the origination or termination point of a call *shall* be the cell site/base station that serves, respectively, the called or called party at the beginning of the call.[51]

However, the Petitioners also want to use wireless customer telephone numbers, instead of serving cell sites, for future interMTA traffic studies – even though the FCC has never approved this approach.[52]

38. T-Mobile raised this issue in response to the Petitioners' arbitration petitions.[53] The Petitioners, in contrast, ignored this subject altogether in their reply.[54] T-Mobile can only assume that the Petitioners have abandoned their argument.

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[50] *See First Local Competition Order*, 11 FCC Rcd at 15499, 16017 ¶ 1044 (1996)("[T]he location of the initial cell site when a call begins *shall* be used as the determinant of the geographic location of the mobile customer.")(emphasis added)

[51] *See* Petitioners' Proposed Traffic Termination Agreement at 3, ¶ 2.6 (emphasis added).

[52] *See, e.g., id.* at 5-6 ¶ 5.2 ("For purposes of this Agreement, a 'valid interMTA traffic study' may be based upon . . . calling and called party information (*e.g.*, originating and terminating NPA-NXX minutes of use."); *id.* at 5 ¶ 5.1 ("Records should be provided at an individual call detail record, if possible, with . . . the originating and terminating numbers . . . .").

[53] *See* T-Mobile Consolidated Response at 9 ¶ 29 (July 5, 2005).

[54] *See* Petitioners' Reply (July 7, 2005).

T-Mobile Issue No. 12 – Symmetrical Compensation

39. FCC rules provide for symmetrical compensation – that is, a wireless carrier shall charge an incumbent LEC for intraMTA call termination at the same rate that the incumbent LEC charges the wireless carrier for terminating its intraMTA traffic.[55] Because the Petitioners' proposed Traffic Termination Agreement is "unclear and subject to varying interpretations," T-Mobile specifically asked the Commission to confirm that any rate that it may establish for rural LEC intraMTA call compensation applies equally well to the rate that T-Mobile may charge the Petitioners when it terminates intraMTA traffic originating on their network.[56] The key concept is that the compensation obligation is reciprocal: each party must compensate the other party for costs incurred in terminating traffic.

40. The Petitioners ignored the topic of symmetrical compensation in their reply.[57] T-Mobile can only assume that the Petitioners have abandoned their proposal to include this language in the Traffic Termination Agreement.

T-Mobile Issue No. 13 – the Effective Date of the Traffic Termination Agreement

41. The Petitioners' proposed Traffic Termination Agreement proposes that the agreement would take effect on "March 12, 2005 for Alma, May 17, 2005 for Chariton Valley, April 20, 2004 for Mid-Missouri and April 13, 2005 for Northeast," although the Petitioners have never explained these proposed effective dates.[58] In response, T-Mobile pointed out that

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55 *See* 47 C.F.R./ § 51.711(a)("Rates for transport and termination of telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.").

56 *See* T-Mobile Consolidated Response at 10 ¶ 31 (July 5, 2005).

57 *See* Petitioners' Reply (July 7, 2005).

58 Petitioners' Proposed Traffic Termination Agreement.

under federal law, intercarrier compensation agreements ordinarily take effect on the date that the request for compensation was first made – here, January 13, 2005.[59]

42. Again, the Petitioners ignored this subject in their reply.[60] T-Mobile can only assume that the Petitioners now agree that January 13, 2005 should be the effective date of any traffic termination agreement between the parties.

New T-Mobile Issue Nos. 14 through 16 – Local Dialing Parity; Indirect Interconnection; and Responsibility for Transport Costs for Land-to-Mobile IntraMTA Traffic

43. T-Mobile must regretfully raise three new "open issues" in light of the position the Petitioners take in a motion filed on July 11, 2005. Specifically, the Petitioners appear to contend that they have no obligation to provide reciprocal compensation unless T-Mobile interconnects directly with their networks and that for land-to-mobile traffic, T-Mobile is responsible for the costs of transport from the Petitioners' networks to T-Mobile's network. The Petitioners additionally infer that they intend to discriminate against T-Mobile customers by refusing to comply with their obligation to provide local dialing parity. A brief response to these new positions is necessary. The Petitioners did not identify these issues in their Petitions, so they cannot take T-Mobile to task for not addressing them earlier in this proceeding.

44. Direct Interconnection. An incumbent LEC cannot require a wireless carrier to connect directly to its network, and an incumbent LEC cannot excuse itself from its reciprocal compensation obligations because the parties interconnect indirectly rather than directly.

45. Since the inception of the wireless industry over 20 years ago, wireless carriers have interconnected with rural LECs indirectly, using Type 2A interconnection.[61] In the 1996

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[59] *See* T-Mobile Consolidated Response at 10 ¶ 33 (July 5, 2005).

[60] *See* Petitioners' Reply (July 7, 2005).

