BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Sprint PCS and AT&T Petitions	)	WT Docket No. 01-316
for Declaratory Ruling on	)	
CMRS Access Charge Issues	)	

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits its comments in response to the Public Notice in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

In response to a primary jurisdiction referral, AT&T Corp. ("AT&T") and Sprint PCS filed petitions for declaratory ruling ("Petitions") seeking a decision from the Commission related to access charges billed to interexchange carriers ("IXCs") for services provided by

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] Sprint PCS and AT&T File Petitions for Declaratory Ruling on CMRS Access Charge Issues, WT Docket No. 01-316, *Public Notice*, DA 01-2618 (rel. Nov. 8, 2001) ("Notice").

CMRS carriers.[3] Specifically, the court referred to the Commission two questions: (1) whether Sprint PCS may charge access fees to AT&T for access to the Sprint PCS wireless network; and (2) if so, whether Sprint PCS' charges for such services are reasonable.

These petitions provide the Commission with the opportunity to clarify the application of access charges to CMRS services. As an initial matter, it is important to note that a regulatory bill and keep regime would avoid this type of dispute. The Commission, therefore, should act quickly to adopt bill and keep as the *de jure* intercarrier compensation regime for local and interexchange CMRS traffic prospectively. Second, the Commission should reaffirm that CMRS carriers are indeed entitled to access charges for terminating interexchange traffic on their networks under the current regime. The Commission should soundly reject AT&T's argument that CMRS carriers are barred by Commission rules from collecting access charges based solely on the notion that bill and keep has become a wide-spread (although not universal) industry practice. Finally, the Commission should adopt a benchmark access rate that would be conclusively presumed reasonable so that future access charge disputes may be avoided. With these actions, the Commission would significantly improve the efficiency of CMRS interconnection.

II. THE DISPUTE BETWEEN SPRINT PCS AND AT&T IS ROOTED IN THE COMMISSION'S FAILURE TO ADOPT BILL AND KEEP.

CTIA has long advocated that the Commission should act immediately to adopt a bill and keep intercarrier compensation regime for the exchange of CMRS traffic.[4] The instant dispute

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[3] AT&T Petition for Declaratory Ruling, WT Docket No. 01-316 (filed Oct. 22, 2001); Sprint PCS Petition for Declaratory Ruling, WT Docket No. 01-316 (filed Oct. 22, 2001).

[4] See Comments of CTIA, CC Docket No. 01-92 (filed Aug. 21, 2001); Reply Comments of CTIA, CC Docket No. 01-92 (filed Nov. 5, 2001); Letter from Thomas E. Wheeler, CTIA to William E. Kennard (Dec. 11, 2000); Letter from Michael F. Altschul, CTIA to

between AT&T and Sprint PCS is a vivid example of costs and delay that could be avoided if the Commission would act to adopt bill and keep as the compensation mechanism for CMRS interconnection. Indeed, imposing bill and keep for both LEC-CMRS and IXC-CMRS traffic would be the most efficient solution to the intractable problems associated with intercarrier compensation in the CMRS context.

Bill and keep is the most efficient economic basis for the exchange of traffic between CMRS carriers and IXCs.[5] It is a practical solution to real-world problems that significantly improves efficiency in the marketplace. Bill and keep provides a greater incentive for all carriers to operate in a cost efficient manner because each carrier must recover its own call termination costs from end users. As a result, a bill and keep regime will more readily send efficient market signals than the present system, thereby enhancing consumer welfare. Further, it will eliminate the seemingly endless disputes between carriers regarding intercarrier payments that have been the subject of this and many other proceedings before the Commission and courts. These ongoing conflicts needlessly waste industry, consumer, and taxpayer resources. The benefits of bill and keep overwhelmingly outweigh any perceived benefits of continuing to pursue an ideal

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William E. Kennard (Dec. 29, 2000); Comments of CTIA, CC Docket No. 95-185 (filed Mar. 4, 1996).

5 The Commission has expressly held that it has jurisdiction over LEC-CMRS intercarrier compensation under both Sections 332 and 201. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, ¶ 1023 (1996) ("Local Competition Order"). While there is no debate that the Commission has jurisdiction over interstate access charges for all carriers, Section 332 provides jurisdiction over intrastate access charges in the CMRS context as well.

-- and likely unachievable -- efficient calling party's network pays regime. This is particularly true for CMRS, which is unencumbered by some of the controversies of applying bill and keep to traffic exchanged between its wireline counterparts.

In light of the fact that the Commission has an ample record supporting bill and keep for the exchange of CMRS traffic,[6] the Commission should adopt bill and keep for both local and interexchange CMRS traffic as expeditiously as possible.

III. ABSENT A REGULATORY REGIME FOR BILL AND KEEP, THE COMMISSION SHOULD CONFIRM CMRS CARRIERS' EXISTING RIGHT TO COLLECT ACCESS CHARGES FOR TERMINATING ACCESS SERVICES PROVIDED TO IXCs.

