

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

In the Matter of)	
)	
Petition for Declaratory Ruling: Lawfulness)	CC Docket No. 01-92
of Incumbent Local Exchange Carrier)	
Wireless Termination Tariffs)	
)	
Interconnection Between Local Exchange Carriers)	CC Docket No. 95-185
and Commercial Mobile Radio Service Providers)	
)	
Implementation of the Local Competition Provisions)	CC Docket No. 96-98
in the Telecommunications Act of 1996)	

PETITION FOR DECLARATORY RULING

September 6, 2002

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Summary of Petition

The undersigned CMRS Petitioners ask the Commission to reaffirm that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act and the Commission's LEC-CMRS interconnection policies.

Most CMRS providers and small ILECs do not exchange sufficient traffic volumes to justify a direct interconnection between their networks, and they instead interconnect indirectly at the LATA tandem switch. Because of the small amounts of traffic exchanged, most carriers that interconnect indirectly with each other often do so without an interconnection contract and pursuant to bill-and-keep. Some small LECs have decided they want to receive reciprocal compensation when they terminate mobile-to-land traffic, but rather than seek interconnection negotiations, they have instead filed wireless termination tariffs. These tariffs are entirely one-sided (demanding that CMRS carriers pay reciprocal compensation but not agreeing to pay such compensation to CMRS providers) and contain unlawful prices, terms and conditions. An ILEC with a lucrative wireless termination tariff in effect has no incentive to negotiate a reasonable interconnection agreement with a CMRS provider.

The Commission has previously ruled that the tariff process is incompatible with the interconnection negotiation process that Congress incorporated in the Communications Act. The Commission has also squarely ruled that an ILEC engages in bad faith if it files CMRS interconnection tariffs before the conclusion of interconnection negotiations. The CMRS Petitioners therefore ask the Commission to direct ILECs to withdraw any wireless termination tariffs in existence today or, alternatively, to declare such tariffs unlawful, void and of no effect.

The Commission has the authority to enter the requested declaratory ruling. The Supreme Court has affirmed the Commission's authority to adopt national interconnection rules. Congress has also imposed a statutory mandate for the Commission to address CMRS interconnection issues of the sort contained in this petition.

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In the Matter of)	
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Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs)	CC Docket No. 01-92
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Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers)	CC Docket No. 95-185
)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)	CC Docket No. 96-98
)	

PETITION FOR DECLARATORY RULING

The undersigned providers of commercial mobile radio service (collectively, “CMRS Petitioners”)¹ petition the Commission to enter a declaratory ruling reaffirming that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act.² In

¹ The CMRS Petitioners include: T-Mobile USA, Inc.; Western Wireless Corporation; Nextel Communications and Nextel Partners. T-Mobile USA, Inc. (formerly known as VoiceStream Wireless Corporation), combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. T-Mobile and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both T-Mobile and Powertel are, however, operated together and are referred to in this request as “T-Mobile.” Western Wireless is the leading provider of cellular service to rural areas in the western United States. The company owns and operates wireless phone systems marketed under the Cellular One® national brand name in 19 states west of the Mississippi River. Western Wireless owns cellular licenses covering about 30% of the land in the continental United States. It owns and operates cellular systems in 88 Rural Service Areas (“RSAs”) and 18 Metropolitan Statistical Areas (“MSAs”) with a combined population of around 9.8 million people. Nextel Communications, Inc. is a nationwide CMRS carrier, providing a unique combination of cellular radio service, short-messaging, Internet access, data transmission, and a two-way digital radio feature. Nextel Partners provides wireless digital communications services in mid-sized and smaller markets throughout the U.S. Through affiliation with Nextel Communications, Inc., its customers have seamless nationwide coverage on the Nextel Digital Mobile Network.

² This petition is submitted pursuant to Section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554(d), and Section 332(c) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). The CMRS Petitioners contemplated filing Section 208 complaints against the ILECs that have engaged in this unlawful activity, but with such a procedure, interested carriers that are not parties to the complaint proceeding would have been unable to partici-

making this determination, the Commission would be reaffirming prior decisions declaring that an incumbent local exchange carrier (“ILEC”) engages in an unlawful practice when it unilaterally files wireless termination tariffs. The CMRS Petitioners further ask the Commission to enter an order directing ILECs to withdraw any wireless termination tariffs in existence today or, alternatively, to declare such tariffs unlawful, void and of no effect.

