

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Developing a Unified Intercarrier Compensation)	
Regime)	CC Docket No. 01-92
)	
T-Mobile <i>et al.</i> Petition for Declaratory Ruling)	
Regarding Incumbent LEC Wireless Termination)	
Tariffs)	
)	

DECLARATORY RULING AND REPORT AND ORDER

Adopted: February 17, 2005

Released: February 24, 2005

By the Commission:

I. INTRODUCTION

1. On September 6, 2002, T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners jointly filed a petition for declaratory ruling asking the Commission to reaffirm "that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic."¹ The petitioners maintain that these tariffs are unlawful because they: (1) bypass the negotiation and arbitration procedures established in sections 251 and 252 of the Act;² (2) do not provide for reciprocal compensation to commercial mobile radio service (CMRS) providers;³ and (3) contain rates that do not comport with the Total Element Long-Run Incremental Cost (TELRIC) pricing methodology as required by the Commission's rules.⁴ The Commission incorporated the T-Mobile Petition into this proceeding and sought comment on the issues raised therein.⁵ For the reasons discussed below, we deny the T-

¹See *T-Mobile USA, Inc. et al. Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs*, CC Docket Nos. 01-92, 95-185, 96-98, Petition of T-Mobile, *et al.* at 1 (filed Sept. 6, 2002) (T-Mobile Petition). Specifically, petitioners request that the Commission declare that the incumbent LEC wireless termination tariffs, as well as the refusal to negotiate interconnection agreements, conflict with sections 251 and 252 of the Act and the Commission's rules, and clarify that an incumbent local exchange carrier (LEC) engages in bad faith by unilaterally filing wireless termination tariffs without first negotiating in good faith with CMRS providers. *Id.* at 14.

²47 U.S.C. §§ 251, 252.

³47 C.F.R. §§ 51.701-17.

⁴See T-Mobile Petition at 5-6, 9-10. See also 47 C.F.R. § 51.705.

⁵See *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, 17 FCC Rcd 19046 (2002). Comments were filed on October 18, (continued....)

Mobile Petition, but amend the Commission's rules on a prospective basis to prohibit the use of tariffs to impose intercarrier compensation obligations with respect to non-access CMRS traffic.⁶

II. BACKGROUND

2. Prior to the 1996 Act, the Commission established rules governing LEC interconnection with CMRS providers.⁷ Pursuant to its authority under section 201(a) of the Act, the Commission adopted rules requiring mutual compensation for the exchange of traffic between LECs and CMRS providers.⁸ In particular, the rules required the originating carrier, whether LEC or CMRS provider, to pay reasonable compensation to the terminating carrier in connection with traffic that terminates on the latter's network facilities.⁹ In a subsequent Notice of Proposed Rulemaking, the Commission explored whether it should retain the current system of negotiated agreements or adopt tariffing requirements.¹⁰ The Commission issued another Notice of Proposed Rulemaking in 1996 to examine further its policies related to interconnection between CMRS providers and LECs, including compensation arrangements.¹¹ To date, the Commission has not issued a decision directly addressing these issues.

3. In the *Local Competition First Report and Order*, the Commission determined that section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the exchange of intraMTA traffic between LECs and CMRS providers.¹² The Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA)¹³ is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access

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2002 and replies were filed on November 1, 2002. Comments and replies filed in response to this petition will be identified as "T-Mobile Comments" and "T-Mobile Reply," and are listed in Appendix C.

⁶In this item, the term "non-access traffic" refers to traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act and ISP-bound traffic.

⁷See generally *Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*) (subsequent history omitted).

⁸See 47 C.F.R. § 20.11.

⁹*CMRS Second Report and Order*, 9 FCC Rcd at 1498, para. 232 (adopting 47 C.F.R. § 20.11).

¹⁰See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, RM-8012, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5455-57, paras. 113-20 (1994) (*CMRS 1994 Notice*).

¹¹See *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, and Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket Nos. 95-185, 94-54, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5058-64, paras. 82-95 (1996) (*CMRS 1996 Notice*).

¹²*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 16016, para. 1041 (adopting section 51.703(a) of the Commission's rules) (*Local Competition First Report and Order*) (subsequent history omitted).

