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 THE FOUR CLEC PETITIONERS

Comes now Respondent T-Mobile USA, Inc. ("T-Mobile") and submits this reply to the opposition filed on November 28, 2005 by the four competitive local exchange carrier ("CLEC") Petitioners in response to T-Mobile's motion to dismiss them from this arbitration proceeding.[1]

The four CLEC Petitioners do not challenge the ruling of this Commission that State regulators possess "only that authority which the Congress has expressly delegated to it":

> As a federal district court in Missouri has held, "[a]bsent 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 telecommunications companies."[2]

Likewise, the CLEC Petitioners do not challenge the fact that Congress has determined, in Section 252(b) of the Act, that State commissions should arbitrate interconnection disputes, but only when one of the parties is an "incumbent local exchange carrier."[3] Nevertheless, the Petitioners urge the Commission to ignore this explicit federal limitation on State authority and act in an area where Congress has foreclosed State intervention.

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[1] The four CLEC Petitioners are Fidelity Communications Services I, Inc.; Fidelity Communications Services II, Inc.; Green Hills Telecommunications Services; and Mark Twain Communications Company.

[2] T-Mobile Motion to Dismiss at 2-3, *quoting Alma/T-Mobile Arbitration Report*, Case No. IO-2005-0468, at 15 and n.25. *See also id.* at 3, *quoting Pacific Bell* v. *Pac West Telecom*, 325 F.3d 1114, 1126-27 (9th Cir. 2003); *MCI* v. *Bell Atlantic Pennsylvania*, 271 F.3d 491, 516 (3d Cir. 2001).

[3] T-Mobile Motion to Dismiss at 1-2.

One factual misstatement in the CLEC Opposition warrants correction at the outset. The CLECs assert, "T-Mobile has refused to establish an agreement with the CLEC Petitioners."[4] To the contrary, T-Mobile and Petitioners' counsel have repeatedly and informally discussed establishing an agreement; quite the opposite of the Petitioners' claim that T-Mobile has "refused" to negotiate an agreement. Admittedly, the parties have been unable thus far to reach agreement. But T-Mobile can hardly be accused of engaging in "bad faith,"[5] "gamesmanship"[6] and "calculated inaction"[7] for participating in negotiations with the Petitioners, particularly when the Petitioners themselves have foreclosed any meaningful progress toward an agreement.. Specifically, the Petitioners have refused depart in any way from their opening position – even though many of their demands are incompatible with federal law, as this Commission recently reaffirmed in its Alma/T-Mobile Arbitration Report.[8] A balanced view of negotiation, however, would include meaningful dialogue and compromise. To the contrary, the Petitioners appear to define "negotiations" and "willingness to establish an agreement" as the other carrier's acquiescence to the Petitioners' demands, no matter how unreasonable.

I. THERE IS NO "VOID IN THE LAW" AS THE CLECS CLAIM BECAUSE CLECS HAVE AN FCC REMEDY IF THEY CHOOSE TO INVOKE IT

The CLECs accuse T-Mobile of "attempt[ing] to exploit a Petitioner-coined 'void in the law'":

> T-Mobile's narrow interpretation of the Act and the FCC's rules is nothing more than gamesmanship seeking to exploit what T-

4 CLEC Opposition at 5.
5 *Id.* at 9.
6 *Id.* at 3.
7 *Id.* at 1, 3, 5, 8 and 9.
8 T-Mobile also does not understand the relevance of the CLECs' statement – "T-Mobile has used the CLEC Petitioners' facilities and services without paying the CLEC Petitioners" (*id.* at 8) – when, in contravention of an explicit federal statute (*see* 47 U.S.C. § 251(b)(5)), the CLECs have used T-Mobile's facilities and services for terminating intraMTA traffic originating on their networks without paying T-Mobile.

