

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

**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 released in the above-captioned proceeding.²

I. INTRODUCTION

The Commission seeks comment on two recently-filed petitions seeking declaratory rulings that 1) rural ILECs are not permitted to unilaterally file “wireless interconnection tariffs,”³ and 2) LECs are permitted to impose access charges on IXCs for inter-MTA traffic that

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 Comment Sought On Petitions For Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic, CC Docket No. 01-92, *Public Notice*, DA 02-2436 (rel. Sept. 30, 2002).

³ Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs, CC Docket No. 01-92, *Petition for Declaratory Ruling of T-Mobile USA, Inc., et. al.* (filed Sept. 6, 2002) (“*Petition*”).

originates or terminates on CMRS networks. CTIA addresses herein the first petition, which requests the Commission take action in a manner consistent with well-established precedent to prevent ILECs from acting in an anticompetitive fashion.

As the *Petition* suggests, the dispute between CMRS providers and LECs over LECs' unilateral exercise of control over their bottleneck facilities is not new. It is one the Commission has dealt with on many occasions, dating back over two decades. In its orders on the subject of LEC-CMRS interconnection, the Commission has made clear that LECs are required to negotiate in good faith with CMRS providers and under no circumstances are they permitted to unilaterally file interconnection tariffs. The validity of these orders continues today, notwithstanding the passage of the Telecommunication Act of 1996 ("1996 Act"), and their relevance is even more important as CMRS providers continue to compete with incumbents. The Commission should therefore act swiftly to once again prohibit LECs from acting in a manner which is aimed solely at stifling the competitive development of CMRS. To be clear, the *Petition* is not about bill and keep, nor is it about indirect interconnection. Petitioners have made clear their willingness to negotiate interconnection agreements with the ILECs, but they cannot do so if the incumbents are permitted to simply file tariffs instead.⁴

⁴ See *Petition* at 4.

II. COMMISSION PRECEDENT MAKES CLEAR THAT ILECs ARE NOT PERMITTED TO UNILATERALLY FILE WIRELESS INTERCONNECTION TARIFFS.

In a series of orders dating back to the mid-1980s, the Commission established the requirements for LEC-CMRS⁵ interconnection negotiations.⁶ Among those requirements that are particularly relevant to the present dispute, CMRS providers are “entitled to reasonable interconnection” which, among other things, would “minimize unnecessary duplication of switching facilities and the associated costs to the ultimate consumer.”⁷ LECs are also required

⁵ Prior to the amendment of section 332 of the Communications Act, 47 U.S.C. § 332, the Commission’s interconnection orders were limited to the interconnection disputes between LECs and cellular carriers. In 1994, the requirements for LEC-cellular interconnection were extended to all CMRS providers. See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411 (1994). These comments, therefore, refer to LEC-CMRS interconnection even where the Commission was discussing LEC-cellular interconnection at the time.

⁶ The history of LEC-CMRS interconnection is best characterized as contentious. Incumbents often refused to recognize cellular operators as co-carriers and they regularly negotiated interconnection agreements in bad faith, if at all. Even as late as 1995, LECs refused to comply with reciprocal compensation requirements, charging some CMRS providers as much as \$0.40 per minute for interconnection. See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Rep. No. CL-379, *Declaratory Ruling*, 2 FCC Rcd 2910, ¶ 10 (1987) (“*Declaratory Ruling*”); Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020 (1996) (“*LEC-CMRS Interconnection NPRM*”); see generally An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission’s Rules Relative to Cellular Communications Systems, CC Docket No. 79-318, *Report and Order*, 86 FCC 2d 469 (1981); *affirmed on recon.*, 89 FCC 2d 58 (1982); *further affirmed on recon.*, 90 FCC 2d 571 (1982).

