

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

In the Matter of )  
Developing a Unified Intercarrier )  
Compensation Regime ) CC Docket No. 01-92  
)  
Comments Sought on Petitions for )  
Declaratory Ruling Regarding )  
Intercarrier Compensation for Wireless Traffic )

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> submits its initial comments in response the Federal Communications Commission’s (Commission’s or FCC’s) Public Notice in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION**

The Commission seeks comments on two petitions requesting declaratory rulings regarding intercarrier compensation for certain types of wireless traffic. The first petition, filed by T-Mobile, requests that the Commission issue a finding that all rural incumbent local exchange carrier (rural ILEC) wireless terminating access tariffs are unlawful.<sup>3</sup> The second petition, filed by US LEC Corp., requests that the Commission issue a ruling that competitive local exchange carriers (CLECs) are entitled to recover access charges from interexchange carriers (IXCs) for the provision of access services on IXC calls originating from, or terminating on, the networks of commercial mobile radio

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 556 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many also provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). And all are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> *In the Matter of Comments Sought on the Petition for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket 01-92, DA 02-2436, Public Notice, (rel. Sept. 30, 2002).

<sup>3</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Petition for Declaratory Ruling of T-Mobile USA, Inc., *et al.* (filed Sept. 6, 2002).

services (CMRS or wireless) providers.<sup>4</sup> NTCA opposes the T-Mobile petition and supports the US LEC petition.

## **II. WIRELESS TERMINATION TARIFFS ARE LAWFUL AND SHOULD NOT BE PREEMPTED**

T-Mobile requests that the Commission declare rural ILEC wireless termination access tariffs unlawful based on the erroneous assertion that the tariffs conflict with sections 251 and 252 of the Act.<sup>5</sup> The effect of T-Mobile's petition is a request that the Commission preempt the states authority to accept tariffs of regulated ILECs. The Commission should reject this request.

State commissions may impose requirements or prescribe regulations that are not inconsistent with the Act.<sup>6</sup> State commissions may also enforce any regulation, order, or policy that establishes access and interconnection obligations that are consistent with the Act.<sup>7</sup> Thus, if CMRS originated traffic is delivered to a rural ILEC in the absence of an approved reciprocal compensation or interconnection agreement, state commissions may enforce existing wireless termination tariffs or approve new wireless termination tariffs to ensure recovery of legitimate intrastate costs.<sup>8</sup> If a CMRS carrier disagrees with a wireless termination tariff, it has the right to request a reciprocal compensation agreement to establish terms, conditions, and rates for the exchange of local traffic pursuant to sections 251 and 252.

Section 252(d)(2) provides state commissions with jurisdiction to establish compensation arrangements and set rates for the transport and termination of local traffic under section 251(b)(5) of the Act. State commissions also have explicit statutory authority and jurisdiction under section 252 to adopt intercarrier compensation regimes for local traffic where they deem them appropriate.

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<sup>4</sup> *Petition of US LEC Corp. for Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic* (filed Sept. 18, 2002). The petition was placed in the record of CC Docket No. 01-92.

<sup>5</sup> T-Mobile Petition, p. 14.

<sup>6</sup> 47 U.S.C. § 261.

<sup>7</sup> 47 U.S.C. § 251(d)(3).

<sup>8</sup> *See*, U.S. West v. Sprint, 275 F.3d 1241, n. 10 (10<sup>th</sup> Cir. 2002)(carriers have the right to purchase services from an ILEC pursuant to an ILEC tariff without negotiating an interconnection agreement).

The FCC may only approve arrangements for the transport and termination of 251(b) traffic if a state commission fails to act.<sup>9</sup>

The Act also imposes the duty on ILECs “to establish reciprocal compensation arrangements for the transport and termination of telecommunications” when requested by another carrier.<sup>10</sup> In addition, ILECs have “the duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements.”<sup>11</sup> The record, however, demonstrates that many rural ILEC attempts to negotiate in good faith and establish reciprocal compensation arrangements with CMRS providers have yielded no such agreements. In the interim, rural ILECs are not receiving any payment for legitimate costs resulting from providing transport and termination of CMRS carrier calls. The filing of a wireless termination tariff in some states has therefore become a necessary action by rural ILECs in order to receive compensation for the use of their network by CMRS carriers. Without such tariffs, there would be no payment by CMRS providers.

