

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

In the Matter of)
)
Developing a Unified Intercarrier) **CC Docket No. 01-92**
Compensation Regime)
)

To: The Commission

**COMMENTS OF
THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group (“RTG”),¹ by its attorneys, respectfully submits these comments in response to the Notice of Proposed Rulemaking (“*Notice*”) released by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding.²

I. INTRODUCTION AND SUMMARY

RTG fully supports the use of bill-and-keep intercarrier compensation arrangements in appropriate circumstances. For LEC-CMRS compensation, this approach may often be a valid and economically justifiable approach. However, for the reasons discussed below, RTG urges the Commission to permit CMRS providers to continue to seek intercarrier compensation using either reciprocal compensation or bill-and-keep methodologies. This flexibility would reflect

¹ The Rural Telecommunications Group is a group of rural telecommunications providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services, such as cellular telephone service, Personal Communications Services (“PCS”), and (“LMDS”) RTG's members are all affiliated with rural telephone companies or are small businesses.

² *In re Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking in CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001) (66 F.R. 38410, May 23, 2001) (“*Notice*”).

both the unique traffic termination asymmetries and cost structures between CMRS providers and landline operators.

Irrespective of the compensation scheme adopted by the Commission, RTG strongly believes that the Commission, not the various states, should maintain jurisdiction to establish standards and resolve controversies that may arise in any CMRS-related compensation/interconnection disputes. Section 332 of the Communications Act of 1934 (the “Act”), as adopted and modified by Congress and affirmed by the courts, clearly establishes the Commission’s exclusive, plenary jurisdiction over LEC-CMRS interconnection agreements. RTG agrees with the Cellular Telecommunications and Internet Association (CTIA) that Section 332 directs the Commission not to cede its jurisdiction to the individual states in matters that fundamentally impact the pricing and entry terms of CMRS.³ It is imperative that CMRS providers, who typically operate across state lines, have a single source of consistent compensation/interconnection direction. Congress determined that the FCC would be that source.⁴

II. THE COMMISSION SHOULD ALLOW FLEXIBILITY IN CMRS INTERCONNECTION/COMPENSATION AGREEMENTS

RTG fully supports the Commission’s initiative to make bill-and-keep compensation terms readily available to all carriers irrespective of technology. Today, bill-and-keep is the exception and requires explicit authorization by a state commission under limited circumstances.⁵ The Commission should make bill-and-keep available to CMRS carriers

³ See Letter to FCC Chairman William E. Kennard from CTIA President Thomas E. Wheeler, December 12, 2000; Letter to FCC Chairman William E. Kennard from CTIA Vice President and General Counsel Michael F. Altschul, December 29, 2000.

⁴ See 47 U.S.C. §332 (c)(1)(B).

⁵ See 47 U.S.C. §252(d)(2)(B), incorporated in the Commission’s rules at 47 C.F.R. §51.713 (requiring a finding of roughly balanced traffic flows and similar network incremental costs).

without meeting these limited circumstances. However, the Commission should not mandate bill-and-keep, but retain it as one of the compensation alternatives for CMRS interconnection agreements. This flexibility will allow wireless network operators, who are only now beginning to receive reciprocal compensation for transporting and terminating wireline traffic over their digital networks, to recover the traffic sensitive costs of these networks from all users of their CMRS networks.

RTG does not dispute the potential concerns raised by the Commission in its Notice regarding reciprocal compensation.⁶ Nor does it disagree with the Commission's justifications for adopting a more easily usable bill-and-keep regime.⁷ At the same time, the potential concerns raised by the Commission for reciprocal compensation do not impact LEC-CMRS interconnection. As the Commission itself notes, its concerns with compensation, and the motivation for its proposals, stem primarily from wireline interconnection situations involving LEC-ISP interconnection. "[W]e are not aware of complaints against CMRS carriers for excessive termination rates—even in unregulated interconnection arrangements—or for engaging in regulatory arbitrage. Thus, there may be less of an imperative to apply a new regime to LEC-CMRS interconnection where significant problems do not exist."⁸

At the same time, the Commission cannot ignore that new wireless networks may have higher transport and termination costs than well-established wireline networks. The Commission recognized this likelihood only three months ago, concluding that wireless networks should be permitted to recover incremental costs and to justify asymmetrical reciprocal compensation by a showing of additional costs associated with spectrum, cell sites, backhaul links, base station

⁶ Notice at ¶¶11-18.

⁷ Notice at ¶¶37-41.

⁸ Notice at ¶65 (emphasis added).

controller and mobile switching centers.⁹ As a matter of policy, the Commission should not now saddle wireless networks -and consequently their subscribers- with the full cost of receiving a call over more expensive networks. The appropriate mechanism for inter-carrier compensation should be left to negotiations between the originating and terminating carriers—as are other terms of interconnection arrangements.

