

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

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In the Matter of)
)
Sprint PCS and AT&T Petitions)
For Declaratory Ruling)
Regarding CMRS Access Charge Issues)

WT Docket No. 01-316

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF THE RURAL CELLULAR ASSOCIATION

The Rural Cellular Association (“RCA”),¹ by counsel, hereby submits these reply comments in response to the Commission’s invitation to comment on issues identified in petitions for declaratory ruling filed by Sprint Spectrum, L.P. d/b/a Sprint PCS (“Sprint PCS”) and AT&T Corp. (“AT&T”) regarding whether Commercial Mobile Radio Service (“CMRS”) providers may charge interexchange carriers (“IXCs”) access fees for the use of CMRS networks and, if so, what rate may be reasonably charged for such services.²

Commenters overwhelmingly demonstrate that CMRS providers are permitted to charge IXCs access fees for the use of CMRS networks.³ To determine what rate may be reasonably

¹ RCA is an association representing the interests of small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA was formed in 1993 to address the distinctive issues facing rural wireless service providers.

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

³ *See, e.g.*, Comments of Nextel Communications at 1 (“the law appears plain: there is no law or policy that prevents Sprint PCS from recovering its call termination costs from AT&T”); Comments of Leaco Cellular at 3 (“there is no law or rule, including the rules in Part 69, that specifically prevents a CMRS carrier from charging for access”); Verizon Wireless at 4.

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charged, many commenters recommend a benchmark approach similar to the one adopted by the Commission in regards to CLEC access rates.⁴ Commenters opposing Sprint PCS' petition fail to address the Commission's previous conclusions that CMRS carriers are entitled to recover access charges and the Commission's findings that the refusal of IXCs to pay access fees violate Sections 201 and 202 of the Communications Act. Further, the oppositions fail to provide support for their arguments that a *de facto* form of bill-and-keep has arisen in the CMRS industry that precludes CMRS carriers from assessing access fees. Given Commission precedent and the absence of federal law or policy that bars CMRS providers from recovering call termination costs from IXCs, the Commission must declare that CMRS providers are entitled to charge IXCs for the provision of access services.

I. Commenters Opposing Sprint PCS' Petition Fail to Address the Commission's Previous Conclusions Regarding the Ability of CMRS Carriers to Recover Access Charges.

As demonstrated in RCA's comments, the Commission has "tentatively concluded" that CMRS carriers should be allowed to recover access charges. The Commission stated that CMRS carriers are entitled to such compensation from IXCs, just as LECs are compensated when interexchange traffic passes from CMRS carriers to IXCs (or vice versa) via LEC networks.⁵

⁴ See, e.g., Comments of Cellular Telecommunications and Internet Association ("CTIA") at 9; Comments of the Oklahoma Rural Telephone Companies at 5-6; Comments of Verizon Wireless at 15.

⁵ See *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers: Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, 5075 (1996).

This reasoning, based in the concept of fairness,⁶ justifies the issuance of a declaratory ruling in favor of the Sprint PCS position.

Commenters opposing the Sprint PCS petition fail to demonstrate otherwise. Rather than provide evidence as to why the Commission should abandon its prior conclusions, AT&T weekly hypothesizes that the Commission has yet to rule on the issue because of “the regulatory quagmire that would result” or because “the Commission recognized that the industry had spontaneously developed its own bill and keep solution to the problem and the Commission saw no need to upset industry practice.”⁷ Worldcom leaps to the baseless conclusion that the fact that the Commission has not yet ruled on this issue means that CMRS providers are now prohibited by federal law from imposing access charges.⁸ Qwest ignores the precedent altogether and instead seeks to accelerate the Commission’s own timetable by requesting that bill-and-keep be adopted prior to June 24, 2002.⁹

⁶ See Comments of Nextel Partners at 2 (“By refusing to compensate CMRS carriers for exchange access costs, IXCs such as AT&T are able to unfairly shift the burden of these costs to the customers of CMRS carriers. There is no justifiable reason for CMRS customers to be forced to subsidize the long distance rates of the IXCs”); Comments of Cingular Wireless at 3 (arguing that CAP and CLEC markets are competitive markets in the same way that CMRS markets are competitive and that the Commission allows these carriers to collect charges for access); Comments of Western Wireless at 2 (“As a matter of fairness, should, for example, Sprint PCS end users – *none of whom uses AT&T for long distance calls* – be compelled to subsidize the long distance rates of AT&T’s long distance customers, or help to protect the investment returns of AT&T’s shareholders, by paying higher airtime rates . . . ?” (emphasis supplied in original)).

⁷ Comments of AT&T at 11-12.

⁸ Comments of Worldcom at 8.

⁹ Comments of Qwest at 1-2. As noted by Qwest, the United States District Court for the Western District of Missouri has stayed all remaining issues in the case between Sprint PCS and AT&T pending a Commission ruling until June 24, 2002. *Id.* at 2, *citing* Public Notice at 1.

Given the Commission's well-reasoned discussion regarding the ability of CMRS providers to recover costs associated with terminating the calls for which IXCs receive compensation from their subscribers, and the lack of any federal ruling to the contrary, the Commission must declare that CMRS providers are entitled to charge IXCs for the provision of access services.

II. Commenters Opposing Sprint PCS' Petition Fail to Recognize that Refusal of IXCs to Pay Access Compensation to CMRS Carriers is in Violation of Sections 201 and 202 of the Communications Act.