¹³The definition of an MTA can be found in section 24.202(a) of the Commission's rules. 47 C.F.R. § 24.202(a).

charges.¹⁴ The Commission reasoned that, because wireless license territories are federally authorized and vary in size, the largest FCC-authorized wireless license territory, *i.e.*, the MTA, would be the most appropriate local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5).¹⁵ Thus, section 51.701(b)(2) of the Commission's rules defines telecommunications traffic exchanged between a LEC and a CMRS provider that is subject to reciprocal compensation as traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area."¹⁶

4. Although section 251(b)(5) and the Commission's reciprocal compensation rules reference an "arrangement" between LECs and other telecommunications carriers, including CMRS providers, they do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other.¹⁷ As a result, carrier disputes exist as to whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers.¹⁸

5. In 2001, the Commission adopted the *Intercarrier Compensation NPRM* in this proceeding, which initiated a comprehensive review of interconnection compensation issues, including interconnection compensation arrangements between LECs and CMRS providers.¹⁹ As the Commission recognized in the *Intercarrier Compensation NPRM*, CMRS providers typically interconnect indirectly with smaller LECs via a Bell Operating Company (BOC) tandem.²⁰ In this scenario, a CMRS provider delivers the call to a BOC tandem, which in turn delivers the call to the terminating LEC. The indirect nature of the interconnection enables the CMRS provider and LEC to exchange traffic even if there is no interconnection agreement or other compensation arrangement between the parties.²¹ In the *Intercarrier Compensation NPRM*, the Commission asked commenters to address the appropriate regulatory framework governing interconnection, including compensation arrangements, between LECs and CMRS providers.²² Specifically, the Commission requested comment on how interconnection between LECs and CMRS providers would "work" within the existing regulatory frameworks under sections 251 and

¹⁴ *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036.

¹⁵ *Id.*

¹⁶ 47 C.F.R. § 51.701(b)(2).

¹⁷ 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.703(a).

¹⁸ See, e.g., T-Mobile Petition at 1 (asking the Commission to find that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for transport and termination under the Act).

¹⁹ See generally *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9637-44, paras. 78-96 (2001) (*Intercarrier Compensation NPRM*). Pleadings filed in response to the *Intercarrier Compensation NPRM* are referred to simply as "Comments" and "Reply" respectively, and are listed in Appendix B.

²⁰ See *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9643, para. 91 n.148. See also Nextel Comments at 10-11; Triton PCS Comments at 13; MSTG Reply at 2. See also T-Mobile Petition at 2.

²¹ See Alliance of Incumbent Rural Independent Telephone and Independent Alliance Reply at 6-7; MITG Reply at 6; MSTG Reply at 7.

²² *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9642, paras. 89-90.

252 and section 332 of the Act.²³

6. The practice of exchanging traffic in the absence of an interconnection agreement or other compensation arrangement has led to numerous disputes between LECs and CMRS providers as to the applicable intercarrier compensation regime. For instance, many CMRS providers argue that intraMTA traffic routed from a CMRS provider through a BOC tandem to another LEC is subject to the reciprocal compensation regime because it originates and terminates in the same MTA.²⁴ Some LECs, however, contend that this traffic is more properly subject to access charges because it originates outside the local calling area of the LEC, is being carried by a toll provider, *i.e.*, the BOC, and is routed to the LEC via access facilities.²⁵ When a LEC seeks payment of access charges from a BOC in these circumstances, the BOC often refuses to pay such charges on the basis that (1) it is merely transiting traffic subject to reciprocal compensation, and (2) the originating carrier is responsible for the reciprocal compensation due.²⁶

7. As a result of these disputes, the LECs have sought assistance from state commissions, requesting that they be compensated for terminating this traffic. Some LECs have asked state commissions to require the BOCs to continue paying for termination.²⁷ For instance, in Tennessee, a number of small LECs filed a petition asking the Tennessee Regulatory Authority to direct BellSouth to

²³*Id.* at 9642, para. 89. The Commission discussed the merits and drawbacks of the negotiation process contained in sections 251 and 252 in the context of interconnection with CMRS providers. *Id.* at 9642, para. 89. The Commission also sought comment on how the various interconnection provisions of the Act should be applied to CMRS providers. *See id.* at 9641, para. 86.

²⁴*See, e.g.*, ALLTEL Reply at 10; AT&T Wireless Reply at 27; CTIA Reply at 11; Nextel Reply at 2, 8; VoiceStream Reply at 33. Some CMRS providers view the status quo as an implicit bill-and-keep arrangement, because they are also uncompensated for incumbent LEC traffic that they terminate. *See, e.g.*, T-Mobile Petition at 3 & n. 8. Typically, small incumbent LECs route their traffic to CMRS providers via an interexchange carrier (IXC), and assert that the traffic is therefore inter-exchange toll traffic for which the terminating carrier receives access charges from the IXC, rather than reciprocal compensation. The Commission has established, however, that an IXC has no obligation to pay a CMRS provider access charges unless it has a contractual obligation to do so. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13196, para. 8 (2002), *petitions for review dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). As a consequence, most traffic sent to CMRS providers from small incumbent LECs is terminated without compensation.