As a matter of law, RTG is concerned that *mandated* bill-and-keep under all circumstances would run afoul of Sections 252, 332 and 201(b) of the Communications Act. Section 252(d)(2)(A) states that that the terms and conditions of transport and termination shall not be considered just and reasonable unless they provide for “the mutual and reciprocal recovery” of each carrier’s additional transport and termination costs for calls that originate on other networks. At least when traffic flows and costs are not in balance, RTG suggests that it is not enough that the Commission allow for the “mutual and reciprocal” recovery of a carrier’s transport and termination costs from its own subscribers. Congress expected that a carrier could collect these incremental costs from the originating carrier. Moreover, the language of Section 252(d)(2)(B) suggests that bill-and-keep is an alternative that *carriers may choose* when traffic and costs can be roughly offset. In no case does this language indicate that the Commission or the states may mandate bill-and-keep in all circumstances by ignoring the general reciprocal compensation provisions of Section 252(d)(2)(A). In Section 252 (d)(2)(B) Congress made clear that the general reciprocal compensation provisions of Section 252 “shall not be construed to preclude arrangements.... including arrangements that waive mutual recovery.” This language permits parties to contractually agree to alternative compensation schemes. Section 332, while mandating LEC-CMRS interconnection, defers to the interconnection standards of Section 201.

⁹ Letter to sprint Senior Counsel Charles McKee from FCC Wireless Telecommunications Bureau Chief Thomas J. Sugrue and FCC Common Carrier Bureau Chief Dorothy T. Attwood, May 9, 2001. *Cost-Based Terminating Compensation for CMRS Providers*, CC Docket Nos. 95-185 and 96-98 and WT Docket No. 97-207, DA 01-1201.

Section 201(a), while providing far more general guidance as to the appropriate terms for physical interconnection, cannot be read without regard to the “just and reasonable” provisions of Section 201(b). For the Commission to conclude that it is “just and reasonable,” under all circumstances, for carriers not to collect the incremental costs of transport and termination from a cost causing entity stands this provision on its head.

III. THE COMMISSION SHOULD EXERCISE THE FULL EXTENT OF ITS JURISDICTION UNDER SECTION 332

Congress has clearly placed CMRS pricing, entry and interconnection decisions within the exclusive jurisdiction of the Commission. The Commission should take the opportunity here to affirm the primacy of Section 332(c)(1)(B) and exercise its plenary authority to establish general CMRS interconnection standards and resolve individual disputes.

RTG fully endorses the position of the Cellular Telecommunications and Internet Association (CTIA) on this matter and asks that the CTIA letters be incorporated into the record of this proceeding.¹⁰ Rather than burden the record with a repetitive analysis of Section 332’s central role in CMRS interconnection, RTG supplements the CTIA analysis.

Section 332 in general and Section 332(c)(1)(B) in particular express Congress’ position as to the importance of maintaining a single regulatory regime for CMRS—a regulatory scheme established and enforced by the Commission—not the individual states. Apart from a few exceptions not applicable here, Congress determined that the states should have no role in the regulation of either interstate or intrastate commercial mobile wireless matters.

This Congressional approach could not be clearer than in the context of interconnection. Section 332(c)(1)(B) states that once a CMRS provider requests interconnection, “*the Commission* shall order a common carrier to establish physical interconnections with such

¹⁰ See *Notice* at note 108.

[CMRS] service pursuant to Section 201 of this Act.”¹¹ The legislative history confirms the approach intended by Congress.¹² Concurrent with the adoption of this section, Congress amended Section 152(b) of the Communications Act in order to clarify that the Commission’s jurisdiction, while typically strictly limited to interstate and international communications, would also apply to intrastate commercial mobile radio charges, classifications, practices, services, facilities or regulations.¹³

In 1996, Congress adopted reciprocal compensation provisions and jurisdictional rules through Sections 251 and 252 of the Telecommunications Act of 1996. Notably, Congress did not disturb Section 332’s CMRS interconnection provisions nor modify the Commission’s exclusive jurisdiction in any way. In fact, as the Commission recognizes in its *Notice*, Congress adopted a savings clause in Section 251(i) to preserve existing Commission jurisdiction over CMRS interconnection matters.¹⁴ Congress has spoken unambiguously three times on CMRS interconnection and the Commission’s exclusive role in regulating it. The Commission need look no farther to conclude that there should be no state role in LEC-CMRS interconnection matters.

As CTIA explains in detail in its letters, the Eight Circuit’s *Iowa Utility* decision confirms that Congress expressly intended for Section 332 to give the Commission plenary authority to order LECs to interconnect with CMRS carriers and issue rules of special concern to CMRS providers. *Iowa Utilities Board v. FCC*, 120 F.3rd 753, 800 n.21 (8th Cir. 1997).

Subsequent decisions support this conclusion. In a 1998 decision, the Court of Appeals for the

¹¹ 47 U.S.C. §332(c)(1)(B) (emphasis added).