I. BACKGROUND FACTS

CMRS carriers ordinarily interconnect with the public switched telephone network (“PSTN”) using Type 2A interconnection – an arrangement whereby a mobile switching center (“MSC”) is connected directly (generally *via* a two-way trunk group) to the LATA tandem switch.³ With Type 2A interconnection, a CMRS provider is directly connected to the network operated by the tandem switch owner, generally, a Regional Bell Operating Company (“RBOC”).⁴ Type 2A interconnection also enables a CMRS carrier to obtain indirect interconnection with all other networks that are connected to (or “subtend”) the same LATA tandem switch – whether the network is operated by another ILEC, another CMRS carrier, or a competitive LEC (“CLEC”). As one RBOC publication provides:

pate. The CMRS Petitioners therefore decided to file this declaratory ruling petition, so as to maximize the opportunity of all parties to participate in this important proceeding and enable the Commission to act upon a more complete record.

³ See, e.g., *Unified Intercarrier Compensation NPRM*, 16 FCC Rcd 9610, 9642 ¶ 91 (2001); *Bowles v. United Telephone*, 12 FCC Rcd 9840, 9843 ¶ 5 (1997). In contrast, with Type 2B interconnection, a MSC is connected directly to a specific end office switch. “Under Type 2B interconnection, the CMRS provider’s primary traffic route is the Type 2B connection, with any overflow traffic routed through a Type 2A connection.” *CMRS Equal Access NPRM*, 9 FCC Rcd 5408, 5451 ¶ 105 (1994). Thus, Type 2A tandem interconnection is also needed to implement a Type 2B end office interconnection.

⁴ The Commission has noted that interconnection is “direct when a carrier’s facilities or equipment is attached to another carrier’s facilities or equipment. Interconnection is indirect when the attachment occurs through the facilities or equipment of an additional carrier.” *Advanced Telecommunications Capability Reconsideration Order*, 15 FCC Rcd 17806, 17845 n.198 (2000).

With the Type 2A interconnection, the WSP [Wireless Service Provider] can establish connections via the LEC network to valid local network area office codes (NXXs) accessible through the tandem.⁵

When two carriers interconnect indirectly with each other (*e.g.*, a CMRS carrier and a rural ILEC), the tandem switch owner switches and often transports traffic originating on one network that is destined to the other network.⁶

Most carriers do not have sufficient traffic volumes with most other carriers to cost justify use of a direct, dedicated interconnection facility between the two networks (*e.g.*, Type 2B interconnection to an end office). Accordingly, most carriers interconnect with each other indirectly, *via* the LATA tandem switch. As the Commission has recognized:

Where CMRS-LEC traffic volumes are small, as in rural areas, . . . the CMRS carrier connects to LEC end offices connected to the tandem together with other carriers (including IXCs) interconnected through the tandem. * * * Because inter-carrier, local CMRS traffic is often insufficient to justify a dedicated trunk, the majority of CMRS-to-CMRS call exchange occurs through a RBOC tandem switch.⁷

Carriers that interconnect indirectly with each other often do so without an interconnection contract and pursuant to bill-and-keep, at least for mobile-to-land traffic.⁸ In this regard, the

⁵ Bellcore, *Notes on the Network*, § 16.2.2.1 at p. 16-8 (1997).

⁶ Transit carriers do not have a customer relationship with either the calling party or the called party. A transit carrier performs its services on behalf of the originating carrier, which decides to use indirect interconnection with the destination network rather than direct interconnection. Thus, the originating carrier historically assumes the obligation to compensate the transit carrier for its transit services.

⁷ *Unified Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9643 ¶ 91 and 9644 ¶ 95.

