BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

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

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

With one exception, T-Mobile will not repeat the legal authorities and arguments it has made in prior pleadings, including its Post-Hearing Brief, its Comments on the Draft Report, and its Reply to the Small Telephone Company Group Comments. With respect to these issues, T-Mobile incorporates by reference its prior pleadings.

Issue 7, the rate the Petitioners should be permitted to charge T-Mobile for terminating intraMTA traffic, merits special attention because of the number of legal errors contained in the Final Report.[1] T-Mobile will address the fundamental problems with this portion of the Report.

1. Summary of Comments.

a. The Petitioners failed to comply with federal and Missouri rules requiring disclosure of their cost study in a timely fashion, which precludes the Commission from even considering the Petitioners' late-filed cost study.

b. The Arbitrator's reliance on the inclusion of the 3.5 cent rate in negotiated -- not arbitrated -- agreements was inappropriate.

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[1] As the Commission is aware, appeals of its arbitration order will be made in federal court, not State court. *See* 47 U.S.C. §§ 252(e)(4), (6).

c. The Petitioners failed to prove that their proposed 3.5 cent rate is below their forward-looking costs. Their cost study model is outmoded and their cost expert could not validate its results. By their own admission in data requests responses, the model does not represent the least cost, most efficient network configuration -- a requirement of the governing federal law.

d. The Arbitrator's criticism of the testimony of T-Mobile's cost expert for relying on RBOC costs was incorrect, as T-Mobile's expert did not rely on such data in correcting the errors in the Petitioners' cost evidence.

2. Petitioners' Failure to Timely Submit Their Cost Study. The arbitration provisions in the Communications Act, which provide the legal authority for the Commission to act in this proceeding (and which correspondingly limits the Commission's authority as well), specify unequivocally that a "party that petitions a State commission . . . *shall, at the time as it submits the petition*, provide the State commission *all relevant documentation* concerning (i) the unresolved issues; [and] the position of each of the parties with respect to those issues." 47 U.S.C. § 252(b)(2)(A)(emphasis added).[2] Governing FCC rules require the Petitioners to submit a cost study to support their proposed rate for reciprocal compensation.[3] Clearly, Petitioners' cost study constitutes "relevant documentation" within the scope of Section 252(b)(2)(A). And,

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[2] *See also* 47 U.S.C. § 252(b)(2)(B)(Petitioners required to concurrently serve other parties with a copy of all documentation); 4 CRS 240.36.040(3)(E)(Arbitration petition "must contain . . . [a]ll relevant documentation that supports the petitioner's position on each unresolved issue.").

[3] *See* 47 C.F.R. § 51.505(e)("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.").

it is noteworthy that the Petitioners have never claimed their cost study is not a "relevant document" within the scope of this statute.[4]

The Petitioners, however, did not submit their cost study with the arbitration petitions they filed on June 7, 2005. They did not submit, and share with T-Mobile, their cost study until July 21, 2005, as part of Mr. Schoonmaker's direct testimony. The Petitioners thus failed to comply with the specific requirements that Congress imposed on parties submitting an arbitration petition. As T-Mobile has previously explained, the Petitioners' failure to comply with the explicit commands of the Communications Act "deprived T-Mobile of its right to prepare a case in response to the Petitions."[5]

Although T-Mobile repeatedly raised this issue with the Arbitrator,[6] he did not address the point until the Final Report, when he rejected T-Mobile's argument:

> The Arbitrator is unwilling to grant such a drastic remedy [dismiss the Petitioners' rate claim]. Assuming *arguendo* that Petitioners violated Section 252(b)(2), the statute does not provide any remedy for that violation. The Arbitrator is unwilling to create a remedy, especially one as harsh as dismissing the claims entirely. Final Report at 15-16.

T-Mobile must respectfully disagree with the decision. Congress was very clear that the Commission's authority in arbitration proceedings is limited to resolving "open issues" only. *See* 47 U.S.C. § 252(c). As noted, the Petitioners have the burden of proving with a cost study

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4 In fact, the Petitioners have <u>*never*</u> responded at all to this argument that T-Mobile has repeatedly raised.

5 T-Mobile Pre-Hearing Brief at 10 ¶ 21. *See also id.* at 12 ¶ 26 ("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 the arbitration petitions – T-Mobile would simply not have the time to analyze those cost studies and prepare appropriate responses, given the compressed timeline afforded by federal law.").