[61] With Type 2A, a wireless carrier can "establish intra-LATA connections to BOC end offices connected to the tandem *and to other carriers interconnected through the tandem.*" Bell Communications Research, NOTES ON

Act, Congress confirmed that competitive carriers can connect indirectly with other networks.[62] The FCC has made clear that it is the competitive carrier, not the incumbent, that determines whether to interconnect "either directly or indirectly, based on their most efficient technical and economical choices."[63] As the FCC's General Counsel has observed, under current rules, "CMRS carriers have a right to interconnect *indirectly* with other carriers":

> Under section 251(a) of the Act, every telecommunications carrier, including CMRS providers, may interconnect with an incumbent LEC either directly or indirectly. . . . The [FCC] as interpreted this provision to give telecommunications carriers, including CMRS providers, the option to interconnect at a single point of interconnection ("POI") in each LATA. In rural areas, CMRS carriers typically interconnect indirectly with smaller LECs through the tandem switch of one of the regional Bell Operating Companies ("RBOCs").[64]

Federal appellate courts have similarly held that "[u]nder the Act, wireless carriers can choose to interconnect indirectly – that is, outside of their respective networks."[65]

46. Indeed, one of the Petitioners' own trade associations has recognized that indirect interconnection is efficient for rural LECs as well, given the relatively small volumes of traffic they exchange with each wireless carrier:

> Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier.[66]

THE BOC INTRA-LATA NETWORKS, TR-NPL-000275, at 16-2, § 2.03 and Figure 16-1 (April 1986)(emphasis added).

62 *See* 47 U.S.C. § 251(a)(1).

63 *First Local Competition Order*, 11 FCC Rcd 15499, 15991 ¶ 997 (1996). *See also First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7305 ¶ 121 (1996)(wireless carriers can continue to use indirect interconnection even when LECs have implemented number portability).

64 FCC Wireless LNP Brief, No. 03-1405, at 8-9 and 31 (D.C. Cir., filed June 24, 2004) (emphasis in original). *See also id.* at 31 ("Contrary to this [rural LEC] statement, CMRS carriers have never been required to have a 'presence' (or POI) within every wireless local service area.").

65 *Central Texas Telephone Coop.* v. *FCC*, 402 F.3d 205, 215 (D.C. Cir. 2005)(internal citations omitted). *See also Atlas Telephone* v. *Oklahoma Corporation Comm'n*, 400 F.3d 1256, 1268 (10th Cir. 2005)(Court rejects rural LEC argument that they can force wireless carrier to connect directly).

66 National Telecommunications Cooperative Association ("NTCA") Ex Parte, FCC Docket No. 01-92 (March 10, 2004), *attaching* NTCA, *Bill and Keep: Is It Right for Rural America*, at 41 (March 2004).

47. As noted above, federal appellate courts have held that the FCC's intraMTA rule "is clear, unambiguous, and on its face admits of no exceptions."[67] There is, therefore, no basis to the Petitioners' suggestion that reciprocal obligation does not apply to intraMTA traffic when the carriers interconnect indirectly.[68]

48. Transport Costs. The Petitioners suggest they are not responsible for the cost of transporting calls originating on their network to T-Mobile's network because they do "not own or lease interexchange facilities."[69] This assertion is baseless. A carrier's transport obligation had nothing to do with whether a carrier owns or leases facilities. Indeed, for mobile-to-land traffic, T-Mobile is responsible for the costs of transporting its customers' calls to the Petitioners' networks – even though it does not "own or lease interexchange facilities."

49. The Communications Act imposes on the Petitioners the "duty to establish *reciprocal compensation arrangements* for the *transport* and termination of telecommunications."[70] As the FCC has declared, "the incumbent and the new entrant are co-carriers and each gains value from the interconnection agreement. Under these circumstances, it is reasonable to require each party to bear a reasonable portion of the economic costs of the arrangement."[71] The FCC has therefore adopted symmetrical transport rules, with the wireless carrier bearing the transport cost for mobile-to-land traffic, and the LEC bearing the transport cost for land-to mobile traffic. As the FCC's General Counsel has explained:

> Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the

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67 *Atlas Telephone* v. *Oklahoma Corporation Comm'n,* 400 F.3d 1256, 1264 (10th Cir. 2005).

68 Indeed, if the Petitioners' were correct in this assertion, T-Mobile would not be required to pay any compensation to the Petitioners because the parties interconnect indirectly.

69 Petitioners' Motion in Limine at 2 (July 11, 2005).

70 47 U.S.C. § 251(b)(5)(emphasis added).

71 *First Local Competition Order*, 11 FCC Rcd 15499, 15781 ¶ 553 (1996).

> call and paying the cost of this traffic. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport.[72]

The Petitioners' suggestion that they have no transport cost obligations and that T-Mobile must pay transport for both mobile-to-land and land-to-mobile traffic directly conflicts with the plain commands of Section 251(b)(5) which requires "reciprocal compensation arrangements for the transport" of traffic.