The Commission has general jurisdiction to implement the 1996 Act’s local-competition provision.<sup>12</sup> Its rulemaking authority extends to the implementation of sections 251 and 252.<sup>13</sup> State commission approval of rural ILEC wireless termination tariffs pending the resolution of negotiations or arbitrations is consistent with the Commission’s authority under sections 251 and 252. It ensures the lawful recovery of intrastate costs associated with the transport and termination of intrastate traffic.

Missouri is an example of how state regulation has fostered cost recovery and stimulated new life into negotiations between CMRS providers and rural ILECs.<sup>14</sup> In Missouri, rural ILECs have received approval of a wireless termination tariff based on a forward-looking economic cost

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<sup>9</sup> 47 U.S.C. § 252(e)(5).

<sup>10</sup> 47 U.S.C. § 251(b)(5).

<sup>11</sup> 47 U.S.C. § 251(c)(1).

<sup>12</sup> *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999).

<sup>13</sup> *Id.*

(FLEC) model. The FLEC-based wireless termination tariff applies only until the rural ILEC and CMRS carrier reach a binding reciprocal compensation agreement. It contains a provision that when a reciprocal compensation contract is reached between the rural ILEC and CMRS carrier, the contract then supercedes the tariff. This provision accommodates section 251 and 252 of the Act.

The Missouri tariff was approved after a full evidentiary hearing with significant CMRS industry representation.<sup>15</sup> The FLEC-based cost of service was included in the evidentiary record and open to full discovery and cross-examination. The state commission allowed expert testimony of CMRS witnesses to scrutinize the FLEC-based rate. In the end, the forward-looking economic cost for terminating a CMRS call on a rural ILEC network was substantially higher than the rate that was eventually approved by the state commission.

Prior to the Missouri wireless termination tariff, T-Mobile used its direct connection with Southwestern Bell Telephone (SWBT) to send traffic indirectly to rural ILECs without an approved compensation agreement. T-Mobile essentially used its SWBT connection to evade paying any termination costs to rural ILECs and avoid negotiations on reciprocal compensation or interconnection agreements.<sup>16</sup>

Since the adoption of the Missouri wireless termination tariff, T-Mobile has finally entered into negotiations with rural ILECs. Rural ILECs are also in the final stages of negotiations with Verizon Wireless and some have reached direct interconnection agreements with Dobson Wireless and Missouri Cellular. In addition negotiations with Sprint PCS are continuing and three issues have been identified with AT&T Wireless for arbitration.<sup>17</sup> Unfortunately, T-Mobile is once again

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<sup>14</sup> *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Missouri Public Service Commission, Case No. TT-2001-139 (Feb. 8, 2001).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See*, The Missouri Small Telephone Company Group Comments, CC Docket No. 01-92, (filed October 18, 2002).

attempting to bypass negotiations and evade paying terminating access by requesting this unlawful ruling.

Wireless termination tariffs have provided carriers with an incentive to resolve outstanding issues in negotiations concerning reciprocal compensation and interconnection agreements. State commission authority to review and approve intrastate tariffs also has helped state commissions fulfill their statutory duties under sections 251 and 252 in a timely and effective manner. The Commission should therefore encourage state commissions to continue to exercise their authority approve wireless termination tariffs pending the resolution of negotiated or arbitrated reciprocal compensation or interconnection arrangements. This will promote negotiations and lead to the accelerated resolution of disputes between parties. The Commission should not usurp a state's authority to act in the absence of a showing that it has failed to act.<sup>18</sup>