> Mobile views as a "void in the law" that would allow it to continue its course of "calculated inaction" with the CLEC Petitioners.[9]

Specifically, the CLECs assert that "[u]nder T-Mobile's reasoning":

> the CLEC Petitioners are unable to initiate negotiation or arbitration, so as a practical matter the CLEC Petitioners must either: (1) forego an agreement; or (2) accept what T-Mobile unilaterally offers.[10]

In fact, there is no "void in the law," and the CLECs have misstated T-Mobile's position.

T-Mobile has never taken the position that CLECs cannot informally request negotiations of wireless carriers; without question, CLECs can, and do, make such requests. The issue here, however, is the forum available to the parties if they are unable to reach an agreement through such voluntary negotiations. The State-commission arbitration procedure is not the proper forum. Congress has determined that State commissions should arbitrate disputes involving an incumbent LEC, not a CLEC. Necessarily, Congress has further determined that State commissions should not arbitrate disputes between two competitive carriers (which includes disputes between a CLEC and a CMRS provider).[11]

In this regard, the FCC has made clear that it will entertain interconnection disputes between carriers such as a CLEC and a wireless carrier via its complaint procedures. FCC Rule 20.11(a), which governs the interconnection of LEC and wireless carrier networks, provides in pertinent part:

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[9] *Id.* at 1 and 3.

[10] *Id.* at 9. *See also id.* at 1 ("T-Mobile would be the only carrier that could request negotiations. As a result, the CLEC Petitions would be held hostage to T-Mobile's demands.").

[11] It bears emphasis that Congress enacted the 1996 Act to "*promote competition and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers." Preamble, Telecommunications Act of 1996, Public Law 104-104, 100 Stat. 56 (1996) (emphasis added). Having States arbitrate interconnection disputes involving incumbent LECs makes sense because incumbent LECs wield market power. In contrast, State arbitration of disputes between two competitive carriers, with no market power, makes no sense and would not promote competition or reduce regulation.

> Complaints against carriers under section 208 of the Communications Act, 47 U.S.C. 208, alleging a violation of this section shall follow the requirements of Sec. 1.711-1.734 of this chapter, 47 CFR 1.711-1.734.[12]

The FCC reaffirmed in its Local Competition Order that an "aggrieved party" can always file "a section 208 complaint with the Commission" if it believes the other carrier "has failed to comply with the requirements of sections 251 and 252."[13] The FCC has repeatedly entertained interconnection disputes between LECs and wireless carriers.[14] With regard to the current arbitration proceeding, Congress made abundantly clear in Section 252(b) that State commissions possess no authority to arbitrate disputes between two competitive carriers.

In summary, the CLEC Petitioners' assertion that there exists a "void in the law" is factually inaccurate. The CLECs may follow the FCC's complaint procedures to air their interconnection differences with T-Mobile. The fact that the CLECs may not like this option does not give them (or the State commission) the authority to create another, arbitration option that Congress reserved solely for ILECs.

II. THE COMMUNICATIONS ACT'S SAVINGS CLAUSES DO NOT EMPOWER THE COMMISSION TO ACT IN AN AREA WHERE CONGRESS HAS DETERMINED IT SHOULD NOT ACT

The CLEC Petitioners take the position that it does not matter that the federal arbitration statute limits the Commission to arbitrating disputes involving incumbent LECs. This is because, they assert, "Sections 251(d)(3), 252(e)(3), and 251 of the Act expressly grant the Com-

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12 47 C.F.R. § 20.11(a).

13 *Local Competition Order*, 11 FCC Rcd 15499, 15564 ¶ 127 (1996). *See also id.* at 15571 ¶ 143 ("[W]e believe that the Commission has authority to review complaints alleging violations of good faith negotiation pursuant to section 208.").

14 *See, e.g.*, *Metrocall* v. C*oncord Telephone*, 17 FCC Rcd 2252 (2002); *TSR Wireless* v. *U S WEST*, 15 FCC Rcd 11166 (2000).

mission such authority" to arbitrate disputes between two competitive carriers.[15] These provisions cited by the Petitioners fail to support their assertion.