Unless and until the Commission imposes a mandatory bill and keep regime for the exchange of CMRS traffic, CMRS carriers are entitled to collect access charges from IXCs for terminating interexchange calls under the Commission's current rules. The Petitions present the opportunity for the Commission to clarify its rules as they apply to CMRS access charges. In response to these Petitions, the Commission should reaffirm that, under the current intercarrier compensation regime, CMRS carriers are entitled to collect access charges from IXCs for the termination of interexchange traffic. In fact, AT&T does not contend that CMRS providers are legally prohibited from collecting access charges; it merely makes a policy argument against implementing such a practice. Absent an order to the contrary, however, the Commission cannot simply refuse to implement its current rules.[7]

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[6] See Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001).

[7] See Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370, 389 (1932) (holding that a regulated entity is "entitled to rely upon the [regulating agency's] declaration[s]." Thus, the agency "may not in a subsequent proceeding … ignore its own pronouncement." Rather, the agency is "bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect.");

In implementing the Telecommunications Act of 1996, the Commission confirmed that CMRS carriers have the right to collect access charges. Specifically, the Commission concluded that CMRS carriers do indeed provide exchange access services,[8] and that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."[9] Accordingly, when traffic originates and terminates between multiple MTAs, the traffic is subject to exchange access charges. The Commission added that "most traffic between LECs and CMRS providers is not subject to interstate access charges *unless it is carried by an IXC*…."[10] Thus, in the Local Competition Order, the Commission made clear that under its regulations CMRS carriers are currently entitled to collect access charges for traffic that originates and terminates from different MTAs.

AT&T does not dispute this fact. It can point to no provision of the Communications Act or the Commission's rules that bars Sprint from collecting access charges from AT&T.[11]

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see also Teleprompter Cable Communications Corp. v. FCC, 565 F.2d 736, 742 (D.C. Cir. 1977) (noting it is an "elementary principle that an administrative agency is bound to adhere to its own rules and procedures"); Community for Creative Non-Violence v. Watt, 670 F.2d 1213, 1216 (D.C. Cir. 1982) ("It is axiomatic that an agency is bound by its own rules and policies.").

8 See Local Competition Order ¶ 1012 ("CMRS providers meet the statutory definition of 'telecommunications carriers' . . . CMRS providers (specifically cellular, broadband PCS and covered SMR) also provide telephone exchange service and exchange access as defined by the 1996 Act.").

9 See id. ¶ 1036.

10 Id. ¶ 1043 (emphasis added).

11 Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. ("Act").

Instead, it points to *de facto* industry practice.[12] Mere convention, however, is not sufficient to make a *de facto* practice into a *de jure* rule. To the extent that bill and keep is a prevailing practice in the industry, the Commission should not confuse voluntary industry practice with what is legally permissible. Indeed, as Sprint PCS demonstrates, the industry practice that AT&T offers as support for its position is not uniformly applied industry-wide.[13] Moreover, bill and keep has become industry practice in part due to the hurdles the IXCs have erected to frustrate CMRS carriers from collecting lawfully-billed access charges. The IXCs' refusal to pay does not equate to industry consensus that they have no obligation to pay. Therefore, the Commission should reject AT&T's argument that CMRS carriers are not legally entitled to access charges based merely on industry practice.

AT&T further contends that "Sprint PCS is compensated for the use of its wireless network through the 'air time' charges its customers accrue on such calls . . . [and that] the Commission would need to ensure that CMRS providers are not achieving double recovery of costs, *i.e.*, from both their terminating end users and from the IXCs."[14] This argument is a red herring. In a competitive industry such as CMRS, prices are set by the market subject to an overall cost recovery constraint. If revenues accrue to a competitive carrier through other than end-user charges -- for example, through access charges -- the "double recovery" that concerns AT&T will be competed away in lower end-user charges. Thus, the AT&T argument demonstrates a fundamental misunderstanding of the Commission's role in regulating prices in a

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12 See AT&T Petition at 10.

13 See Sprint PCS Petition at 5 (explaining that Western Wireless bills IXCs for access and that it is Sprint PCS' understanding that Verizon Wireless is in the process of billing as well).

14 AT&T Petition at 14, 23.

competitive telecommunications marketplace. To the extent the Commission elects to review CMRS access charges to ensure their reasonableness, the competitive CMRS industry does not require a review of end-user rates to prevent "double recovery."

The Commission has properly concluded that compensation for carrying IXC-originated traffic and end-user charges imposed on subscribers are two entirely separate matters.[15] The third party pay aspects of access charges could give rise to market failure and thus may warrant regulatory intervention. In a competitive market, such as CMRS, end-user prices coincide closely with a carrier's cost, and the Commission need take no role in regulating such prices.[16] The unprecedented nature of AT&T's request, effectively seeking a Commission inquiry into end-user rates, cannot be overstated.[17] The Commission has never established the rates that CMRS carriers charge for their services; there is no history in CMRS regulation of federal rate-of-return rate regulation.