⁸ Most CMRS carriers send their traffic destined to a small ILEC to the tandem owner, which then switches the traffic to the large trunk group connecting the tandem switch with the destination small ILEC, a trunk group that the small ILEC uses to send and receive most of its inter-network, PSTN traffic. *See id.* at 9643 n.143. The physical routing of calls in the other direction (land-to-mobile) is generally the same, although the compensation arrangement is often quite different. For land-to-mobile calls, the small ILEC generally sends its customers traffic to the tandem switch using the same common trunk group it sends and receives most other traffic. Historically, the RBOC, which operated as the exclusive intraLATA toll carrier, then switched the traffic to the two-way Type 2A trunk group connecting its tandem to the mobile switching center (“MSC”). With the introduction of intraLATA equal access, the call routing became more involved. The small ILEC generally still sends the land-to-mobile call to the tandem switch (because the IXC generally cannot cost justify a direct connection to the small ILEC end office switch); the tandem switch owner switches the call to the serving IXC switch; the IXC switch immediately returns the call to the tandem switch; and the tandem switch then forwards the call to the Type 2A facility

Iowa Utilities Board and the Oklahoma Corporation Commission ruled recently that all intraMTA LEC-CMRS traffic – both mobile-to-land and land-to mobile – should be exchanged subject to bill-and-keep.⁹

Some small ILECs have decided that they want to receive reciprocal compensation, despite the small volume of traffic exchanged with carriers indirectly interconnecting with them. The CMRS Petitioners are willing to negotiate an interconnection agreement with these small ILECs, upon request, even though the dollars involved often do not justify the time and expense associated with negotiating an interconnection contract, preparing monthly statements, and auditing amounts billed.¹⁰ The CMRS Petitioners expect, however, the small ILECs will negotiate reciprocal compensation arrangements, not the one-way arrangements they ordinarily seek (*i.e.*, they receive terminating compensation from CMRS carriers but refuse to pay CMRS carriers terminating compensation for land-to-mobile calls).

Some small ILECs have decided, however, to bypass the bilateral negotiation process mandated by the Communications Act and the Commission's LEC-CMRS interconnection policies. These small ILECs have instead filed "wireless termination tariffs" with their state com-

connecting the MSC. In this scenario, the rural ILEC receives originating access charges. The tandem switch owner is compensated because it charges both originating and terminating access for one call (as its tandem switch is used twice in an intraLATA call). In contrast, the CMRS carriers have traditionally received nothing for call termination.

The CMRS Petitioners believe that an ILEC's use of the access regime for intraMTA calls with CMRS carriers is flatly inconsistent with the Commission's rules that such calls should be governed by reciprocal compensation, not access charges. This is a subject that the Commission may need to address if this issue is not resolved through negotiation, arbitration, or other means of dispute resolution.

⁹ See Iowa Utilities Board, *Exchange of Transit Traffic*, Docket Nos. SPU-00-7, TF-00-275, DRU-00-2, *Proposed Decision and Order* (Nov. 26, 2001); *Order Affirming Proposed Decision and Order* (March 18, 2002); Corporation Commission of the State of Oklahoma, Arbitration Proceeding, Cause No. PUD 200200149, 200200150, 200200151, and 200200153, *Interlocutory Order*, Order No. 466613, August 9, 2002.

¹⁰ For example, VoiceStream received from Fidelity Communications Services (in Minnesota) a bill dated May 24, 2002 for \$42.77, with Fidelity stating that it had terminated 740 minutes of VoiceStream traffic and charging \$0.058 per MOU. Similarly, VoiceStream received from Easton Telephone Company (in Minnesota) a bill dated July 1, 2002 for \$78.21, with Easton stating that it had terminated 1,236 minutes of VoiceStream traffic and charging \$0.063 per MOU. Clearly, with these small dollar amounts, the cost of negotiating an interconnection contract, preparing monthly statements, and auditing amounts billed cannot be economically justified.

mission. This has occurred in Missouri, where small ILECs have recently filed complaints against certain CMRS carriers for not complying with terms that they set in their tariffs. This is also now occurring in Nebraska, where the Public Service Commission has suspended the tariffs filed by small ILECs, but has opened a proceeding to address the lawfulness of wireless termination tariffs.¹¹ The Iowa Utilities Board addressed this matter by striking proposed rural ILEC tariffs and adopting a bill and keep form of reciprocal compensation, absent negotiated agreements. Notwithstanding the encouraging actions of the Iowa commission, unless this Commission acts promptly, small ILECs in other states can be expected to pursue the same course.