### **III. CMRS PROVIDERS CANNOT IMPOSE “BILL AND KEEP” ON RURAL ILECS**

T-Mobile claims that because wireless carriers interconnect with rural ILECs indirectly through an intermediate carrier (usually an RBOC tandem), wireless carriers have the unilateral right to invoke “bill and keep” and pay rural ILECs nothing for the use of their networks.<sup>19</sup> T-Mobile's claim is false, misleading, and a violation of the Act. As a matter of law, state commissions, not CMRS providers, have the authority to impose a forward-looking economic cost (FLEC), a default proxy, or a “bill and keep” arrangement for transport and termination of local traffic between CMRS providers and rural ILECs.<sup>20</sup> In addition, “bill and keep” would violate the “just and reasonable” standard under section 210(b) when local call traffic between carriers is unbalanced. As CompTel points out:

The United States Court of Appeals for the District of Columbia Circuit has explained that a “basic principle used to ensure that rates are ‘just and reasonable’ is that rates are determined

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<sup>18</sup> 47 U.S.C. § 252(e)(5).

<sup>19</sup> T-Mobile Petition, p. 3.

<sup>20</sup> See, 47 U.S.C § 252(d)(2)(B)(i) and 47 C.F.R. § 51.701 through 51.717.

on the basis of cost.” Although Section 201(b) does not require the Commission to establish purely cost-based rates, the Commission must specifically justify any differential that does not reflect cost. The Commission has not justified, nor could it justify based on any data on record in this or any other proceedings, an intercarrier compensation rate of zero. Therefore, mandatory bill-and-keep regimes, where traffic flows between competing carriers are not roughly equal, are not “just and reasonable” under Section 201(b) of the Act.<sup>21</sup>

T-Mobile therefore has no right to impose “bill and keep” on rural ILECs.

T-Mobile also claims that when a rural ILEC files a wireless termination tariff for approval by a state commission, it removes any bargaining power a CMRS provider has to negotiate a reciprocal compensation agreement with that rural ILEC. Again, T-Mobile’s claim is false and misleading. In reality, rural ILECs are the carriers without bargaining power when negotiating reciprocal compensation agreements with CMRS providers. Because wireless-originated call traffic is currently terminated on rural ILECs’ networks without payment, there is no incentive for CMRS carriers to negotiate in good faith or enter into binding reciprocal compensation agreements with rural ILECs.

CMRS providers that indirectly send CMRS call traffic to rural ILECs through an RBOC tandem in most cases terminate their traffic without notification to the rural ILEC. Rural ILECs in these cases cannot identify CMRS traffic at the terminating end office from other traffic coming over the same RBOC tandem trunks. Consequently, because rural ILECs cannot identify this CMRS traffic, CMRS carriers take the position that there is no need to negotiate reciprocal compensation or interconnection agreements for CMRS traffic terminating on rural ILEC networks. And why should CMRS carriers negotiate when they can easily pilfer access to rural ILEC networks by hiding behind RBOC tandems.

CMRS carriers in numerous states have refused to enter into compensation or interconnection agreements with rural ILECs. NTCA has determined that in at least 20 states many

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<sup>21</sup> CompTel Initial Comments in CC Docket No. 01-92, p. 24 (filed Aug. 21, 2001), citing *ALLTel Corp. v. FCC*, 838 F.2d 551, 557 (D.C. Cir. 1999) and *CompTel v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996).

of its members have been unable to negotiate or renegotiate a reciprocal compensation or interconnection agreement with nationwide and/or regional wireless carriers. These states include Iowa, Texas, New Mexico, Minnesota, Nebraska, North Carolina, North Dakota, Georgia, Tennessee, Wisconsin, Missouri, Mississippi, Oklahoma, Ohio, Illinois, Montana, Kansas, Indiana, South Carolina, and Oregon. Many rural ILECs in these states are not being compensated for any wireless traffic terminating on their networks.