6 *See, e.g.*, T-Mobile Comments on Draft Report at 6; T-Mobile Post Hearing Brief at 22-23; T-Mobile Pre-Hearing Brief at 10 ¶ 21; T-Mobile Consolidated Response at 7 ¶ 20.

that their proposed rates comply with FCC rules.[7] If the Petitioners do not meet this burden in the way that Congress has commanded (*e.g.*, file a cost study with the arbitration petition), then the rate issue necessarily is no longer "open" and the Commission necessarily no longer has the authority to decide the issue. The appropriate remedy for Petitioners' failure to meet their burden of proof in the manner that Congress and the FCC has specified is to dismiss the rate claim and adopt T-Mobile's 1.5 cent proposal.[8]

It is important to emphasize that the predicament in which the Petitioners find themselves is entirely self-inflicted. After all, if their cost study was not completed at the time they were prepared to file their arbitration petitions, the Petitioners could have easily postponed filing their petitions until the study had been completed. Mr. Schoonmaker testified that he has been evaluating the application of the HAI model to the Petitioners' networks for six years, and when asked, "So even after six years of evaluation, you're still not sure whether the Hatfield Model yields reliable results for these four companies?" he merely answered, "That's true."[9] The Petitioners' own cost witness makes it abundantly clear that their cost evidence is so unreliable that he does not trust it himself.

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[7] In fact, this Commission has already recognized that under FCC rules, "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 TELRIC methodology prescribed by the FCC. The regulation further requests that SWBT meet its burden through the use of a cost study." *Determination of Prices, Terms, and Conditions of Certain Unbundled Network Elements,* Case No. TO-2001-438 (Aug. 2, 2002).

[8] Alternatively, the Commission could impose an interim rate of $.004 or impose bill-and-keep pending a full cost proceeding. The Congressional decision to require cost studies with the arbitration petition makes immanent sense given the complexity of cost studies and the short time permitted for arbitration

[9] Tr. 166 l. 11 - 25.

In any event, T-Mobile submits that, under federal law, this Commission does not possess the authority to excuse any firm from the specific commands imposed by Congress – whether or not it believes the non-compliance was justified.

Moreover, the Arbitrator's conclusion that the statute does "not provide any remedy for that violation" is inconsistent with this Commission's own precedent in applying this federal statute. Specifically, in *Sage Telecom*, Case No. TO-2002-307 (Jan. 17, 2002), the Commission dismissed the arbitration petition on the ground that the petitioner did "not compl[y] with the requirements of Section 252(b)(2) because the petitioner failed to file *any* of the relevant documents with its petition":

> The petition fails to meet the minimum requirements as set out in Section 252(b)(2), and the Commission will dismiss the petition (emphasis in original).[10]

In summary, T-Mobile submits that, as a matter of federal law, the Commission is required to strike the Petitioners' cost study.

3. A. The Relevance of Rates Contained in Negotiated Agreements with Other Parties. The Final Report, in adopting the Petitioners' proposed 3.5-cent rate, placed considerable reliance on the facts that (a) the Petitioners agreed to this rate with *other* wireless carriers, and (b) T-Mobile agreed to this rate with *other* Missouri LECs:

- "Petitioners agreed to a 3.5 cent rate in their approved agreements with Cingular, Sprint PCS, Alltel, and US Cellular" (Report at 13);
- "Petitioners have offered that same rate to T-Mobile" (*id.*).;
- "T-Mobile previously agreed to a 3.5 cent rate with other Missouri rural ILECs with similar forward-looking costs as developed by Mr. Schoonmaker. T-Mobile has agreed to this 3.5 cent rate with Ozark Telephone Company, Seneca Telephone Company, and Goodman Telephone Company in TK-2004-0166, TK-2004-0167, and TK-2004-0165" (*id.* at 14).
- "This is the same rate T-Mobile has agreed to with Seneca, Goodman, and Ozark" (*id.* at 15); and

[10] T-Mobile had cited this decision to the Arbitrator (*see* Post-Hearing Brief at 23 n.38), but the Final Report makes no mention of it.

- This is the same rate that rural ILECs and other wireless carriers have agreed to in the overwhelming majority of approved traffic termination agreements in Missouri" (*id.*).

But as T-Mobile has previously explained, the reciprocal compensation rate that one party has agreed to voluntarily with a ***non***-party is, as a matter of federal law, irrelevant to this arbitration proceeding and cannot be used by the Petitioners to avoid their burden of proof, and should no be relied upon by the Commission in resolving the rate issue.

