Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Cost-Based Terminating Compensation	)	CC Docket Nos. 95-185 and 96-98
For CMRS Providers	)	WT Docket No. 97-207

OPPOSITION OF SPRINT PCS TO SBC COMMUNICATIONS APPLICATION FOR REVIEW

Sprint Spectrum L.P., d/b/a Sprint PCS ("Sprint PCS"), hereby opposes SBC Communications' June 8, 2001 Application for Review ("SBC Petition"). The SBC Petition, submitted in response to a May 9, 2001 letter issued jointly by the Wireless Telecommunications and Common Carrier Bureaus,[1] is procedurally defective and substantively incorrect.

I. SBC'S PETITION IS PROCEDURALLY INFIRM AND MUST ACCORDINGLY BE DISMISSED

In February 2000, Sprint PCS asked the Commission to "confirm that under the Communications Act and its implementing rules, a CMRS provider is entitled to recover in reciprocal compensation all the additional costs it incurs in terminating local traffic originated on other networks — whether the additional cost is incurred in switching or delivering the call to the mobile customer."[2] The Commission requested comment on this request on May 11, 2000.[3] Fourteen parties filed comments, and eleven submitted reply comments. SBC chose not to participate.

Commission Rule 1.115(a) imposes certain obligations on persons that challenge a Bureau order in a proceeding where they have not participated. Among other things, such a person

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[1] *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, and Dorothy T. Attwood, Chief, Common Carrier Bureau, to Charles McKee, Sprint PCS, CC Docket Nos. 95-185 and 96-98 and WT Docket No. 97-207 (May 9, 2001)("Joint Bureau Letter").

[2] *See* Letter from Jonathan M. Chambers, Sprint PCS, to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, and Lawrence E. Strickling, Chief, Common Carrier Bureau, CC Docket Nos. 95-185 and 96-98 and WT Docket No. 97-207, at 1 (Feb. 2, 2000).

[3] *See Public Notice,* "Comment Sought on Reciprocal Compensation for CMRS Providers," DA 00-1050, 15 FCC Rcd 8141 (May 11, 2000).

"shall include within his application a statement . . . showing good reason why it was not possible for him to participate in the earlier stages of the proceeding":

> Any application for review which fails to make an adequate showing in this respect will be dismissed.[4]

SBC's application makes no showing, much less "an adequate showing," why it was not possible for it to participate in the earlier stages of the CMRS reciprocal compensation proceeding. Accordingly, its application for review must be dismissed.

II. THE JOINT BUREAU LETTER IS CONSISTENT WITH THE COMMUNICATIONS ACT, COMMISSION RULES AND ORDERS

SBC's principal argument is that the Bureaus' position is "plainly inconsistent with the Commission's reciprocal compensation rules."[5] This argument lacks merit.

SBC first asserts that the Bureaus established "an entirely new 'additional cost' standard that would apply uniquely to CMRS providers."[6] According to SBC, the Commission has "effectively limited" the universe of recoverable traffic-sensitive costs to "end office switching."[7] From this unsupported premise, SBC reasons that the Bureaus contravened this "effective limit" by holding that, upon adequate proof, a CMRS carrier may recover in reciprocal compensation the costs of any network component that is cost sensitive to increasing call traffic volumes.

Nowhere do the Commission orders and rules limit reciprocal compensation to the traffic sensitive costs of switching. Indeed, such a position would be incompatible with the plain language of the statute. Congress did not limit reciprocal compensation to the recovery of switching

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[4] 47 C.F.R. § 1.115(a).

[5] SBC Petition at 2.

[6] *Id.* at 4.

[7] *Id.* at 3.

costs. To the contrary, the Communications Act provides unambiguously that "each carrier" may recover the "additional costs" of terminating traffic on "each carrier's *network facilities*."[8]

In implementing this statute, the Commission adopted Rule 51.711(b) so that an interconnecting carrier like Sprint PCS can obtain reciprocal compensation based on its own call termination costs rather than the costs that an incumbent LEC incurs in terminating traffic over its landline network.[9] In its petition, SBC readily acknowledges that it is "not asking" the Commission to "eliminate its symmetry presumption, under which CMRS providers are entitled to overcome the presumption by showing that their termination costs exceed those of an ILEC."[10]

The position taken in the Joint Bureau letter is not only consistent with the plain language of the Communications Act and implementing rules, it is also consistent with the Commission's interpretation of the Act as applied specifically to LEC/CMRS interconnection. In its recent *Intercarrier Compensation NPRM*, the Commission explicitly reaffirmed that a CMRS carrier may recover in reciprocal compensation all of its additional (traffic sensitive) costs of call termination, regardless of the network element involved:

> Thus, if a CMRS carrier can demonstrate that the costs associated with spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, to some degree, with the level of traffic that is carried on the wireless network, a CMRS carrier can submit a cost study to justify its claim to asymmetric reciprocal compensation that includes additional traffic sensitive costs associated with those network elements.[11]

The Commission has thus squarely rejected the very argument that SBC advances.