²⁵*See, e.g.*, MECA Comments at 37.

²⁶*See* Letter from Glenn Reynolds, Vice President, Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed May 16, 2003) (attaching Letter from Glenn Reynolds, Vice President, Federal Regulatory, BellSouth Corporation, to William Maher, Chief, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 01-92 at 1-2 (filed May 15, 2003) (stating that LECs are obligated to accept calls from carriers who have chosen to interconnect indirectly through a third party transiting company and must recognize that the compensation due them for local calls from other carriers is the responsibility of the originating carrier) (BellSouth May 16 *Ex Parte* Letter).

²⁷*See* Letter from Elaine Critides, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at Attach. (filed Apr. 16, 2003) (attaching various state filings and cases addressing this issue) (Verizon Wireless April 16 *Ex Parte* Letter).

maintain all existing settlement arrangements and mechanisms currently in effect.²⁸ More recently, a LEC in Iowa threatened to block wireless originated traffic routed through a Qwest tandem unless Qwest agreed to pay the LEC tariffed access charges.²⁹ The state commission in Iowa granted injunctive relief preventing the LEC from blocking the traffic at issue.³⁰ Although settlements have been reached in some cases,³¹ many of these disputes remain unresolved. As a result of these disputes, many LECs have filed wireless termination tariffs with state commissions in an attempt to be compensated for traffic that originates with CMRS providers.³² Typically, these tariffs apply only in the situation where there is no interconnection agreement or reciprocal compensation arrangement between the parties.³³

8. On September 6, 2002, T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners jointly filed a petition for declaratory ruling, which the Commission incorporated into this proceeding.³⁴ The petitioners and other CMRS providers claim that, by filing these tariffs, the incumbent LECs are acting in bad faith by attempting to preempt the negotiation process contemplated by the Act and the Commission's rules.³⁵ The incumbent LECs

²⁸See Verizon Wireless April 16 *Ex Parte* Letter (attaching *General Docket Addressing Rural Universal Service*, Docket No. 00-00523, Petition for Emergency Relief and Request for Standstill Order By the Tennessee Rural Independent Coalition, at 1 (Tenn. Reg. Auth. Apr. 3, 2003)). Similar petitions were filed by LECs in Georgia, Mississippi, North Carolina, and Kentucky. See Verizon Wireless April 16 *Ex Parte* Letter, at Attach.

²⁹See *Qwest Corp. v. East Buchanan Telephone Cooperative*, Docket No. FCU-04-42, Temporary Injunction, at 1-2, 4 (Iowa Dept. of Util. Bd. Aug. 13, 2004).

³⁰See *Qwest Corp. v. East Buchanan Telephone Cooperative*, Docket Nos. FCU-04-42 and FCU-04-43, Order Granting Injunctive Relief, at 9 (Iowa Dept. of Util. Bd. Dec. 23, 2004)

³¹See, e.g., *Investigation of Duties and Obligations of Telecommunications Carriers with Respect to the Transport and Termination of CMRS Traffic*, Docket No. P-100, SUB 151, Order Granting Relief From Billing Obligations, at 1 (North Carolina Util. Comm. Dec. 12, 2003) (relieving BellSouth of its billing obligations due to settlements reached between the parties).

³²See, e.g., MITG Reply at 6; T-Mobile Petition at 4-5. Many state commissions allowed these tariffs to go into effect, while other state commissions initiated investigations into these tariffs seeking further justification of the rates and terms contained therein. See Letter from Laura S. Gallagher, Counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 2-3 (filed Dec. 10, 2003). See also Letter from Laura S. Gallagher, Counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at Attach. (filed Aug. 14, 2003) (attaching an amended *ex parte* with conflicting state decisions considering the lawfulness of wireless termination tariffs filed by CenturyTel).

³³See, e.g., Letter from Bryan T. McCartney, Counsel for the Missouri Small Telephone Company Group, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 3-4 (filed Aug. 17, 2004) (explaining that the wireless termination tariffs at issue in Missouri apply only in the absence of an agreement and are expressly subordinate to approved agreements under the Act) (MSTG Aug. 17 *Ex Parte* Letter).

