

Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of )  
)  
Developing a Unified Intercarrier ) CC Docket No. 01-92  
Compensation Regime )  
)  
Petition by T-Mobile *et al.* for Declaratory )  
Ruling re: Lawfulness of Incumbent Local )  
Exchange Carrier Wireless Termination Tariffs )  
  
To: The Commission

**SUPPORTING COMMENTS OF CINGULAR WIRELESS LLC**

Cingular Wireless LLC (“Cingular”) hereby submits its comments in support of the Petition for Declaratory Ruling filed September 6, 2002 by T-Mobile USA, Inc., PowerTel, Inc., Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners (the “Petitioners”) regarding the lawfulness of incumbent local exchange carrier (“ILEC”) wireless termination tariffs.<sup>1</sup>

**I. INDIRECT INTERCONNECTION AMONG WIRELESS CARRIERS AND ILECS FOR TRANSPORT AND TERMINATION OF INTRALATA TRAFFIC IS SUBJECT TO SECTION 251**

***Indirect Interconnection.*** Section 251(a)(1) of the Communications Act provides that “Each telecommunications carrier has the duty . . . to interconnect directly *or indirectly* with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1) (emphasis

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<sup>1</sup> Public Notice, *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic; Pleading Cycle Established*, CC Docket 01-92, DA 02-2436 (Sept. 30, 2002).

added).<sup>2</sup> Indirect interconnection is often employed when the volume of traffic between two carriers does not justify direct physical transport connections between their switches.

One of the most common forms of interconnection for CMRS carriers is Type 2A interconnection — interconnection at the tandem level — which provides direct interconnection with the tandem switch and also allows indirect interconnection with all of the switches subtending the tandem switch (*i.e.*, the end office switches below that tandem in the network hierarchy).<sup>3</sup> The Commission has specifically recognized that this is a permissible form of indirect interconnection to the subtending switches: by using “a trunk between a MSC and the LEC tandem, . . . the CMRS carrier connects to LEC end offices connected to the tandem together with other carriers (including IXCs) interconnected through the tandem.”<sup>4</sup> If the tandem owner agrees to provide transit services to the wireless carrier, Type 2A interconnection allows the wireless carrier to send traffic to another ILEC that is also interconnected at the tandem.

***Reciprocal Compensation.*** Given that a CMRS carrier, who has reached agreement with the tandem owner to provide transit services, has the right to indirectly interconnect with an ILEC via Type 2A interconnection at the tandem serving the ILEC’s end office switch, that ILEC then has the duty, under Section 251(b)(5), to “establish reciprocal compensation

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<sup>2</sup> The Section 251(a)(1) mandate, like that of Section 251(c)(2), pertains to the direct or indirect “physical linking of two networks for the mutual exchange of traffic.” *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *First Report and Order*, 11 F.C.C.R. 15,499, ¶ 176 (1996) (*Local Competition Order*), *aff’d in part sub nom. Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *aff’d in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997); *aff’d in part and reversed in part sub nom. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (subsequent history omitted). *See also Total Telecommunications Services, Inc. v. AT&T*, 16 F.C.C.R. 5726, ¶¶ 25-26 (2001).

<sup>3</sup> *See Developing a Unified Inter-carrier Compensation Regime*, CC Docket 01-92, *Notice of Proposed Rulemaking*, FCC 01-132, ¶ 91 (2001) (*Inter-carrier Compensation NPRM*).

<sup>4</sup> *Id.* The Commission has specifically endorsed carriers’ right to interconnect at the tandem level. *See Local Competition Order* at ¶ 211-12.

arrangements for the transport and termination of telecommunications.” 47 U.S.C. § 251(b)(5). The statute does not make this optional. It is the ILEC’s statutory duty.

“Reciprocal compensation” means that each carrier pays the other for the transport and termination of traffic exchanged at the carriers’ interconnection point.<sup>5</sup> “LECs therefore ‘are obligated, pursuant to section 251(b)(5) . . . to enter into reciprocal compensation arrangements with all CMRS providers . . . for the transport and termination of traffic on each other’s networks.’”<sup>6</sup>

The Commission has held that “reciprocal compensation” requires “symmetrical compensation.”<sup>7</sup> As Petitioners have pointed out, however, many ILECs avoid this duty — they route intra-MTA traffic destined for the network of a CMRS provider with whom they are interconnected at the tandem through an interexchange carrier (“IXC”).<sup>8</sup> As a result, instead of paying the terminating carrier reciprocal compensation, the ILEC collects originating access charges from the IXC and the terminating CMRS carrier is paid nothing. Given the reciprocal compensation obligation imposed by Section 251(b)(5), ILECs are obliged to pay the CMRS carrier the cost of transport and termination of ILEC-CMRS calls routed through their point of interconnection, *i.e.*, the tandem.

***Duty to Negotiate in Good Faith.*** Section 251(c)(1) “imposes on incumbent LECs the ‘duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described’ in sections 251(b) and(c), and further provides that ‘[t]he requesting telecommunications carrier also has the duty to negotiate in good

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<sup>5</sup> See 47 C.F.R. § 51.701(e) (“a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier’s network facilities of telecommunications traffic that originates on the network facilities of the other carrier.”).