50. Dialing Parity. The Petitioners suggest that they can discriminate against T-Mobile customers by requiring their customers to make a toll call (and dial extra digits) in calling T-Mobile customers with local telephone numbers. This position is not just baseless; the Petitioners would have the Arbitrator approve their violation of their local dialing parity obligations – something the Arbitrator obviously cannot do.[73]

51. Under the Communications Act, exchange and toll services are differentiated based on the physical location of the calling and called parties.[74] The problem originating carriers face is that they do not know the physical location of the called party when he or she is served by another carrier.[75] Accordingly, since the inception of direct (non-operator assisted) dialing over 50 years ago, rural and other LECs have used the called party's telephone number as a surrogate for his or her physical location. As the Commission has recently explained, it is

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[72] FCC Intermodal LNP Brief, Nos. 03-1414, 1414, at 35 (D.C. Cir., filed July 9, 2004).

[73] *See* 47 U.S.C. § 251(b)(3)("Each local exchange carrier has the following duties: . . . (3) The duty to provide dialing parity to competitive providers of telephone exchange service."). *See also Second Local Competition Order*, 11 FCC Rcd 19392, 19429 ¶ 68 (1996)("We reject USTA's argument that the section 251(b)(3) dialing parity requirements do not include an obligation to provide dialing parity to CMRS providers.").

[74] If the calling and called parties are both located "within a telephone exchange, or within a connected system of telephone exchanges," the call is a local exchange call." *See* 47 U.S.C. § 153(47). If, in contrast, the calling and called parties are located in "different exchange areas for where is there made a separate charge not included in contracts with subscribers for exchange service," then the call is treated as a toll call. *See id.* at § 153(48).

[75] *See, e.g. Virginia Arbitration Order*, 17 FCC Rcd 27039, 27182 ¶ 301 (2002)("The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.").

"standard industry practice for telecommunications carriers to compare the NPA/NXX codes of the calling and called party to determine the proper rating of a call":

> [A] call is rated as local if the called number is assigned to a rate center within the local calling area of the originating rate center. If the called number is assigned to a rate center outside the local calling area of the originating rate center, it is rated as a toll call.[76]

Under this long-standing industry practice, if the calling and called parties' numbers correspond to the same local calling area, the LEC rates and bills the call as local, "regardless of whether the two parties actually are physically located in the same local calling area."[77]

52. The Petitioners are required to provide local dialing parity, by which their customers must be able to dial the "same number of digits to make a local telephone call notwithstanding the identity of the . . . called party's telecommunications service provider."[78] To comply with this directive, the Petitioners must treat as local any land-to-mobile call where the wireless customer has a local telephone number – namely, a number that is associated with, or rated to, one of the Petitioners' rate centers.[79]

LIST OF UNRESOLVED ISSUES

53. Attached to this pleading is a list of issues which T-Mobile believes are disputed by the parties. T-Mobile has prepared this list in the form of a matrix, or "Disputed Points List,"

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[76] *Unified Intercarrier Compensation Further NPRM*, FCC 05-33, at ¶ 141 (March 3, 2005). The FCC has recognized that there exists "no viable alternative to the current system, under which carriers rate calls by comparing the originating and terminating NPA-NXX codes. . . . Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide." *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27181-82 ¶ 301 (2002).

[77] *Starpower Communications* v. *Verizon*, 18 FCC Rcd 23625, 23629 ¶ 9 (2003).

[78] 47 C.F.R. § 51.207. *See generally* 47 U.S.C. § 251(b)(3).

[79] The Petitioners assert without explanation that this matter is rather governed by the toll dial parity rule if the interconnection point with a wireless carrier is located outside of their local calling area. *See* Motion in Limine at 2. This argument, however, is incompatible with the Act's definitions, which differentiates local from toll calls based on the location of the calling and called parties – *not* on the interconnection point between two carriers. In addition, under the Petitioners' position, wireless carriers could never assign local telephone numbers to residents of rural LEC service areas, because the interconnection point is almost always located in an area other than the rural LEC exchange.

which the Commission has recently used in other interconnection arbitration. T-Mobile acknowledges that the Procedural Schedule contemplated that the parties would file a joint list of disputed issues. However, given the compressed deadlines for performing numerous tasks in this case, the parties have simply been unable to confer sufficiently to formulate a joint document. T-Mobile intends to conduct intensive discussions with the Petitioners in the coming days to achieve agreement on the composition of the issues list.

CONCLUSION

54. The issues presented in this case should be resolved in light of controlling federal law, which establishes the framework for the interconnection relationship and burden of proof for unresolved issues. The Petitioners have either failed to provide necessary and relevant evidence with the Petitions, failed to meet their burden of proof, or have outright asked the Commission to resolve an issue in a manner that is contrary to the federal scheme.

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 15th day of July, 2005, to the following counsel of record:

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