Wireless carriers are in no hurry to reach agreements with rural ILECs. In addition to knowing that many rural ILECs cannot identify the traffic from the RBOC tandem in many of states, wireless carriers also know that in most instances the ratio of call traffic between the wireless carrier and rural ILEC is 70%-80% terminating on the rural ILEC network. Consequently, wireless carriers have every incentive to stall negotiations as long as humanly possible so as to avoid being net payers under the Commission's rules.

Today, when a rural ILEC submits a bill to a CMRS carrier for the termination of wireless traffic without a compensation agreement, the bill is simply ignored. The CMRS carrier response is a de facto "bill and keep" arrangement. In other words, as long as wireless carriers believe they can unilaterally impose a "bill and keep" arrangement on rural ILECs, they will never pay for their use of a rural ILEC's network, regardless of the significant traffic imbalance between carriers. Given the CMRS carrier response, it is not surprising that some rural ILECs have filed wireless terminating access tariffs in an effort to recover their costs of providing access to CMRS carriers pending a compensation agreement. The rural ILEC alternative to not filing a tariff is to not get paid for CMRS use of their network. Without state approved tariffs there would be no compensation and no reciprocal compensation or interconnection agreements on the horizon.

Without state commission authority to approve wireless termination tariffs many rural ILECs would have virtually no mechanism to recover the ongoing and growing costs of providing

intrastate transport and termination service to CMRS providers. State commissions would be limited in their means of ensuring proper recovery of legitimate intrastate costs pending the resolution of negotiated or arbitrated reciprocal compensation agreements. The tariffs not only help ensure appropriate intrastate cost recovery for rate-of-return regulated ILECs, but they also fuel the acceleration of negotiated or arbitrated compensation agreements.<sup>22</sup> Without state authority to approve such tariffs legally recognized costs would continue to go unrecovered and CMRS carrier negotiations would continue to go nowhere.

#### **IV. THE VOLUME OF CMRS TRAFFIC TERMINATING ON RURAL ILEC NETWORKS IS SUBSTANTIAL AND GROWING RAPIDLY**

T-Mobile claims that the volume of wireless traffic that terminates on rural ILEC networks is so *de minimus* that wireless carriers should not be required to pay anything for wireless calls terminating on rural ILEC networks.<sup>23</sup> This claim is patently false. The volume of CMRS traffic terminating on rural ILEC networks and revenue loss resulting from CMRS carrier nonpayment is substantial and growing rapidly.

In 1998, the average wireless customer's monthly minutes-of-use was only 89 minutes per month. As of third quarter 2001, the average wireless customer's usage has more than quadrupled to 363 minutes per month.<sup>24</sup> As of April 2002, wireless customers spend an average of 550 minutes on their wireless phone per month and this figure continues to grow.<sup>25</sup> Today, many carriers estimate that the usage is between 600-650 minutes per month per customer. Most of the traffic is obviously terminating on wireline networks.

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<sup>22</sup> *U.S. West v. Sprint*, 275 F.3d 1241, n. 10 (10<sup>th</sup> Cir. 2002)(There is an incentive for carriers to negotiate prices and terms that are more favorable than those set forth in ILEC tariffs).

<sup>23</sup> T-Mobile Petition, pp. 7-9.

<sup>24</sup> Public Forum For the 7th Annual CMRS Competition Report, Charles Mahla, Senior Economist, Econ One, February 28, 2002. The report is available at <http://wireless.fcc.gov/cmrs-crforum.html>.

<sup>25</sup> See, 3G, or Not to Be?, by Yuki Noguchi, The Washington Post, Business p. E1, April 5, 2002.

Moreover, between 1998 and 2001, the number of wireless subscribers in the United States doubled from 60 million to 120 million.<sup>26</sup> Today, this figure has grown to more than 135 million.<sup>27</sup> During this same period of amazing growth, wireless carrier revenues have increased from \$29 billion to \$58 billion.<sup>28</sup> And total wireless monthly minutes have grown 5 billion to 99 billion per month.