<sup>6</sup> *TSR Wireless, Inc. v. U S WEST Communications, Inc.*, 15 F.C.C.R. 11,166, ¶ 4 (2000).

<sup>7</sup> See *Local Competition Order* at ¶¶ 1085-1091.

faith the terms and conditions of such agreements.”<sup>9</sup> As Petitioners have pointed out, the Commission has long recognized that the unilateral filing of a tariff concerning interconnection without first negotiating the contents of that tariff may not constitute good faith bargaining.<sup>10</sup> The ILEC’s duty to negotiate over transport and termination rates includes a duty to CMRS carriers: “LECs’ reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.”<sup>11</sup> Accordingly, an ILEC that attempts to establish compensation rates for CMRS traffic by unilateral tariff is not complying with its obligations under Section 251.

***Reciprocal Compensation Must Be Based on Cost, Not Access Charges.*** The Commission has made clear that reciprocal compensation for transport and termination of traffic must be cost-based: “Section 251(d)(2)(A)(i) provides for ‘recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.’”<sup>12</sup> Moreover, the Commission expressly held 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.”<sup>13</sup>

The Commission’s rules establish three means for determining the rates for reciprocal compensation:

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<sup>8</sup> Petition at 3 n.8, 5 n.12.

<sup>9</sup> *Local Competition Order* at ¶ 138, quoting 47 U.S.C. § 251(c)(1).

<sup>10</sup> Petition at 8; see *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling*, 2 F.C.C.R. 2910, ¶ 56 (1987) (*Second RCC Order*); *Memorandum Opinion and Order on Reconsideration*, 4 F.C.C.R. 2369, ¶¶ 13-14 (1989) (*Third RCC Order*).

<sup>11</sup> *Local Competition Order* at ¶ 1041.

<sup>12</sup> *Local Competition Order* at ¶ 1034, quoting 47 U.S.C. § 251(d)(2)(A)(i).

<sup>13</sup> *Id.* at ¶ 1036.

(a) An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§51.505 and 51.511;

(2) Default proxies, as provided in §51.707; or

(3) A bill-and-keep arrangement, as provided in §51.713.<sup>14</sup>

Accordingly, a LEC that sets its transport and termination charges on the basis of its intrastate or interstate access charges, instead of according to the foregoing methodology, is not complying with Section 251.

## **II. UNILATERAL WIRELESS ACCESS TARIFFS THAT ARE NON-RECIPROCAL AND NON-COST-BASED ARE UNLAWFUL**

### **A. The Unilateral Filing of Tariffs Covering Matters Subject to Good-Faith Negotiation Renders Such Tariffs Unjust and Unreasonable**

As discussed above, the Commission has long recognized that a carrier may be acting in bad faith when it preempts the bargaining process and files a unilateral tariff that covers the subject matter about which it has an obligation to negotiate. This is especially the case when the tariff covers matters about which there has been no real attempt to negotiate, or about which there is a dispute, because such a tariff filing renders the negotiation process “meaningless.”<sup>15</sup> Cingular agrees with Petitioners that tariff filings by ILECs that purport to establish compensation rates for transport and termination, without good-faith negotiation of the terms thereof, does not constitute good-faith bargaining. ILECs should not be permitted to set these compensation rates unilaterally. Accordingly, the filing of such a tariff should be deemed an unjust and unreasonable practice.

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<sup>14</sup> 47 C.F.R. § 51.705(a).

<sup>15</sup> *Third RCC Order*, 4 F.C.C.R. 2369 at ¶14.

Moreover, the filing of such a tariff that purports to set the compensation rates for transport and termination of CMRS traffic based on intrastate or interstate access charge elements, with or without an “additive,” should result in the tariff being deemed null and void. Such a tariff not only preempts the negotiation process, but also sets the rate in a manner expressly forbidden by the Commission’s rules.

**B. Unilateral ILEC Wireless Access Tariff Filings Effectively Preclude Negotiation of Reasonable, Lawful Agreements**

In practice, ILECs’ filing of unilateral wireless access tariffs has made negotiation of lawful and reasonable agreements for termination and transport of CMRS traffic all but impossible. For example, Cingular has been in negotiations with Lennon Telephone Company in Michigan that have proved fruitless because the ILEC insists on compensation rates identical to those it has on file in its tariff. In Missouri, 29 ILECs have filed wireless access tariffs setting their terminating compensation on the basis of the traffic sensitive elements of their intrastate access charges with a \$.02 per MOU additive substituted for the Carrier Common Line Charge. While some of these ILECs are now in negotiations with CMRS providers, their proposed negotiated rate is identical to the unlawful tariff rate, which is non-cost-based and excessively high. If ILECs can get away with filing tariffs that set termination rates at unlawfully high levels, they have no incentive to bargain in good faith. The structure created by Sections 251 and 252 is effectively undone by such unilateral tariff filings.

**CONCLUSION**

For the foregoing reasons, Cingular urges the Commission to grant the Petitioners' request for a declaratory ruling. The Commission should declare that unilaterally filed ILEC wireless access tariffs that subject indirectly interconnected traffic to non-reciprocal and non-cost-based termination charges are unjust and unreasonable.

Respectfully submitted,

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