¹² “The House Bill requires in Section 332(c)(1)(B) that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile service, upon reasonable request.” The Senate acceded to this approach. Conference Report, Omnibus Budget Reconciliation Act of 1993, H.R. Rep 213, 103rd Cong., 1st Sess., 491-492 (1993).

¹³ 47 U.S.C. §152(b).

¹⁴ *Notice* at ¶86.

District of Columbia noted that that Commission had determined that CMRS interconnection rights were “subject to the Commission’s authority to decide when interconnection is necessary” in accordance with Section 201(a). *Telecommunications Resellers Association v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir 1998). The Court then explained that the Commission “has the authority to issue general rules on when interconnection will be “in the public interest” under section 201, and hence when it will be required under section 332.” *Id.* at 1198. In June of this year, the D.C. Circuit ruled that that Commission could resolve CMRS-LEC disputes arising under its interconnection rules. *Qwest Corporation v FCC*, 252 F.3d 462 (D.C. Cir. 2001). The Court first concluded that the Commission’s jurisdiction to promulgate CMRS-LEC interconnection rules rested on Section 332, not Sections 251 and 252. *Id.* at 466- 467. Then, the Court, relying on the *Iowa Utilities Board* decision, found that this independent source of jurisdiction over CMRS interconnection permitted the FCC to resolve disputes through formal complaints, rather than the state arbitration provisions established by Section 252. *Id.* The Commission can find strong support in these decisions for a decision to exercise both general rule making and adjudicative authority over all CMRS interconnection matters.¹⁵

The Commission also seeks specific comment on three matters relating to the “conflicting” statutory schemes for interconnection. The Commission first asks how it should apply the seemingly conflicting guidance on CMRS interconnection contained in Sections 332 and 201 and Sections 251 and 252.¹⁶ The Commission should follow the statutory language that provides it with specific guidance on CMRS interconnection. The later adoption of general interconnection provisions in the Act cannot, standing alone, supercede this language. In fact,

¹⁵ The Commission maintains independent CMRS interconnection rules at section 20.11, adopted prior to the 1996 Act, and can exercise its authority under §§ 332 through them today.

¹⁶ *Notice* at ¶86.

the 1996 provisions contain a savings clause that direct the Commission to continue with the 1993 approach established by Congress.

The Commission then asks whether Section 332 preempts state regulation of intrastate LEC-CMRS interconnection or whether Sections 251 and 252 provide for a continuing state role.¹⁷ Section 332 (c)(1)(B)'s express direction for "the Commission" to order interconnection, coupled with Congress' subsequent failure to change this language while adopting more general interconnection standards in 1996, indicates that Congress meant for the Commission to have a plenary role concerning CMRS-LEC interconnection standards.

Finally, the Commission asks whether it should forbear from applying either Section 332 or Sections 251 and 252.¹⁸ While RTG does not believe that the latter provisions apply to CMRS interconnection matters, it would support a Commission move to forbear from applying Sections 251 and 252 if as a result the Commission were able to permit CMRS carriers to freely choose between reciprocal compensation and bill-and-keep in their negotiations with LECs and other carriers.

IV. CONCLUSION

RTG fully supports any Commission effort to make bill-and-keep one of the options available for CMRS-LEC compensation. The Commission should not mandate bill-and-keep to the exclusion of reciprocal compensation, but allow carriers to mutually agree to the proper compensation approach on a case-by-case basis. The Commission should rethink its approach to CMRS-related interconnection and compensation by retaining plenary jurisdiction over these

¹⁷ *Notice* at ¶87.

¹⁸ *Id.* at ¶88.

matters. Congress intended a unitary approach to CMRS interconnection that cannot be accomplished through conflicting state decisions.

Respectfully submitted,

THE RURAL TELECOMMUNICATIONS GROUP

By: _____/s/_____

Caressa D. Bennet, General Counsel
Brent H. Weingardt, Regulatory Counsel
Kenneth C. Johnson, Director of Regulatory and
Legislative Affairs

Rural Telecommunications Group
Bennet & Bennet, PLLC
1000 Vermont Avenue, NW
Tenth Floor
Washington, DC 20005
202-371-1500

August 21, 2001

U:\Docs2\RTG\Comments & Exparte\Bill&KeepComments.8.13.01.bhw.doc

CERTIFICATE OF SERVICE

I, Fatmata Deen, an employee at the Law Offices of Bennet & Bennet, PLLC, hereby certify that the foregoing "Comments of the Rural Telecommunications Group" have been served via first class mail on the following, this 21st day of August, 2001.

Paul Moon
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C423
Washington, DC 20554

International Transcription Service, Inc.
Federal Communications Commission
445 12th Street, S.W., Room CY-B402
Washington, DC 20554

Jane Jackson
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-A225
Washington, DC 20554

_____/s/_____
Fatmata Deen