³⁴T-Mobile Petition at 1.

³⁵See, e.g., T-Mobile Petition at 8-9; AT&T Wireless T-Mobile Comments at 4-6; CTIA T-Mobile Comments at 4-5; Cingular Wireless T-Mobile Comments at 3-4; Verizon Wireless T-Mobile Comments at 2-3. But see Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 5 (claiming that it is the CMRS providers that have elected to bypass the negotiation process by establishing indirect interconnection with incumbent LECs without any agreement to do so).

respond that, in the absence of an agreement or other arrangement, wireless termination tariffs are the only mechanism by which they can obtain compensation for terminating this traffic.³⁶ They claim that they are provided no meaningful opportunity to bargain and no technical ability to stop the flow of this incoming traffic.³⁷ Further, they emphasize that the establishment of these tariffs in no way precludes CMRS providers from exercising their right to pursue interconnection with them under the Act, and that such tariffs apply only in the absence of an agreement or other arrangement.³⁸

III. DISCUSSION

9. In light of existing carrier disputes, we find it necessary to clarify the type of arrangements necessary to trigger payment obligations. Because the existing rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. Going forward, however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff.³⁹ In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.

10. Our finding that tariffed arrangements were permitted under the existing rules is based on the fact that neither the Commission's reciprocal compensation rules, nor the section 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the types of arrangements that trigger a compensation obligation. Because the existing compensation rules are silent as to the type of arrangement necessary to trigger payment obligations, we find that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff.⁴⁰ Prior to the 1996

³⁶See, e.g., Frontier and Citizens T-Mobile Comments at 7; ICORE T-Mobile Comments at 7; Michigan Rural Incumbent Local Exchange Carriers T-Mobile Comments at 3; Minnesota Independent Coalition T-Mobile Comments at 1-2; NTCA T-Mobile Comments at 2-3; Rural Iowa Independent Telephone Association T-Mobile Comments at 6. The incumbent LECs dispute the existence of a *de facto* bill-and-keep arrangement. See, e.g., Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 10-12; Fred Williamson T-Mobile Comments at 2; Frontier and Citizens T-Mobile Comments at 5; Rural Iowa Independent Telephone Association T-Mobile Comments at 3.

³⁷See, e.g., Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 12; Frontier and Citizens T-Mobile Comments at 7.

³⁸See, e.g., Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 5-6, 8-9; Michigan Rural Incumbent Local Exchange Carriers T-Mobile Comments 4; Minnesota Independent Coalition T-Mobile Comments at 2; MITG T-Mobile Comments at 7-10; MSTG T-Mobile Comments at 2-3, 6. The CMRS providers respond that, once such tariffs are in effect, the incumbent LEC has little incentive to cooperate in good faith negotiations. See, e.g., Cingular Wireless T-Mobile Comments at 6. The incumbent LECs counter with the fact that many CMRS providers reached agreements with LECs after the wireless termination tariffs were filed and argue that these tariffs provide an appropriate incentive to pursue negotiations. See MSTG Aug. 17 *Ex Parte* Letter at 4.

³⁹This new rule applies only to non-access traffic as defined in note 6 above.

⁴⁰Although a tariffed arrangement would not be unlawful *per se* under the current rules, we make no findings regarding specific obligations of any customer of any carrier to pay any tariffed charges. A complaint requesting that we make such findings would not state a cause of action for which the Commission can grant relief. See *Illinois Bell Tel. Co. v. AT&T*, File Nos. E-89-41 through E-89-61, Order, 4 FCC Rcd 5268, 5270, para. 18 ("The complaints do (continued....)")

Act, the Commission specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers⁴¹ and it acknowledged that the intrastate portions of interconnection arrangements are sometimes filed in state tariffs.⁴² Thus, it appears that the Commission was aware of these arrangements and explicitly declined to preempt them at that time.⁴³

11. We reject arguments that our prior decisions require a different result. The petitioners state that, in 1987 and 1989, the Commission found that an incumbent LEC engages in bad faith when it files unilaterally a CMRS interconnection tariff, and they argue that the Commission should reaffirm that holding here.⁴⁴ We acknowledge that our early decisions addressing CMRS interconnection issues suggest that the Commission intended for these arrangements to be negotiated agreements between the parties and express an expectation that tariffs would be filed only after carriers have negotiated agreements.⁴⁵ These decisions, however, pre-date the reciprocal compensation rules adopted by the Commission pursuant to the 1996 Act. To the extent the Commission was concerned about the use of tariffs because there is unequal bargaining power between CMRS providers and LECs, the 1996 Act introduced a mechanism by which CMRS providers may compel LECs to enter into bilateral interconnection arrangements.⁴⁶ Thus, we do not find that these early decisions are dispositive as to what types of arrangements are necessary to trigger payment obligations under existing rules.⁴⁷