⁷ The Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services, *Memorandum Opinion and Order*, 59 Rad. Reg. 2d (P&F) 1275, Appendix B, ¶ 2 (1986); see 47 C.F.R. § 20.11(a).

to provide interconnection within a reasonable time,⁸ and, importantly, they are prohibited from unilaterally filing tariffs to impose interconnection obligations on CMRS carriers that were not reached by agreement.⁹ Specifically, the Commission has already concluded that “the terms and conditions of [CMRS] interconnection must be negotiated in good faith. . . . [W]e expect that tariffs reflecting charges to [CMRS] carriers will be filed only after the co-carriers have negotiated agreements on interconnection.”¹⁰

Two years later, it explained that

[o]ur statement regarding “pre-tariff negotiation agreements” was intended to reflect our recognition that, as CTIA suggests, *if a telephone company is able to file tariffs before reaching an interconnection agreement, a [CMRS] carrier's bargaining power will be diminished*. However, we also acknowledge that . . . landline companies and [CMRS] operators may sincerely negotiate in good faith, and still fail to agree on all issues. Faced with these competing goals, *we reaffirm that tariffs should not be filed before the co-carriers have conducted good faith negotiations on an interconnection agreement*.¹¹

The FCC confronted a situation somewhat analogous to the present dispute. The incumbent, while acknowledging that it must negotiate with CMRS carriers in good faith, insisted that it may unilaterally file an entire interconnection tariff notwithstanding the parties' failure to agree on certain issues. The FCC rejected this position concluding that it “would not expect the BOC to file a tariff pertaining to [an] 'unresolved issue.' To interpret our statement otherwise . . . would

⁸ See Declaratory Ruling ¶ 29 (“This policy clearly follows from the Commission’s longstanding goal of bringing cellular service to the public as rapidly as possible.”).

⁹ Id. ¶ 56.

¹⁰ Id.

¹¹ The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding), Rep. No. CL-379, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, ¶ 13 (1989) (citations omitted) (emphasis added).

mean that, when an impasse [in negotiations] is reached, the landline company could proceed unilaterally to file its tariffs, thereby rendering meaningless the negotiations already conducted on this matter. . . . *We observe, though, that a landline company's filing of a tariff before an interconnection agreement has been negotiated could indicate a lack of good faith.*"¹²

The *Petition* makes clear that certain rural ILECs are acting in flagrant disregard of the Commission's orders. Rather than negotiate in good faith, they have unilaterally filed "wireless termination tariffs" in several states. In fact, they have not even attempted to negotiate with wireless carriers and instead have filed complaints at the state commission for failure to comply with the illegal tariff filings.¹³ While the number of carriers following this course seems limited at this time, if permitted to continue, it is likely that other carriers will follow suite. The Commission should therefore reaffirm that all ILECs are prohibited from acting in such a unilateral fashion.

Not only have carriers failed to negotiate in good faith, their wireless termination tariff filings do not provide for reciprocal compensation. In addition, the tariff rates are well-above those permitted by the Commission. These terms harken back to conduct the Commission has spent considerable effort trying to eliminate.¹⁴ The issue is not merely one of fairness, but one of promoting competition. The Commission has long understood the pernicious effect of exercising market power in a way that imposes excessive and non-symmetrical costs on carriers through interconnection. "[A] LEC may have the incentive and the ability to prevent or reduce demand for interconnection with a prospective local competitor, such as a CMRS provider, below the

¹² Id. ¶ 14 (emphasis added).

¹³ See *Petition* at 4-5.

¹⁴ See generally *LEC-CMRS Interconnection NPRM*.

efficient level by denying interconnection or setting interconnection rates at excessive levels.”¹⁵

Thus, the steps these rural ILECs have taken are not only geared at increasing their revenues, they are also aimed at stifling competition.¹⁶ The Commission anticipated this possibility, and made clear that it was prepared to preempt intrastate interconnection charges that effectively interfered with the federal right to interconnect.¹⁷

The issues presented in the *Petition* are a classic example of a rural ILEC exercising impermissible control over its bottleneck facilities. The effects of such conduct are well understood, as is the solution. The Commission must act, as it is directed under sections 201 and 332 of the Communications Act, to declare these tariffs unreasonable and thus invalid.

III. THE REQUIREMENTS ESTABLISHED IN THE COMMISSION’S LEC-CMRS INTERCONNECTION ORDERS CONTINUE TO BE APPLICABLE.

The 1996 amendments to the Communications Act, including the addition of sections 251 and 252, should not be interpreted as altering the requirements the Commission established in reviewing LEC-CMRS interconnection arrangements. Sections 251 and 252 govern the terms of negotiated interconnection agreements between all telecommunications carriers. Similar to the

¹⁵ Id. ¶ 12.