Congress has made clear that two carriers can agree voluntarily to terms "without regard to the standards set forth in subsections (b) and (c) of section 251 of this title." 47 U.S.C. § 252(a)(1). Agreements that are negotiated voluntarily (without arbitration) often include provisions that do not meet the requirements of the Act or governing FCC rules. After all, the very essence of negotiated agreements is *compromise*, whereby each party makes a concession in one area to receive a benefit in another area (or a party makes concessions because the cost of arbitration or other business concerns may exceed the benefits of arbitration). In addition, there is utterly no record evidence that the parties to the referenced negotiated agreements even based their decision regarding the reciprocal compensation rate by reference to the incumbent LEC's TELRIC costs (and, given that Mr. Schoonmaker did not complete his TELRIC cost study until *after* the arbitration petitions here were filed, it would not have even been possible for these negotiated agreements to have considered TELRIC cost studies).

In summary, the Commission's arbitration order should expressly confirm that negotiated agreements involving non-parties are irrelevant as a matter of federal law.

B. Commission Approval of Negotiated Agreements. The Final Report, in adopting the Petitioners' proposed 3.5-cent rate, also placed reliance on the fact the Commission has "approved a 3.5 cent intraMTA rate in approximately 70 agreements between rural Missouri

ILECs and wireless carriers." Final Report at 14. This fact, too, is legally irrelevant in this arbitration proceeding.

Congress has specified that in an arbitration proceeding, this Commission "shall ensure" that its order resolving the open issues complies with the Act and governing FCC rules and specifically "shall . . . establish" rates consistent with the Act and governing FCC rules. *See* 47 U.S.C. § 252(c). The Commission undertakes no similar analysis in reviewing and approving *negotiated* agreements. It does not, for example, examine whether the rates contained in an negotiated agreement comply with Section 252(d) of the Act and the FCC's implementing rules.[11] To the contrary, given the statutory right of parties to a negotiated agreement to agree to terms "without regard to the standards" set forth in the Act (*see* 47 U.S.C. § 252(a)(1)), the Commission's authority to approve *negotiated* agreements is very limited. As the Commission stated in its order approving the Ozark/T-Mobile negotiated agreement:

> The Commission, under the provisions of Section 252(e)(1) of the federal Telecommunications Act of 1996, . . . may only reject a negotiated agreement upon a finding that its implementation would be discriminatory to a nonparty or inconsistent with the public interest, convenience and necessity. Case No. TX-2004-0166 (Oct. 2, 2003).

In summary, the Commission's arbitration order should expressly confirm that its approval of reciprocal compensation rates in negotiated agreements is irrelevant as a matter of federal law in this arbitration proceeding.

C. The Rates in an SBC/T-Mobile Agreement. The Final Report concludes that the TELRIC costs T-Mobile had calculated for the Petitioners "appears" to be less than the rates T-Mobile pays for traffic exchanged with SBC, although the Report does not refer to any record evidence. Based on this "appearance," the Report states it would be "counter-intuitive to

[11] In fact, the Commission could not possibly engage in such an analysis because TELRIC studies are not submitted with negotiated agreements.

conclude that the forward-looking costs of [the four Petitioners] would be less than those of SBC." Final Report at 14.

However, there is *no* evidence in this record about SBC's costs, the rates T-Mobile pays SBC for any interconnection or services, and whether those rates were negotiated (without regard to TELRIC) or arbitrated (using TELRIC standards). T-Mobile's cost expert testified that he would expect a small rural ILEC to have higher common transport costs due to longer distances among switches and transmission systems with less trunk capacity, but noted that the Petitioners' claimed common transport costs are 28 to 54 times the highest common transport rate (excluding Nevada), and their claimed costs are 197 to 375 times the SBC rate in Missouri. This is an extraordinary difference. It is four times higher than the highest common transport rate across the U.S., and 28 times higher than Southwestern Bell's common transport rate in Missouri. So, while the corrected common transport costs are significantly lower, they are still well above those of the RBOCs and major independent telcos. And, basing an arbitration decision on an opinion – whether something is "intuitive" or not – does not meet the federal statutory requirement that the Commission "ensure" that the rates adopted comply with the TELRIC rules.

In summary, the Commission's arbitration order should delete any reference to possible rates agreed to by SBC and T-Mobile.