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not allege that AT&T, in its role as a carrier, acted or failed to act in contravention of the Communications Act . . . Rather, they allege conditionally that AT&T may have failed to pay the lawful charge for service. Such allegations do not state a cause of action under the complaint procedures and are properly dismissed.”), *recon. denied*, 4 FCC Rcd 7759 at 7760, ¶ 4 (1989) (“BOCs may not bring a complaint against AT&T in its capacity as a customer.”).

⁴¹In the *CMRS Second Report and Order*, the Commission preempted state and local regulations governing the kind of interconnection to which CMRS providers are entitled, but it specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers. *See CMRS Second Report and Order*, 9 FCC Rcd at 1498, para. 230-31. In the *CMRS 1996 Notice*, however, the Commission requested comment on the possibility of preemption of interconnection rates applied to LEC-CMRS traffic. *See CMRS 1996 Notice*, 11 FCC Rcd at 5072-73, paras. 111-12.

⁴²*See CMRS 1994 Notice*, 9 FCC Rcd at 5451, 5453, paras. 104, 108.

⁴³In 1996, however, the Commission did preempt state tariffs imposing charges on CMRS providers for LEC-originated traffic. *See Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042.

⁴⁴T-Mobile Petition at 8.

⁴⁵*See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, Declaratory Ruling, 2 FCC Rcd 2910, 2916, para. 56 (1987) (stating that “we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection”); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Report No. CL-379, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2370-71, paras. 13-14 (1989).

⁴⁶*See generally* 47 U.S.C. §§ 251-252; 47 C.F.R. Part 51. *See also Local Competition First Report and Order*, 11 FCC Rcd at 15574-75, para. 149 (describing how section 252 of the Act provides the incentive to negotiate in good faith).

⁴⁷*See Michigan Rural Incumbent Local Exchange Carriers T-Mobile Comments at 5; Minnesota Independent Coalition T-Mobile Comments at 3.*

12. Although section 20.11 and the Commission's reciprocal compensation rules establish default rights to intercarrier compensation, they do not preclude carriers from accepting alternative compensation arrangements. By routing traffic to LECs in the absence of a request to establish reciprocal or mutual compensation, CMRS providers accept the terms of otherwise applicable state tariffs. These tariffs do not prevent CMRS providers from requesting reciprocal or mutual compensation at the rates required by the Commission's rules.⁴⁸ Accordingly, wireless termination tariffs do not violate a CMRS provider's rights to reciprocal or mutual compensation under section 251(b)(5) and section 20.11 of the Commission's rules.⁴⁹

13. The CMRS providers argue that imposing the terms of interconnection pursuant to a tariff regime is inconsistent with the negotiation processes contained sections 251 and 252 of the Act, and cite the Commission's finding in *Global NAPs*.⁵⁰ In *Global NAPs*, the Commission found that "[u]sing the tariff process to circumvent the section 251 and 252 processes cannot be allowed."⁵¹ The Commission's finding in *Global NAPs* was premised, however, on the fact that the tariff at issue could supersede the terms of a valid interconnection agreement.⁵² Because the wireless termination tariffs at issue here apply only in the absence of an agreement,⁵³ they have not been used to circumvent the processes contained in sections 251 and 252 of the Act.⁵⁴ Moreover, the Commission has determined that

⁴⁸Section 20.11 of the Commission rules requires "reasonable compensation," 47 C.F.R. § 20.11, whereas reciprocal compensation rates are established by the state commissions based on forward-looking economic costs, 47 C.F.R. § 1.705.

⁴⁹Because most wireless termination tariffs are effective only in the absence of a reciprocal compensation arrangement under section 251(b)(5), we need not decide whether such tariffs satisfy the statutory requirements of that section. See Letter from Cheryl A. Tritt, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, Attach. at 10-11 (filed July 9, 2004) (arguing that these tariffs do not satisfy a LEC's statutory duty to establish reciprocal compensation arrangements) (T-Mobile July 9 *Ex Parte* Letter).