SBC also asserts that the Bureau erred in not requiring a CMRS carrier to demonstrate functional equivalency to tandem switching in order to receive reciprocal compensation at the

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[8] 47 U.S.C. § 252(d)(2)(A)(emphasis added). The Supreme Court has held that where Congress as "directly spoken to the precise question at issue," conflicting agency action is impermissible. *See Chevron USA* v. *Natural Resources Defense Counsel,* 467 U.S. 837, 842-43 (1994).

[9] *See* 47 C.F.R. § 51.711(b).

[10] SBC Petition at 5-6.

[11] *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Notice of Proposed Rulemaking,* FCC 01-132, at ¶ 104 (April 27, 2001)("*Intercarrier Compensation NPRM*").

incumbent LEC's tandem rate.[12] Once again, SBC's argument is one that the Commission has squarely addressed — and rejected:

> The "equivalent facility" language of sections 51.701(c) and (d) of the Commission's rules was not intended to require that wireless network components be reviewed on the basis of their relationship to wireline network components. * * * [S]ection 51.711(a)(3) is clear in requiring only a geographic area test. Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled to the tandem interconnection rate to terminate local telecommunications traffic on its network.[13]

As SBC recognizes, it is "axiomatic that Bureaus of the Commission may not alter rules established by the Commission itself."[14] Given the clarity in which both Congress and the Commission have spoken, the Bureaus had no choice but to issue the ruling they made.

III. THE JOINT BUREAU LETTER IS PROCEDURALLY PROPER

SBC finally contends that the Bureau letter is "procedurally improper because it completely fails to acknowledge or respond to the comments that were filed in opposition to the Sprint PCS letter."[15] Notably, the one case that SBC cites in support of its position actually confirms that the procedures the Bureaus used were proper.[16]

The Commission and its Bureaus do, indeed, have "the duty to respond to *significant* comments."[17] A significant comment is one that "raises points *relevant* to the agency's decision

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[12] *See* SBC Petition at 6-10. There is no such "functional equivalency" requirement in the rule and no conflict exists. *See* 47 C.F.R. § 51.711(a).

[13] *Intercarrier Compensation NPRM* at ¶¶ 104-05.

[14] SBC Petition at 2.

[15] SBC Petition at 10.

[16] In *Grand Canyon Air Tour Coalition* v. *FAA,* 154 F.3d 455 (D.C. Cir. 1998), the appellants argued that the FAA, in violation of the Administrative Procedures Act, failed to respond to certain industry comments. The Court held that there was no APA violation because the FAA was required by statute to adopt the definition promulgated by the Secretary of the Interior and that as a result, the Secretary's definition was not relevant to the issue before the FAA. Similarly, here, as SBC concedes, the Bureaus were required to take a position consistent with FCC precedent. *See* SBC Application for Review at 2 and 4.

[17] *Alabama Power* v. *Costle,* 636 F.2d 323, 384 (D.C. Cir. 1979)(emphasis added).

and which, if adopted, would require a change in an agency's proposed rule."[18] The Bureau was under no obligation to consider the arguments SBC recites because they are not legally relevant.

The arguments that SBC contends the Bureaus did not consider all involve arguments based on public policy and economics. However, these types of arguments are not relevant to the legal issue before the Bureau — whether under the Communications Act or Commission orders, a CMRS carrier may recover the traffic sensitive costs of all network elements used in call termination.[19] The fact that SBC may believe that the policy judgment that Congress made "makes no sense" is legally irrelevant,[20] and the Bureau was under no obligation to consider much less respond to, legally irrelevant arguments — especially where, as here, the Commission has already addressed the very issues before the Bureau.

IV. CONCLUSION

SBC's application for review is procedurally defective, lacks merit, and should accordingly be dismissed.[21]

Respectfully submitted,

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[18] *ACLU* v. *FCC,* 823 F.2d 1554, 1581 (D.C. 1987)(emphasis added), *quoting Alabama Power* v. *Costle,* 636 F.2d 323, 384 (D.C. Cir. 1979), and *HBO* v. *FCC,* 567 F.2d 9, 35-36 (D.C. Cir. 1977).

[19] As one court has noted, "when, as here, the statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative." *Citicasters* v. *Mcaskill,* 89 F.3d 1350, 1354 (8th Cir. 1996), *quoting Northern States Power* v. *United States,* 73 F.3d 764, 766 (8th Cir. 1996).

[20] SBC Petition at 6.

[21] The FCC is authorized to deny SBC's application "without specifying reasons therefor." 47 C.F.R. § 1.115(g).

CERTIFICATE OF SERVICE

I, Jo-Ann G. Monroe, hereby certify that on this 25th day of June 2001, copies of the foregoing "Opposition of Sprint PCS" were served by first class U.S. mail, postage prepaid, to the following:

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