The fundamental problem with these wireless termination tariffs is that the small ILECs unilaterally set unfair and unlawful terms and conditions for interconnection and employ non-TELRIC prices. If these tariffs are allowed to take effect, ILECs then have no incentive to negotiate fair and lawful prices, terms and conditions. For example, the tariffs filed by small ILECs in Missouri:

- ◆ Are entirely one-sided, with the ILECs requiring CMRS carriers to pay their costs of call termination; however, the ILECs do not agree to pay CMRS carriers the costs they incur in terminating intraMTA traffic originating on the ILECs' networks;¹²
- ◆ The ILECs in their tariffed call termination compensation rates include costs that the Commission has ruled may not be recovered, including an indisputably arbi-

¹¹ In the Matter of the Commission, on its own motion, seeking to investigate telecommunications companies' terms, conditions, and rates for the provision of wireless termination service, Application No. C-2738/PI-58, *Order Opening Docket and Setting Hearing*, June 5, 2002.

¹² More specifically, the ILECs typically route intraMTA, even intraLATA traffic, land-to-mobile traffic bound for the CMRS providers *via* an IXC and will not affirm their reciprocal compensation obligations. For purposes of this Request, the term reciprocal compensation is used to emphasize that ILEC prices should be based on reciprocal (local) compensation, not access charges.

trary two cent (\$0.02 per MOU) “adder” that the Missouri ILECs included to recover their non-traffic-sensitive loop costs; and

- ◆ The tariffs authorize the ILECs to block mobile-to-land-traffic if the CMRS carriers do not pay the unlawful charges that the ILECs unilaterally set in their tariffs.

The most offensive aspect of the tariffs is the chosen pricing methodology. Commission rules, which have now been affirmed by the U.S. Supreme Court,¹³ require that transport and call termination rates be set using TELRIC pricing methodology.¹⁴ In contravention of these rules, ILEC tariffs for intraMTA CMRS traffic are typically based upon the ILECs’ access charge rate.

There are other problems with the use of wireless termination tariffs, including:

- ◆ A CMRS carrier may not even be aware that the ILEC has filed a wireless termination tariff with a state commission. Indeed, a CMRS carrier might not learn of a tariff until after it takes effect, when the ILEC begins attempting to impose the tariff’s terms on a CMRS provider;
- ◆ In the negotiation and arbitration process, the ILEC has the burden of justifying its proposed reciprocal compensation rates and the other terms of interconnection that it is proposing; in contrast, with the tariff process, the competitive carrier has the burden of demonstrating that the ILEC’s proposed prices and terms are unreasonable;
- ◆ It is unlikely that the prices contained in the tariff are consistent with the costing/pricing standards set forth in the Communications Act and the Commission’s implementing rules governing interconnection and reciprocal compensation. In practice, small ILEC tariffs unabashedly set rates that include access rate elements despite the

¹³ See *Verizon Communications v. FCC*, No. 00-511 (May 13, 2002).

¹⁴ See, e.g., 47 C.F.R. §§ 51.505(b); 51.705(a)(1).

Commission's repeated admonishment that intraMTA traffic involving a CMRS carrier is subject to reciprocal compensation, not access charges; and

- ◆ Appeals of arbitration decisions are heard in federal court, where the court reviews federal law issues *de novo*; in contrast, appeals of state commission tariff orders are heard in state appellate courts, where the state commission's decision is ordinarily subject to the deferential arbitrary and capricious standard and where the court generally has little familiarity with the federal Communications Act and the Commission's implementing regulations.

An ILEC, with a lucrative wireless termination tariff in effect that contains one-sided prices, terms and conditions, has no incentive to negotiate a reasonable interconnection agreement with a CMRS provider. It is time for the Commission to intercede before oppressive wireless termination tariffs arise on a more widespread basis.

As documented immediately below, the Commission has already ruled that an ILEC may not unilaterally file state wireless termination tariffs as a means to bypass the negotiation process. The CMRS Petitioners hereby ask the Commission to declare that wireless termination tariffs are unlawful and that ILECs do not engage in good faith negotiations by filing wireless termination tariffs to set the rates, terms, and conditions for interconnection.