⁵⁰See Sprint T-Mobile Comments at 8-9; United States Cellular Corp. T-Mobile Comments at 3; Verizon Wireless T-Mobile Comments at 4.

⁵¹See *Bell Atlantic-Delaware, Inc., et al., v. Global NAPs, Inc.*, 15 FCC Rcd 12946, 12959, para 23 (1999) (*Global NAPs*), recon. denied, *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd 5997 (2000); *Bell Atlantic-Delaware, Inc., v. Global NAPs, Inc.*, 15 FCC Rcd 20665 (2000) (*Global NAPs II*).

⁵²The Commission found *Global NAPs'* tariff unlawful because, *inter alia*, it "purport[ed] to apply the [terms of the] tariff even when a valid interconnection agreement could be in place." *Id.* See also *Global NAPs II*, 15 FCC Rcd at 20671, para. 16 (stating that "[i]f a party to an interconnection proceeding could alter the outcome of the negotiation/mediation/arbitration processes set forth in sections 251 and 252 simply by filing a federal tariff, those processes could become significantly moot.").

⁵³See, e.g., Letter from Brian T. McCartney, Counsel for the Missouri Small Telephone Company Group, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 2-4 (filed Aug. 17, 2004) (stating that the wireless termination tariffs at issue in Missouri apply only in the absence of an agreement under the Act and are expressly subordinate to approved agreements under the Act).

⁵⁴For similar reasons, the court decisions in *Wisconsin Bell v. Ave M. Bie* and *Verizon North v. John G. Strand* do not require that we reach a different conclusion under the existing rules. *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Ave M Bie, et al. and WorldCom, Inc.*, 340 F.3d 441 (7th Cir. 2003); *Verizon North, Inc. v. John G. Strand*, 309 F.3d 935 (6th Cir. 2002). In *Wisconsin Bell v. Ave M. Bie*, the court was concerned that mandatory state tariffs inappropriately created a parallel process to the section 251/252 negotiation process. *Wisconsin Bell v. Ave* (continued....)

interconnection rates imposed via tariff may be permissible so long as the tariff does not supersede or negate the federal provisions under sections 251 and 252.⁵⁵ For all these reasons, we cannot conclude that a tariff filed by an incumbent LEC imposing termination charges on wireless traffic would be unlawful under the existing rules and, thus, we deny the petition for declaratory ruling filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners.⁵⁶

14. Although we deny the CMRS providers' requested ruling under the current rules, we now take action in this proceeding to amend our rules going forward in order to make clear our preference for contractual arrangements for non-access CMRS traffic. As discussed above, precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act. Accordingly, we amend section 20.11 of the Commission's rules to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff.⁵⁷ Therefore, such existing wireless termination tariffs shall no longer apply upon the effective date of these amendments to our rules. We take this action pursuant to our plenary authority under sections 201 and 332 of the Act, the latter of which states that "[u]pon reasonable request of any person providing

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_____ *M. Bie*, 340 F.3d at 443-44. Similarly, in *Verizon North v. John G. Strand*, the court rejected a state tariff requirement that bypassed and ignored the process for interconnection set out in the Act. *Verizon North v. John G. Strand*, 309 F.3d at 941-44. In this case, however, the wireless termination tariffs are a default mechanism that apply only if no other process is invoked. Moreover, the court's decision *Verizon North Inc. v. John G. Strand* is likewise distinguishable. See *Verizon North Inc. v. John G. Strand* 367 F.3d 577 (6th Cir. 2004). That case involved a tariff filing by a competitive carrier that could have initiated the section 252 process, but instead filed a tariff imposing reciprocal compensation charges. *Id.* at 579-83. Although competitors may compel negotiations under section 252, until now incumbent LECs did not have this same ability, as discussed below. Thus, absent these wireless termination tariffs, these carriers may have no other means by which to obtain compensation for terminating this traffic. See *Alma Tel. Co., et al. v. Public Service Commission of the State of Missouri*, 2004 WL 2216600, at *5 (Mo. Ct. App. Oct. 5, 2004) (finding that a group of rural companies had no alternative but to pursue tariff options because CMRS providers could not be compelled to negotiate compensation rates under the federal Act).

⁵⁵See *Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997) (finding that a Texas state law establishing a default wholesale rate was consistent with sections 251 and 252 even though the rate was available to carriers without negotiation or arbitration and did not comply with the wholesale rate standard established in section 251 and federal rules because the state law did not interfere with the rights of carriers to seek more favorable rates under the section 251/252 process).