4. A. The Defects in the Petitioners' Cost Evidence: the HAI Model. The Final Report states that the HAI model that the Petitioners relied upon is "the most widely used model for calculating forward-looking costs." Report at 15. However, there is *no* record evidence that the HAI model is "the most widely used model for calculating forward-looking costs."[12] For

[12] The Arbitrator did cite to a 4.5 year old decision where rural LECs introduced the model to help justify in a non-arbitration proceeding their proposed wireless termination rates that were less than the model (and with the model apparently producing rates higher than those resulting from a fully distributed cost study. *See* Final Report at 13 n.16. As noted by T-Mobile, the HAI model used in that proceeding has been superseded by a later version.

example, there is no record evidence that the HAI model has been accepted for use in any arbitration proceeding in any State. The Petitioners' own cost witness (Mr. Schoonmaker) expressed "concerns about the validity of the HAI Model I am presenting."[13] He expressed personal concern about a lack of time to test the default inputs in the model, raising doubt that "the costs may not reflect the economic costs of the companies in all respects."[14] He also confessed misgivings about the generalized formulas which mask the companies' individual costs, the arguable inapplicability of the HAI model to small companies such as the Petitioners, and the inaccuracy of the model's results for small geographic areas, such as those covered by the Petitioners.[15]

T-Mobile's cost witness (Mr. Conwell) noted that the model was rejected in an Oklahoma arbitration proceeding and that the HAI 5.0a model issued in 1998 and upon which the Petitioners relied has been replaced with a later version, 5.3.[16] Version 5.0a was the version utilized by the RLECs in the *Mark* Twain case, relied on by the Arbitrator. The subsequent rejection of that version puts into question the results of the model relied on by the Commission in *Mark* Twain. Interestingly, Mr. Schoonmaker admitted that the now-rejected Version 5.0a ".has been used to develop the costs presented in this proceeding."[17] Thus, the Arbitrator's conclusion conflicts with the record evidence.

B. The Petitioners' Inputs to the HAI Model. Any model is only as good as the inputs utilized. However, the Petitioners failed to justify the assumptions they used with their model. In fact, Mr. Schoonmaker appears to have been so dissatisfied with the results yielded by the

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13 Schoonmaker Direct, Ex. 8, p. 7 l. 20.

14 *Id.*, p. 8 l. 1-5.

15 *Id*, p. 8 l. 6 - p. 9 l. 2.

16 Conwell Direct, Ex. 13, p. 14 l. 19 - 15 l. 2; p. 22 l. 15 - 23 l. 2.

17 Schoonmaker Direct, Ex. 8, p. 10 l. 4-5.

HAI model that he changed the inputs a few days before he wrote his direct testimony. Those changes yielded a 57% reduction in projected transport and termination costs (e.g., the reduction for Alma was from 21.3 cents per minute to 9.1 cents). Mr. Conwell summarized those changes in Ex. WCC-1 to his direct testimony, which Mr. Schoonmaker conceded was accurate.[18]

The testimony of T-Mobile's cost witness, not rebutted by the Petitioners, demonstrated based on public information on switching and the Petitioners' own response to data requests that the HAI model and the inputs the Petitioners were using were erroneous. Although current versions of the HAI model call for a recovery of 0% of traffic sensitive costs, the Petitioners' model called for recovery of 70% of those costs. This adjustment alone reduced end office switching costs from 1.04 cents per minute to .07 cents.[19]

The Petitioners' own responses to discovery requests demonstrate that HAI Version 5.0a grossly overstates interoffice facility costs. Just one example is the assumption that Alma utilizes 22 miles of interoffice facilities, while in reality the company only has 3.64 miles of such facilities.[20] Mr. Schoonmaker admitted to numerous additional problems with the assumptions made in the HAI model concerning the nature of the networks which the Petitioners operate.[21] The Petitioners also made no attempt to refute numerous points made by T-Mobile's cost witness (Mr. Conwell), including: (a) the Petitioners may recover through reciprocal compensation their costs for transport and termination;[22] (b) the controlling FCC rules prohibit reliance on embedded costs;[23] (c) costs should be developed on an individual company basis;[24] (d) the cost

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18 Tr. 162 l. 18 - 164 l. 10; Conwell direct, Ex. WCC-1.