II. THE COMMISSION SHOULD DECLARE WIRELESS TERMINATION TARIFFS UNLAWFUL AND REAFFIRM THAT ILECS DO NOT ENGAGE IN GOOD FAITH NEGOTIATIONS BY UNILATERALLY FILING SUCH TARIFFS

Some small ILECs do not like the *status quo*, whereby *de minimus* amounts of intra-MTA traffic with CMRS providers are exchanged without a formal interconnection agreement and typically on a bill-and-keep basis. However, rather than asking CMRS carriers to commence interconnection negotiations, these ILECs have instead decided to file state "wireless termination

tariffs” so that they can unilaterally dictate the rates, terms, and conditions of the interconnection arrangement. As noted above, many of these tariffs are one-sided (*e.g.*, they purportedly obligate a CMRS carrier to pay the ILEC for call termination, but the ILEC does not agree to pay the CMRS carrier for intraMTA call termination). The Commission has previously held that an ILEC engages in bad faith when it files unilaterally a CMRS interconnection tariff, and it should reaffirm this holding here.

These small ILECs are engaging in the same course of action that certain large ILECs pursued over a decade ago – namely, to preempt interconnection negotiations by unilaterally filing state interconnection tariffs that contain all the terms they desire. In 1987, the Commission held that ILEC “tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection” and that an ILEC filing a tariff before an agreement has been reached engages in bad faith, which is actionable in a Section 208 complaint.¹⁵ Two years later, the Commission “reaffirm[ed] that tariffs should not be filed before co-carriers have conducted good faith negotiations on an interconnection agreement”:

Our statement regarding “pre-tariff negotiation agreements” was intended to reflect our recognition that . . . if a telephone company is able to file tariffs before reaching an interconnection agreement, a cellular carrier’s bargaining power will be diminished. . . . [U]nder our “pre-tariff negotiation agreement” policy, we would not expect the BOC to file a tariff pertaining to “unresolved” issue.”¹⁶

The Commission noted that to rule otherwise, “would mean that, when an impasse is reached, the landline company could proceed unilaterally to file its tariffs, thereby rendering meaningless the

¹⁵ *Second Radio Common Carrier Order*, 2 FCC Rcd 2910, 2916 ¶ 56 (1987).

¹⁶ *Third Radio Common Carrier Order*, 4 FCC Rcd 2369, 2370-71 ¶¶ 13-14 (1989).

negotiations already conducted on this matter.”¹⁷ The Commission later extended this good-faith negotiation policy to LEC-PCS interconnection.¹⁸

Congress largely incorporated this LEC-CMRS negotiation process in Sections 251 and 252 of the Telecommunications Act of 1996, but broadened the negotiation process to include all interconnecting carriers. First, pursuant to Section 251(a) of the Act, all telecommunications carriers are required to interconnect directly or indirectly with other telecommunications carriers. Second, under Section 251(b)(5) of the Act, LECs are obligated to implement reciprocal compensation arrangements for the exchange of telecommunications traffic. And lastly, Section 251(c)(1) of the Act imposes upon ILECs a “duty to negotiate in good faith.” Nowhere in Sections 251 and 252 did Congress provide for one party to set unilaterally the terms of interconnection pursuant to a tariff; indeed, a tariff regime is at fundamental odds with the negotiation process that Congress adopted. In this regard, the Commission has recognized that “[u]sing the tariff process to circumvent the section 251 and 252 processes cannot be allowed.”¹⁹ More recently, the Commission held that an ILEC may not avoid the rates contained in an interconnection contract simply by filing a tariff containing higher rates.²⁰

Although rural ILECs can claim a temporary exemption from the requirements of Section 251(c),²¹ these ILECs cannot avoid the requirements of Section 251(b)(5) “to establish reciprocal

¹⁷ *Third Radio Common Carrier Order*, 4 FCC Rcd at 2370-71 ¶ 14.