First, the three statutes upon which the CLEC Petitioners rely have no relevance to this proceeding:

- Section 251(d) is a limitation on FCC authority and, in any event, this statute is limited to obligations imposed in Section 251 and does not encompass the dispute resolution procedures specified in Section 252(b).[16]
- Section 252(e)(3) recognizes that State commissions may impose "other requirements" (e.g., service quality standards) "in its review of an agreement."[17] However, Section 252(e) applies only to agreements "adopted by negotiation or arbitration," which Congress made clear are limited to agreements involving an incumbent LEC.[18] In other words, a State commission can impose "other" (or additional) requirements on incumbents LECs, but this statute does not recognize that State commissions can arbitrate interconnection agreements between two competitive carriers.
- Section 261(c) recognizes that State commissions may impose additional requirements on carriers so long as the requirement is "necessary to further competition" and "as long as the State's requirements are not inconsistent with this part."[19] State arbitration of interconnection disputes between two competitive carriers cannot credibly be deemed "necessary" given the availability of the FCC forum to resolve such disputes. And, a State requirement that two competitive carriers arbitrate a dispute be-

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15 *See* CLEC Opposition at 1. *See also id.* at 3, 4, 5 and 6.

16 *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).

17 *See* 47 U.S.C. § 252(e)(3).

18 *See id.* at §§ 252(a)(1), (b)(1), and (e)(1).

19 *See* 47 U.S.C. § 261(3).

fore it would be flatly "inconsistent" with Section 252(b), which limits State arbitration authority to cases involving incumbent LECs only.

There is, however, a more fundamental flaw in the CLEC Petitioners' position. The three statutes upon which the CLECs rely are savings clauses.[20] Savings clauses do not grant authority to a State commission, as the CLECs assert (notably, without any support for this proposed departure of the savings clause function). Rather, savings clauses recognize, or reserve, whatever authority a State commission may independently possess.[21] But as T-Mobile demonstrates below in Part III – and importantly, as the CLEC Petitioners readily concede – Missouri law does not empower the Commission to arbitrate disputes between two parties unless "all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators."[22]

The Commission has recognized that it acts as a "deputized federal regulator" in implementing the Communications Act.[23] Federal courts have admonished that, in assuming in this special role, State commissions "are confined to the role that the Act delineates."[24] This Commission should not – and indeed, cannot – act in an area Congress deliberately determined States should not intervene – particularly where, as here, there is a federal remedy to adjudicate the federal claims at issue.

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[20] The Commission 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).

[21] *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.").

[22] CLEC Opposition at 11, *quoting* Section 386.230 RSMo.

[23] *See Application of Missouri RSA No. 7 Limited Partnership*, Case No. TO-2003-0531 (Sept. 16, 2003). *See also Level 3/SBC Arbitration*, Docket No. 04-L3CT-1046-ARB (Kansas Corporation Commission, Feb. 4, 2005)("In this arbitration, the Commission is acting as a 'deputized federal regulator' under the authority of Sections 251 and 252 of the Act.")(supporting citation omitted).

[24] *Pacific Bell* v. *Pac-West Telecomm*, 325 F.3d 1114, 1126 n.10 (9th Cir. 2003).

III. THE COMMISSION DOES NOT HAVE INDEPENDENT AUTHORITY UNDER STATE LAW TO ARBITRATE DISPUTES BETWEEN CLECS AND T-MOBILE

T-Mobile demonstrated in its motion to dismiss that the Commission does not have independent authority under State law to arbitrate disputes between a CLEC and a wireless carrier:

> Under State law, this Commission possesses no authority over wireless carriers like T-Mobile. Moreover, under the Commission's own rules, its arbitration authority extends only to arbitration petition filed under "section 252 of the Act," which as noted above, applies only where an ILEC is one of the parties.[25]