⁵⁶Because we deny the T-Mobile Petition, we need not address the Motions to Dismiss alleging procedural deficiencies. See, e.g., Montana Local Exchange Carriers T-Mobile Comments 3; NTCA T-Mobile Comments at 2. See also *Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariff*, CC Docket No. 01-92, Montana Local Exchange Carriers Motion to Dismiss, at 2-3 (filed Oct. 18, 2002); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Missouri Independent Telephone Company Group Motion to Dismiss, at 2-3 (filed Aug. 3, 2004). Rather, state tariffs are affected only prospectively under the rule change adopted pursuant to our rulemaking authority.

⁵⁷As discussed below, we also adopt new rules permitting incumbent LECs to invoke the section 252 process and establish interim compensation arrangements, which are triggered by a request for negotiation from either carrier. For this reason, we reject claims that, in the absence of wireless termination tariffs, LECs would be denied compensation for terminating this traffic. See, e.g., Nebraska Rural Independent Companies T-Mobile Comments at 6; NTCA T-Mobile Comments at 7-8; Rural ILEC T-Mobile Comments at 7-8. Under the amended rules, however, in the absence of a request for an interconnection agreement, no compensation is owed for termination.

commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service”⁵⁸

15. We acknowledge that LECs may have had difficulty obtaining compensation from CMRS providers because LECs may not require CMRS providers to negotiate interconnection agreements or submit to arbitration under section 252 of the Act.⁵⁹ In the *Local Competition First Report and Order*, the Commission held that section 251(b)(5) requires LECs to enter into reciprocal compensation arrangements with all CMRS providers but that it does not explicitly impose reciprocal obligations on CMRS providers.⁶⁰ Thus, the Commission’s rules impose certain obligations on LECs, but not on CMRS providers.⁶¹ Moreover, some commenters observe that CMRS providers may lack incentives to engage in negotiations to establish reciprocal compensation arrangements.⁶²

16. In light of our decision to prohibit the use of tariffs to impose termination charges on non-access traffic, we find it necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today. Accordingly, we amend section 20.11 of our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the

⁵⁸47 U.S.C. § 332(c)(1)(B). See *Local Competition First Report and Order*, 11 FCC Rcd at 16005, para. 1023 (affirming that “section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection”). In *Iowa Utils. Bd. v. FCC*, the United States Court of Appeals for the Eighth Circuit held that the Commission has authority to issue rules of special concern to CMRS providers. See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (vacating the Commission’s pricing rules for lack of jurisdiction except for “the rules of special concern to CMRS providers” based in part upon the authority granted to the Commission in 47 U.S.C. § 332(c)(1)(B)), *vacated and remanded in part on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). See also *Qwest v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001) (describing the Eighth Circuit’s analysis of section 332(c)(1)(B) in *Iowa Utils. Bd. v. FCC* and concluding that an attempt to relitigate the issue was barred by the doctrine of issue preclusion).

⁵⁹See Ronan/Hot Springs Comments at 13; MSTG Reply at 6-7, 10, 12. See also TCA Reply at 4-5 (contending that CMRS providers do not want interconnection agreements with small LECs).

⁶⁰*Local Competition First Report and Order*, 11 FCC Rcd at 15996-97, paras. 1005, 1008 (holding that CMRS providers will not be classified as LECs and are not subject to the obligations in section 251(b)(5)). Compare *id.* at 16018, para. 1045 (suggesting that CMRS providers will enter into reciprocal compensation arrangements).

⁶¹47 C.F.R. § 51.703(a). There is some uncertainty as to the relationship between the arrangements contemplated in section 20.11 and the section 251/252 agreements contained in the Act. Therefore, the rights of LECs to compel negotiations with CMRS providers are not entirely clear. Compare Letter from Brian T. McCartney, counsel for the Missouri Small Telephone Company Group, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 13 (filed Aug. 17, 2004) (stating that the rights of rural incumbent LECs to compel negotiations are not clear) with T-Mobile July 9 *Ex Parte* Letter, Attach. at 7, 9, 13 (arguing that LECs can require CMRS providers to negotiate interconnection under sections 201 and 332 of the Act). Further, although CMRS providers may indeed have an existing legal obligation to compensate LECs for the termination of wireless traffic under section 20.11(b)(2) (see Letter from Michael F. Altschul, Senior Vice President and General Counsel, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 1 n.3, 4 (filed Nov. 30, 2004)), the rules fail to specify the mechanism by which LECs may obtain this compensation.