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15 Cf. The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding), *Memorandum Opinion and Order on Reconsideration*, Rep. No. CL-379, 4 FCC Rcd 2369, ¶ 27 (1987) ("[W]e reject NYNEX's argument that mutual compensation for [interstate] switching is inappropriate because the cellular operator may be recovering its costs from its subscribers. Rather, we agree with the cellular oppositions that a cellular carrier's subscriber rates, or the costs recovered, are not germane to the issue of mutual compensation arrangements between co-carriers.").

16 It is well accepted that in a competitive market price will closely approximate or equal a producer's total average cost. See F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 19-20 (3d ed. 1993).

17 AT&T's suggestion that Sprint PCS would receive a windfall because it could collect access while billing its end users for per-minute charges is ironic given that AT&T presumably incorporates access costs into its retail rates and yet refuses to pay access charges billed by CMRS carriers.

Finally, AT&T may not engage in self-help by refusing to pay Sprint PCS' billed access charges.[18] The Act provides a remedy in Section 208 complaint proceedings if AT&T believes that another carrier's practices are unjust and unreasonable in violation of the Act.[19] However, litigation of CMRS access charge disputes could be largely avoided with clarification by the Commission. The Commission should unequivocally reaffirm CMRS carriers' right to access charges for interexchange calls terminated by CMRS carriers. Contrary to AT&T's assertion, CMRS carriers have an existing, indeed long-established, right to collect access charges. This right is not prospective only, as AT&T suggests. Indeed, if the Commission alters the current regime, a bill and keep regime would obviate the need for proceedings such as this to resolve access charge disputes.

In addition, the Commission should use the opportunity presented by the Petitions to clarify what rate would be just and reasonable under Section 201(b) for the termination of interstate, interexchange traffic by CMRS carriers. To that end, the Commission should adopt a "safe harbor" for CMRS access charges. The Commission should set a benchmark rate that would be conclusively presumed reasonable, while allowing CMRS carriers to justify higher rates by demonstrating higher costs. This safe harbor should not be set at the reciprocal compensation rate, as AT&T requests. The reciprocal compensation rate, which is based on ILEC forward-looking costs, is not appropriate for CMRS carriers whose termination costs are

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18 See Bell Atl.-Del. v. Frontier Communications Servs., Inc. *et al.*, *Order on Review*, File No. E-98-48 *et al.*, 15 FCC Rcd 7475, ¶ 11 (2000) ("[W]e are troubled by self-help actions taken by the Defendants in an apparent effort to delay payment … mandated by the Act and our rules. … As has been stated in other contexts, the Commission looks disfavorably on such self-help.").

19 See 47 U.S.C. § 208.

likely to be higher than the costs of terminating calls on the ILECs' fully-deployed wireline networks.[20]

For simplicity's sake, the Commission should establish a CMRS safe harbor at the same rates that it adopted in the CLEC Access Charge Order.[21] The Commission has already made a finding that the benchmark adopted in that order is conclusively presumed reasonable for CLECs; it would likewise serve as a reasonable benchmark for CMRS access charges.[22] However, because access charges are intended to be cost-based, CMRS carriers must be afforded an opportunity to justify rates above the benchmark.[23] By adopting this safe harbor for CMRS access charges under the current regime, the Commission could resolve many pending and potential rate disputes between carriers. While it is imperative that the Commission adopt a bill and keep regime to eliminate these issues into the future, the Commission would make significant headway in improving the existing intercarrier compensation system by reaffirming CMRS carriers' right to collect access charges and by adopting a safe harbor access rate.

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20 See Local Competition Order ¶ 1085 (adopting the ILECs' transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination); id. ¶ 1117 ("[CMRS termination] cost is generally considered to be greater than the cost of LEC termination"); see also Letter from Jonathan M. Chambers, Sprint PCS, to Thomas J. Sugrue and Lawrence E. Strickling, Re: Cost-Based Terminating Compensation for CMRS Providers, CC Docket Nos. 95-185, 96-98; WT Docket No. 97-207 (Feb. 2, 2000); Comments of CTIA, CC Docket 01-92, at 26 (filed Aug. 21, 2001).

21 Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-262, 16 FCC Rcd 9923, ¶¶ 45-63 (2001).

22 See id. ¶ 40.

23 See AT&T Petition at 24-25.

IV. CONCLUSION

For these reasons, CTIA respectfully urges the Commission to move promptly to a bill and keep regime for the exchange of CMRS traffic. In any event, CTIA respectfully requests that the Commission confirm CMRS carriers' right to charge IXCs for terminating access services under the existing intercarrier compensation regime.

Respectfully submitted,

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