The CLEC Petitioners do not dispute this lack of authority under federal law, but note that under Section 386.230 RSMo., the Commission may arbitrate disputes where "all the parties to such controversy agree in writing to submit such controversy to the commission as arbitrators."[26]

T-Mobile does not agree to State arbitration with the four CLEC Petitioners pursuant to this State statute. It is not a question of what T-Mobile "wants," as the CLECs suggest.[27] The Petitioners propose a "kitchen sink" approach of throwing all interconnection issues (past and future, ILEC and CLEC) together in a single state proceeding. This type of approach unnecessarily muddies and complicates an otherwise federally-limited procedure designed for quick and efficient resolution of interconnection disputes with an ILEC. The FCC has provided an avenue for the CLEC Petitioners, who may decide whether to begin to engage in meaningful negotiation with T-Mobile or to bring their dispute before the FCC.[28] Resolution by the FCC of federal issues between two competitive carriers is consistent with clear Congressional intent and preserves the resources of the parties and Commission for proper scope of the Section 252 arbitration.

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25 T-Mobile Motion to Dismiss at 3-4.

26 CLEC Opposition at 11, *quoting* Section 386.230 RSMo.

27 See id.

28 Congress has required the FCC to act on complaints "within five months after the date on which the complaint was filed." 47 U.S.C. § 208(b)(1). The FCC is the nation's expert agency on federal telecommunications law, and its decisions have precedential effect for all CLEC/wireless carrier interconnection across the nation.

IV. THE COMMISSION LACKS THE AUTHORITY TO ENFORCE ITS 1997 DECISION IN TT-97-524

Eight years ago, in Case No. TT-97-524, the Commission "prohibited wireless carriers from sending wireless calls to small rural LECs in the absence of a compensation agreement."[29] The CLEC Petitioners repeatedly accuse T-Mobile of "violat[ing] this Commission order," and they ask the Commission to "enforce its order."[30] T-Mobile respectfully submits that this Commission lacks the authority to enforce its TT-97-524 order.

The Commission has recognized that wireless carriers are "specifically excluded from the statutory definition of 'telecommunications service" and that, as a result, they are "not subject to the general regulatory jurisdiction of the Commission."[31] Accordingly, T-Mobile submits that the Commission did not (and does not today) possess the authority under State law to prohibit wireless carriers from sending their mobile-to-land calls in the absence of an interconnection agreement – because in entering such an order, it necessarily would be exercising regulatory authority over wireless carriers.[32] If the Commission was without authority to enter its order in TT-97-524, it necessarily follows that it cannot enforce the order as the CLECs request.

Moreover, the Commission could not enforce its TT-97-524 order even if it possessed such general 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."[33] 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

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[29] CLEC Opposition at 5. See also Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff, P.S.C. Mo.-No. 40, Case No. TT-97-524 (Dec. 23, 1997).

[30] CLEC Opposition at 5, 7 and 8.

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

[32] T-Mobile notes that no wireless carrier participated in the TT-97-524 docket and thus, it is not surprising that the Commission did not consider its subject matter jurisdiction over wireless carriers.

[33] 47 U.S.C. § 332(c)(3)(A).

in the State) would clearly constitute entry regulation that is prohibited by federal statute. Accordingly, the TT-97-524 order would be preempted by federal law (again, even assuming independent authority existed in State law).

Further, the CLEC Petitioners' request that the Commission bar T-Mobile from sending calls in the absence of a completed interconnection agreement is simply another twist on their position that T-Mobile should agree to all the CLECs' demands for an interconnection agreement. This contravenes the spirit of negotiation, in which both parties determine where and how to compromise to reach agreement.

V. CONCLUSION

Wherefore, for the reasons set forth in this reply and in its motion to dismiss, T-Mobile respectfully requests that the Commission dismiss Fidelity Communications Services I, Inc.; Fidelity Communications Services II, Inc.; Green Hills Telecommunications Services; and Mark Twain Communications Company as petitioners in this case.

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
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