⁶²See, e.g., MSTG Reply at 12, 25; OPASTCO Reply at 4-5. See also Frontier and Citizens T-Mobile Comments at 5 (noting that, because CMRS providers are generally net payers of reciprocal compensation, it is in their financial interest to maintain the *status quo* of bill-and-keep).

negotiation and arbitration procedures set forth in section 252 of the Act.⁶³ A CMRS provider receiving such a request must negotiate in good faith and must, if requested, submit to arbitration by the state commission. In recognition that the establishment of interconnection arrangements may take more than 160 days,⁶⁴ we also establish interim compensation requirements under section 20.11 consistent with those already provided in section 51.715 of the Commission's rules.⁶⁵ Interim compensation requirements are necessary for all the reasons the Commission articulated in *Local Competition First Report and Order*.⁶⁶

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

17. A Final Regulatory Flexibility Analysis has been prepared for this Declaratory Ruling and Report and Order and is included in Appendix D.

B. Paperwork Reduction Act Analysis

18. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. § 3506(c)(4).

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-5, 7, 10, 201-05, 207-09, 214, 218-20, 225-27, 251-54, 256, 271, 303, 332, 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-55, 157, 160, 201-05, 207-09, 214, 218-20, 225-27, 251-54, 256, 271, 303, 332, 403, 405, 502, and 503, and sections 1.1, 1.421 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.421, this Declaratory Ruling and Report and Order in CC Docket No. 01-92 IS ADOPTED, and that Part 20 of the Commission's Rules, 47 C.F.R. Part 20, IS AMENDED as set forth in Appendix A.

20. IT IS FURTHER ORDERED that the rule revisions adopted in this Declaratory Ruling and Report and Order SHALL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register.

⁶³See Appendix A.

⁶⁴See 47 U.S.C. § 252(b)(1).

⁶⁵See 47 C.F.R. § 51.715 (establishing interim transport and termination pricing upon request for an interconnection arrangement).

⁶⁶*Local Competition First Report and Order*, 11 FCC Rcd at 16029-30, para. 1065 (finding that interim compensation was necessary to promote competition in the local exchange).

21. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners is DENIED as set forth herein.

22. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**AMENDMENT TO THE CODE OF FEDERAL REGULATIONS**

For the reasons discussed in the preamble, the Federal Communications Commission amends Part 20 of Title 47 of the Code of Federal Regulation as follows:

1. The authority citation for Part 20 continues to read as follows:

Authority: Secs. 4, 10, 251-254, 303, and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 154, 160, 251-254, 303, and 332, unless otherwise noted.

2. Section 20.11 is amended by adding new paragraphs (e) and (f) to read as follows:

§ 20.11 Interconnection to facilities of local exchange carriers.

* * * * *

(e) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

(f) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in § 51.715 shall apply.

APPENDIX B**INTERCARRIER COMPENSATION NPRM
CC DOCKET NO. 01-92****COMMENTS**

ACS of Anchorage, Inc.
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alaska Telephone Association
Allegiance Telecom, Inc.
Allied Personal Communications Industry
ALLTEL Communications Inc.
America Online, Inc. (AOL)
AT&T Corp.
AT&T Wireless Services, Inc.
BellSouth Corp.
Cable & Wireless USA
Cablevision Lightpath, Inc.
California Public Utilities Commission (California Commission)
Cbeyond Communications
Cellular Telecommunications & Internet Association (CTIA)
CenturyTel, Inc.
Competitive Telecommunications Association (CompTel)
Florida Public Service Commission (Florida Commission)
Focal Communications Corp., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp. (Focal *et al.*)
General Services Administration (GSA)
Global Crossing Ltd.
Global NAPs Inc.
Guyana Telephone & Telegraph Ltd.
GVNW Consulting, Inc.
Home Telephone Company, Inc.
ICORE Inc.
Illinois Commerce Commission (Illinois Commission)
Independent Telephone & Telecommunications Alliance
Information Technology Association of America
Iowa Utilities Board (Iowa Commission)
ITC's, Inc.
KMC Telecom, Inc.
Level 3 Communications
Maryland Office of the People's Counsel (MD-OPC)
Michigan Exchange Carriers Association, Inc. (MECA)
Mid Missouri Cellular
Minnesota Independent Coalition
Missouri Public Service Commission (Missouri Commission)
Missouri Small Telephone Company Group (MSTG)
Mpower Communications Corp.
National Association of Regulatory Utility Commissioners (NARUC)