¹⁶ See id. (“Excessive prices for termination of CMRS-originated traffic would lead to retail prices (charged to CMRS customers) that are above the efficient level and thus discourage CMRS customers from placing calls to wireline customers that would be made if LEC interconnection rates were set at efficient levels. . . . Even where interconnection is mandated, a LEC still could potentially restrict entry either by setting the interconnection rates prohibitively high or by specifying technical requirements for interconnection that are disadvantageous for the connecting network.”).

¹⁷ See Declaratory Ruling ¶ 18 (“at some point, the intrastate component of charges for physical interconnection, as well as other charges to [CMRS] carriers, may be so high as to effectively preclude interconnection. This would ‘negate’ the federal decision to permit interconnection, thus warranting our preemption of some aspects of particular intrastate charges.”) (citations omitted).

Commission's decisions a decade earlier, sections 251 and 252 require incumbents to negotiate in good faith.¹⁸ Often, CMRS providers and LECs engage in the negotiation process established by these provisions and by the Commission's orders.

Even absent the negotiations contemplated by the 1996 Act, LECs are not permitted to revert to conduct which the Commission has already prohibited. The Commission's authority to continue to enforce the requirements for LEC-CMRS interconnection is well-established. Most of the mandates governing LEC-CMRS interconnection were established under sections 201 and later under section 332. These provisions of the Act retain their full force and effect today. Section 201 requires all carriers to interconnect upon reasonable request and section 332 provides specifically for CMRS that

[u]pon 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 Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.¹⁹

Congress' 1993 amendment to the Communications Act was intended to promote a uniformly-regulated, efficient, competitive CMRS market. Access to LEC facilities on reasonable terms and conditions, therefore, was essential. For this reason, Congress charged the Commission with implementing regulatory policies that foster the full development of CMRS which was critically dependent upon efficient interconnection with LECs. The House Report accompanying the amendment to section 332 states that:

Section 332(c)(1)(B) provides that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile

¹⁸ See 47 U.S.C. §§ 251(c)(1), 252.

¹⁹ Id. § 332(c)(1)(B).

service, upon reasonable request. Nothing here shall be construed to expand or limit the Commission's authority under section 201, except as this paragraph provides. *The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.*²⁰

Implicit in this express grant of authority, is the determination that the Commission would continue not only to order LEC-CMRS interconnection, but to order efficient interconnection pursuant to reasonable terms and conditions. Such a policy would enhance competition and foster the development of a national wireless network. As the Commission has explained, “[t]he availability of interconnection cannot . . . be divorced from its price.”²¹

Any suggestion that Congress' goals under sections 201 and 332 have been superceded by the 1996 Act, or that the Commission's orders are no longer relevant, have been swept away by the courts and by recent Commission action. In *Iowa Utilities Board v. FCC*, the Court of Appeals for the Eighth Circuit addressed the Commission's section 332 jurisdiction over CMRS interconnection after the 1996 Act.²² The Eighth Circuit vacated parts of the Commission's *Local Competition Order*²³ on the grounds that the Commission had exceeded its jurisdiction

²⁰ H.R. Rep. No. 103-111, at 261 (1993) reprinted in 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

²¹ *LEC-CMRS Interconnection NPRM* ¶ 10.

²² *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (“*Iowa Utilities*”). Although the Supreme Court later reversed parts of the Eighth Circuit's decision, the court's holding with respect to the Commission's section 332 jurisdiction was not addressed, and thus remains valid precedent. See *Qwest Corp. v. FCC*, 252 F.3d 462, 466 (D.C. Cir. 2001) (holding that a loser's failure to appeal a judgment “left him as badly off as if he had appealed and lost,” meaning that the Eighth Circuit's holding on section 332 was considered “a final judgment with preclusive effects.”) (citing *Angel v. Bullington*, 330 U.S. 183, 189 (1947)).

²³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio

under sections 251 and 252 by setting interconnection rates.²⁴ The court premised its jurisdictional findings on both sections 251 and 252 and an analysis of section 2(b) of the Communications Act.²⁵ Although the Commission in the *Local Competition Order* declined to exercise its sections 332, 201, and 2(b) jurisdiction over LEC-CMRS interconnection, the court's decision with respect to LEC-CMRS interconnection turned on these provisions. Specifically, the court preserved the "rules of special concern to the CMRS providers,"²⁶ including the Commission's regulations that established CMRS providers' right to renegotiate existing, non-reciprocal transport and termination arrangements as well as the symmetrical reciprocal compensation pricing arrangements for transport and termination of traffic between LECs and CMRS providers -- arrangements that the court believed the Commission lacked jurisdiction to adopt for LECs, but has jurisdiction to adopt for CMRS interconnection.