¹⁸ *See Second CMRS Order*, 9 FCC Rcd 1411, 1497-98 ¶¶ 227-30 (1994). The policies and rules that the Commission adopted in this order were based on the statutory authority granted in Section 332(c)(1) of the Act. As such, the policies and rules survive the enactment of the 1996 Act. *See note 22 infra*.

¹⁹ *Bell Atlantic v. Global NAPs*, 15 FCC Rcd 12946, 12959 ¶ 23 (1999), *aff’d on recon.*, 15 FCC Rcd 5997 (2000), *aff’d*, 247 F.3d 252 (D.C. Cir. 2001).

²⁰ *See WorldCom/Verizon Arbitration Order*, DD Docket 00-218, DA 02-1731, at 294-97 ¶¶ 599-603 (July 17, 2002).

²¹ Most rural ILECs do not invoke the provisions of Section 252(f)(1), which would give them a four month exemption from Section 252(c) requirements, because they acknowledge that Type 2A interconnection is technically feasible and not unduly economically burdensome and that as a result, invoking the statutory procedure

compensation arrangements for the transport and termination of telecommunications.” Commission rules also require a rural LEC to provide “interconnection reasonably requested by a mobile service licensee.”²² Finally, as noted above, Commission orders direct LECs to negotiate in good faith with CMRS providers.²³

The Communications Act and the Commission’s LEC-CMRS interconnection policies and rules clearly envision a process whereby two carriers attempt to negotiate an interconnection agreement for the exchange of telecommunications traffic, if either party seeks to change the *status quo*. As the Commission has already noted, an ILEC’s unilateral filing of interconnection tariffs before or during interconnection negotiations usurps this process and removes the little bargaining power that CMRS carriers possess. Many ILECs throughout the country have initiated negotiations under Section 252 of the Act with CMRS providers, resulting in the establishment of negotiated rates, terms, and conditions for interconnection. When the negotiations have not lead to an agreement, ILECs have sought arbitration with state commissions under the Act. The Commission should, therefore, reaffirm that no LEC, regardless of size, may unilaterally file interconnection tariffs.

III. THE COMMISSION HAS THE AUTHORITY AND STATUTORY MANDATE TO ENTER THE REQUESTED DECLARATORY RULING

Congress has empowered the Commission to issue “a declaratory order to terminate a controversy or remove uncertainty.”²⁴ In this regard, the Supreme Court has noted that the

would constitute a pointless exercise. Indeed, many rural ILECs supported indirect, Type 2A interconnection with cellular carriers before the enactment of the 1996 Act.

²² See 47 C.F.R. § 20.11(a).

²³ Appellate courts have recognized that Section 332 provides “an independent basis of support *outside* the 1996 Act” to adopt rules governing LEC-CMRS interconnection. *Qwest v. FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001)(emphasis in original). See also *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997).

²⁴ 5 U.S.C. § 554(e).

Commission can and should play a leadership role in the administration of “the new *federal* regime.”²⁵ The Supreme Court has further noted that the concept of “state’s rights” has little relevance in the context of interconnection:

This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.²⁶

The Commission thus possesses ample authority to address this declaratory ruling petition, because such a Commission ruling would end considerable controversy.

In fact, Congress has imposed a statutory mandate for the Commission to address CMRS interconnection issues of the sort contained in this petition. Section 332(c)(1) of the Communications Act provides:

Upon reasonable request of any person providing commercial mobile service, the Commission *shall* order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title.²⁷

The Commission has repeatedly acknowledged that this statute “requires” it to act on petitions such as this that are filed under this statute.²⁸

Congress has fundamentally expanded the Commission’s authority over CMRS providers so the Commission could “establish a Federal regulatory framework to govern the offering of all

²⁵ *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1999)(emphasis in original).