AT&T wrongly asserts that its refusal to pay access charges does not constitute a violation of either Section 201 or 202 of the Act. AT&T argues that Section 201(b) does not impose liability on a customer, including a customer that is a carrier, for actions in connection with the purchase of services.¹⁰ AT&T also submits that Section 202(a) does not apply to claims that a customer has failed to pay a given carrier for service.¹¹

As referenced in RCA's Comments, the Commission has ruled in the context of a dispute between AT&T and a CLEC, MGC Communications, that AT&T's refusal to pay a carrier for purchased access services was a violation of Section 201(b) of the Act.¹² In *MGC Communications v. AT&T*, the Commission found that AT&T purchased access in that it failed to take certain steps "that a carrier would take if it truly wished to terminate a LEC's originating

¹⁰ Comments of AT&T at 13.

¹¹ Comments of AT&T at 16.

¹² Comments of RCA at 4.

access service.”¹³ The Commission ruled that “AT&T’s refusal to pay for the originating access service that it has received . . . amounts to impermissible self-help and a violation of section 201(b) of the Act.”¹⁴ Similarly, AT&T’s refusal to pay Sprint PCS for access services that it willingly accepted is in violation of Section 201(b) of the Act.¹⁵

As demonstrated in RCA’s comments, AT&T’s refusal to pay access fees charged by CMRS carriers violates Section 202(a) of the Act.¹⁶ In its comments, Verizon Wireless observes that landline LECs and CMRS carriers both provide AT&T and other IXCs with originating and terminating exchange access service; thus, these services are identical or “like” in both the wireline and wireless scenarios. Verizon Wireless states,

[w]hile it compensates landline ILECs and CLECs for their provision of access, AT&T refuses to pay Sprint PCS and other CMRS providers for this service . . . based entirely on the fact that Sprint PCS and other CMRS providers use wireless transmission facilities to provide this access. Accordingly, AT&T’s practice constitutes unreasonable discrimination in violation of Section 202(a).¹⁷

¹³ 14 FCC Rcd 11647 (CCB,1999); aff’d 15 FCC Rcd 308 (1999).

¹⁴ MGC at 11659. The Commission also found that AT&T continued to willingly accept MGC access service “for the convenience of AT&T’s customers” and “for the business advantage that AT&T received therefrom.” *Id.*

¹⁵ See Comments of Cingular Wireless at 5 (noting that today’s telecommunications operates under a calling-party’s-network-pays (“CPNP”) system and that it would be manifestly unjust and unreasonable to permit IXCs to decide which of the similarly situated exchange access providers, landline or CMRS, they will compensate for use of their facilities; “The refusal of IXCs to pay CMRS carriers for terminating access is profoundly unjust not only because the IXCs receive a financial windfall but also because the CMRS carriers suffer a concomitant and substantial loss of revenue). See also, Comments of RCA at 4 (RCA demonstrating that AT&T’s unilateral selection of the terminating carrier entitled to payment violates Section 201(a) of the Act).

¹⁶ See Comments of RCA at 3-4.

¹⁷ Comments of Verizon Wireless at 11. See Comments of Western Wireless at 5 (demonstrating that CMRS carriers, CLECs and ILECs are the same for purposes of Section 201(b) of the Act).
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III. Commenters Opposing Sprint PCS' Petition Erroneously Assert That the Absence of a Prevalent Use of Access Charges by the CMRS Industry Precludes CMRS Carriers From Assessing Access Fees.

AT&T and Worldcom fail to provide support for their argument that a *de facto* form of bill-and-keep has arisen which precludes CMRS carriers from assessing access charges. As demonstrated above and in comments supporting Sprint PCS, there exists no federal law or policy that bars CMRS providers from recovering call termination costs from IXCs. As noted by CTIA, "Mere convention . . . is not sufficient to make a *de facto* practice into a *de jure* rule."¹⁸

Further, bill-and-keep is not the most appropriate form of compensation mechanism for AT&T traffic terminating on Sprint PCS' network. Sprint PCS does not originate or terminate any traffic on AT&T's network. Accordingly, AT&T incurs no costs caused by Sprint PCS. However, AT&T terminates and originates a large amount of traffic on Sprint's network. As noted by Western Wireless, "[i]n this situation, the conceptual basis for 'bill-and-keep' is not clear at all: is it just and reasonable to impose a non-compensatory scheme, resulting in a windfall to one company, and an economic detriment to another, simply because it would be simpler from a regulator's point of view?"¹⁹

IV. Conclusion

The Commission has long recognized that costs are incurred by the end user's service provider to provide interstate access service and these costs should be recovered from IXCs.

202(a) of the Act in that all have the same external costs imposed upon them by IXCs).

¹⁸ See Comments of CTIA at 6.

¹⁹ Comments of Western Wireless at 7. See Comments of the Missouri Small Telephone Company Group at 4 ("bill and keep is only appropriate in a situation where traffic is balanced and the costs of the carriers are similar").

Further, the Commission has confirmed that CMRS providers are entitled to just and reasonable compensation for their provision of access service and that they should be compensated from IXCs, just as LECs are compensated when interexchange traffic passes from CMRS carriers to IXCs (or vice versa) via LEC networks. Commenters opposing Sprint PCS' petition were unable to provide any federal ruling to the contrary and were unable to support their claim that a *de facto* form of bill-and-keep has arisen which precludes CMRS carriers from assessing access charges. Accordingly, the Commission must declare that CMRS providers are entitled to charge IXCs for the provision of access services.

AT&T refuses to pay for access services that it willingly accepted which amounts to impermissible self-help and is in violation of Section 201(b) of the Act; its unilateral selection of the terminating carrier entitled to payment is in violation of Section 201(a) of the Act; and its practice of refusing to pay Sprint PCS for access services while compensating ILECs and CLECs in the same service constitutes unreasonable discrimination and is a violation of Section 202(a) of the Act. Commenters opposing Sprint PCS' petition were unable to refute these violations. Accordingly, the Commission must also declare that AT&T's refusal to pay Sprint PCS for access services is in violation of the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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