The court determined that in 1993 Congress expressly created an exemption for section 332 in section 2(b) for regulation of CMRS providers. It reasoned that since the section 2(b) reservation of authority to the states does not apply, the Commission, not the states, has the ultimate authority to establish interconnection arrangements between LECs and CMRS carriers. Significantly, the court recognized that Congress provided express Commission authority to regulate LEC-CMRS interconnection under section 332(c)(1)(B).²⁷ The court's interpretation of

Service Providers, CC Docket Nos. 96-98; 95-185, *First Report and Order*, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order*").

²⁴ *Iowa Utilities*, 120 F.3d at 794.

²⁵ 47 U.S.C. §§ 152(b), 251, 252.

²⁶ *Iowa Utilities*, 120 F.3d at 800 n.21.

²⁷ See id.

the Commission's broad authority under section 332 makes clear that the Commission's previous orders, directing good faith negotiations, reciprocal compensation, and prohibiting unilateral tariff filings, continue to govern LEC-CMRS interconnection.

The D.C. Circuit has also reaffirmed the Commission's jurisdiction over CMRS interconnection pursuant to section 332, and relied upon the Eighth Circuit's holding in *Iowa Utilities* for support. In *Qwest Corp. v. FCC*, the court addressed whether the Commission had authority to enforce section 51.703(b) of its rules (adopted in the *Local Competition Order*), which forbids LECs from charging paging companies for carrying and completing LEC originated calls.²⁸ The Commission enforced this rule through adjudication of complaints brought by paging carriers under section 208, while the LECs objected, arguing that under section 251(c)(1) such disputes can only be resolved through state managed negotiation and arbitration.

The Commission argued that it has jurisdiction to resolve these complaints under section 332. The issue before the court was whether section 51.703(b), as applied to CMRS, was derived solely from the 1996 Act, or whether it is validated by section 332. The court observed that if the rule relied upon section 332, then the Commission undisputedly has jurisdiction to adjudicate section 208 complaints alleging violations of section 51.703(b). The court determined that this precise issue had been resolved by the Eighth Circuit in *Iowa Utilities*; thus it saw no need to re-examine the issue. It understood the Eighth Circuit to mean that section 332 gives the Commission the authority to order LECs to interconnect with CMRS carriers, and "to issue the rules of special concern to the CMRS providers, i.e., 47 C.F.R. §§ 51.701, 51.703...."²⁹ Thus,

²⁸ 252 F.3d at 464.

²⁹ *Iowa Utilities*, 120 F.3d at 800 n.21.

both the Eighth Circuit and the D.C. Circuit cases should be understood as affirming the Commission's section 332 jurisdiction with respect to LEC-CMRS interconnection disputes.

The D.C. Circuit's decision eliminates any ambiguity with respect to the Eighth Circuit's holding. In holding that *Iowa Utilities* precluded re-litigation of this issue, the D.C. Circuit reinforced the validity of the Commission's authority to regulate LEC-CMRS interconnection under section 332 of the Act. Accordingly, the Eighth Circuit's holding in *Iowa Utilities* should continue to be the guiding principle for resolution of LEC-CMRS interconnection issues. While the "rules of special concern" the court upheld in *Iowa Utilities* were those adopted in the *Local Competition Order*, the court's decision should also be understood as upholding the rules of special concern for LEC-CMRS interconnection adopted by the Commission pursuant to sections 201 and 332.

IV. CONCLUSION

There can be little dispute that the rural ILECs are violating the express requirements the Commission has established for LEC-CMRS interconnection. They have failed to negotiate in good faith, they have unilaterally filed interconnection tariffs for CMRS traffic, and they have failed to establish reciprocal compensation arrangements. Commission action to preempt such anti-competitive conduct is not only permissible but required under sections 201 and 332. For the reasons discussed herein, the Commission should declare all unilateral wireless termination tariffs invalid and require ILECs to negotiate in good faith if they wish to alter existing interconnection arrangements.

Respectfully submitted,

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