²⁶ *Id.*

²⁷ 47 U.S.C. § 332(c)(1)(B)(emphasis added). The Commission has noted that its authority under Section 201 is “quite broad.” Brief of Respondents, *Qwest Corp. v. FCC*, No. 00-1376, at 36-37 (D.C. Cir., Feb. 14, 2001). The appellate court agreed with the Commission’s views concerning the scope of its regulatory authority. *See Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

²⁸ *See, e.g., Second CMRS Interconnection NPRM*, 10 FCC Rcd 10666, 10685-86 ¶ 39 (1995)(“We read Section 332(c)(1)(B) . . . to mean that the Commission is *required* to respond to requests for interconnection) (emphasis added); *Specialized Mobile Radio NPRM*, 9 FCC Rcd 4405, 4410 ¶ 19 (1994)(“Section 332(c)(1)(B) . . . *requires* the Commission pursuant to Section 201 to order common carriers to interconnect with CMRS providers.”) (emphasis added); *1993 Budget Act NPRM*, 8 FCC Rcd 7988, 8001 ¶ 69 (1993)(“Section 332(c)(1)(B) *requires* the Commission to order a common carrier to interconnect with a [CMRS] provider.”)(emphasis added).

commercial mobile services.”²⁹ Congress modified Sections 2(b) and 332(c) specifically to “foster the growth and development of mobile services that by their nature operate without regard to state lines,” and because Congress considers “the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhanced competition and advance a seamless national network.”³⁰ Federal appellate courts have affirmed this expansive regulatory authority,³¹ and as the Commission recognized only last year, Section 332(c)(1)(B) “expressly grants [it] the authority to order carriers to interconnect with CMRS providers”:

The 1993 Budget Act significantly changed the regulatory framework for CMRS. . . . CMRS interconnection was a significant element of this framework. . . . [S]ection 332(c)(1)(B) . . . expressly grants the Commission the authority to order carriers to interconnect with CMRS providers. . . . Congress also added an exception to section 2(b) of the Communications Act. Section 2(b) generally reserves to the states jurisdiction over intrastate communications service by wire or radio of any carrier. The 1993 Budget Act amended section 2(b) to exempt section 332 from its provisions.³²

The Commission has additional, separate authority to order ILECs to engage in good faith negotiation with CMRS carriers and to refrain from filing one-sided interconnection tariffs. Specifically, the Commission has preempted states in this area, ruling that it possesses “plenary jurisdiction to require cellular interconnection negotiations to be conducted in good faith”.³³

[T]he conduct of interconnection negotiations cannot be separated into interstate and intrastate comments. Good faith cannot be quantified and allocated according to relative interstate and intrastate use. Furthermore, any state regulation which permits departures from our good faith requirement could severely affect interstate communications by preventing cellular carriers from obtaining interconnec-

²⁹ H.R. REP. NO. 103-213. 103d Cong., 1st Sess. 490 (1993).

³⁰ H.R. REP. NO. 103-111, 103d Cong., 1st Sess. 260-61 (1993).

³¹ See *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997). It is noteworthy that not a single ILEC challenged this holding in the appeal before the Supreme Court. See *AT&T v. Iowa Utilities Board*, 585 U.S. 366 (1999). See also *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

³² *Developing a Unified Inter-carrier Compensation Regime*, 16 FCC Rcd 9610, 9640 31 ¶ 84 (2001).

³³ *Third Radio Common Carrier Order*, 4 FCC Rcd at 2371 ¶ 16.

tion agreements and consequently excluding them from the nationwide public telephone network.³⁴

In summary, it is clear that the Commission has both the legal authority and the obligation to act on this petition and to reaffirm the interconnection obligations of ILECs as applied to CMRS providers.

IV. CONCLUSION

For the forgoing reasons, the CMRS Petitioners respectfully request that the Commission:

³⁴ *Second Radio Common Carrier Order*, 2 FCC Rcd at 2912-13 ¶ 21. The state/interstate distinction the Commission made in 1987 has largely become irrelevant as applied to LEC-CMRS interconnection as a result of the statutory provisions discussed above that were enacted with the 1993 Budget Act.

- ❖ Declare that ILEC wireless termination tariffs, as well as the refusal to negotiate interconnection agreements, conflict with the letter and spirit of Sections 251 and 252 and the Commission's LEC-CMRS interconnection rules and policies; and
- ❖ Clarify that an ILEC engages in bad faith by unilaterally filing wireless termination tariffs without first negotiating in good faith the terms and conditions of interconnection with the CMRS provider.

The CMRS Petitioners believe that the requested Commission actions will lay the foundation for a productive negotiation process.

Respectfully submitted,

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