19 Conwell Direct, Ex. 13, p. 18-23.

20 Tr. 168 l. 11 - 170 l. 10; Ex. 11, answers to questions 10(a) and 13(b).

21 Tr. 170 l. 24 - 173 l. 7; Ex. 11, answers to questions 9(a), 10(b), 11(b), 12(a), and 13.

22 Conwell direct, Ex. 13, p. 20-22.

23 Schoonmaker rebuttal, Ex. 9, p. 9 l. 7-9.

study presented by the Petitioners must represent their forward-looking costs for transport and termination;[25] and (e) only days before the presentation of direct testimony, the Petitioners re-ran the model, with new inputs, and reduced their cost estimates by over 50%.[26]

Finally, the Petitioners did not challenge the demonstration that the HAI model they were using did not model small networks like those which the Petitioners operate, for, as Mr. Schoonmaker admitted, the model produced unreliable results for small companies and small geographic areas.[27] Importantly, the Arbitrator did not identify any evidence offered by T-Mobile's cost witness that he believed was not credible and not entitled to consideration. Absent such findings, the Commission must assume that Mr. Conwell's criticisms of the Petitioners' cost data are valid and that as a result, the Petitioners failed to meet their burden of proof on the rate issue.

5. <u>The Reference to T-Mobile's Cost Witness</u>. The Final Report states that "some of the[] adjustments" made by Mr. Conwell were "based on inputs or standards used by Regional Bell Operating Companies and [these adjustments] were not necessarily representative of Petitioners' business practices." Report at 13-14. The Report, however, does not identify the specific adjustments at issue.

In fact, T-Mobile's cost witness did not use RBOC data. T-Mobile's witness did refer to the now common practice of switch prices being based on a per-line basis, but the Petitioners' own answer to a T-Mobile data request concedes that vendors provide varying quotes for switch prices "on a per line basis."[28] The fact that per line prices varied does not mean it was because

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24 *Id*., p. 9 l. 19-20.

25 Conwell direct, Ex. 13, p. 10 l. 18-20.

26 *Id*., p 11 l. 19 - 12 l. 18; Ex. WCC-1.

27 Schoonmaker direct, Ex. 8, p. 8-9.

28 Ex. 11, answer to question 1.

of different usage: there could be a number of variables - different software built into the estimates for example. What is important is that Petitioners concede that switches are priced on a per-line basis. With such a formula, the amount of T-Mobile traffic that the Petitioners terminate has no bearing on their switching costs (because switching costs would no longer be traffic sensitive).

The Petitioners' data response goes on to say, cryptically, the pricing "clearly indicat[ed] that the switches are being bid on something other than a per line basis." Had the bid prices been a function of usage, the data response would have said so. It does not. The Schoonmaker argument that Mr. Conwell's testimony about switch pricing must be disregarded, because it is contradicted by the data response, which Mr. Schoonmaker prepared. The Petitioners cannot say at the beginning of a sentence that prices were on a per line basis and end the sentence with a statement that they must not have been on a per-line basis.

Mr. Conwell also pointed to SBC common transport costs by way of analogy, and acknowledged that the Petitioners would have higher transport costs, due to greater distances between switches, but he did not believe the Petitioners' costs should be 28 times higher![29] But he did not attempt to substitute SBC costs for the costs of the Petitioners. He used small company data, such as data from the Rural Utility Service or independent company inputs from the HAI model. The Arbitrator erroneously found that Mr. Conwell had used RBOC data to correct the Petitioners' purported costs.

Conclusion: The T-Mobile 1.5 Cent Proposal. The Final Report correctly concludes that the Commission can "only approve rates that do not exceed the forward-looking economic cost per unit" that that the "Petitioners have the burden to prove their forward-looking costs."

[29] Conwell direct, Ex. 13, p. 33 l. 5-10; Ex. WCC-10.

Final Report at 13.[30] When the Final Report is stripped of matters that are not legally relevant, the conclusion is inescapable that the Petitioners have not met their burden of demonstrating that their proposed 3.5 cent rate does "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."[31] The T-Mobile proposal of 1.5 cents per minute, which T-Mobile offered during negotiations, is fully supported by reliable cost evidence.

T-Mobile respectfully requests that the Commission strike Petitioners' cost study from the record because of their failure to comply with Section 252(b)(2). If the Commission denies this request, then based on the record evidence, it must conclude that the Petitioners failed to prove that their proposed 3.5 cents/minute rate does not exceed their TELRIC costs of call termination.

Respectfully submitted,

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[30] To his credit, the Arbitrator changed his preliminary finding that "both parties have an equal burden" of proof on the rate issue. *See* Draft Report at 15.

[31] 47 C.F.R. § 51.505(e).

Certificate of Service

I hereby certify that a true and final copy of the foregoing was served via electronic transmission on this 27th day of September, 2005, to the following counsel of record:

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