The revenue loss to rural ILEC as a result of CMRS non-payment of termination access is also substantial and growing rapidly. For example, a large regional ILEC in Wisconsin has several transport and termination contracts with many wireless carriers to deliver CMRS traffic to rural ILECs exchanges over Feature Group C circuits that were installed and ordered to terminate MTS traffic. The CMRS carriers pay the large ILEC ½ cent per minute-of-use for tandem switching and transport for wireless calls, and if the call terminates on the large ILEC's exchange, the ILEC is paid an additional ½ cent per minute-of-use.

Conversely, a small Wisconsin rural ILEC that receives a significant amount of CMRS terminating traffic from the large ILEC's Feature Group C circuits receives no payment for terminating the CMRS traffic and has neither a reciprocal compensation or interconnection agreement with these same CMRS carriers. The rural ILEC records the all of the traffic terminating on its networks that is sent from large ILEC's Feature Group C circuits. The rural ILEC bills the large ILEC intrastate access in accordance with its state approved tariff. The rural ILEC sends a bill of approximately \$20,000 to the large ILEC each month for terminating this traffic. The large ILEC in return only pays the rural ILEC about \$3,000 per month. Over 75 percent of the traffic that the large ILEC delivers to the rural ILEC therefore is unpaid. Here again, CMRS carriers are hiding behind large ILEC tandem connections to evade paying terminating access to a rural ILEC network.

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<sup>26</sup> CTIA's Semi-Annual Wireless Industry Survey Results, June 1985 to June 2001, see [www.ctia.org](http://www.ctia.org).

<sup>27</sup> See CTIA's Homepage at [www.ctia.org](http://www.ctia.org).

<sup>28</sup> CTIA's Semi-Annual Wireless Industry Survey Results, June 1985 to June 2001, see [www.ctia.org](http://www.ctia.org).

The rural ILEC has met with the large ILEC several times in an effort to obtain compensation for traffic that is being delivered to the rural ILEC or to have large ILEC stop sending unidentified traffic to small ILEC. The large ILEC has refused to do either. The amount of traffic that has been terminated on the rural ILEC's network without compensation has now reached approximately \$500,000. CMRS traffic terminating on this rural ILEC networks is by no means *de minimus*.

**V. CLECS ARE ENTITLED TO RECOVER ACCESS CHARGES FOR PROVIDING ACCESS SERVICE FOR CMRS TRAFFIC**

US LEC Corp. requests that the Commission issue a ruling that CLECs are entitled to recover access charges from IXCs for the provision of access services on interexchange calls originating from, or terminating on, the networks of commercial mobile radio services CMRS providers. NTCA urges the Commission to grant US LEC's petition. The Commission has previously stated that in cases where a "cellular carrier is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charges."<sup>29</sup> CLECs are also local telephone companies and therefore are entitled to the same recovery of access charges as ILECs for connecting the CMRS provider and the IXC so that interexchange calls can be completed on a CLEC's network.

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<sup>29</sup> *Implementation of the Local Compensation Provisions of the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, Rules and Regulations, 61 FR 45476, 45578, ¶ 696 (Aug. 29, 1996).

## VI. CONCLUSION

Based on the reasons stated above, the Commission should reject the T-Mobile petition and grant the US LEC petition.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION

By: /s/ L. Marie Guillory  
L. Marie Guillory

By: /s/ Daniel Mitchell  
Daniel Mitchell

Its Attorneys

4121 Wilson Boulevard, 10<sup>th</sup> Floor  
Arlington, VA 22203-1801  
(703) 351-2000

October 18, 2002

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 01-92, DA 02-2436 was served on this 18th day of October 2002 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy  
Gail Malloy

Chairman Michael Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-B201  
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 8-A204  
Washington D.C. 20554

Commissioner Kevin J. Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-C302  
Washington, D.C. 20554

Commissioner Michael J. Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 8-A302  
Washington, D.C. 20554

Qualex International Portals II  
445 12th Street, S.W.  
Room CY-B402  
Washington, D.C. 20554

Jane Jackson, Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

William Maher, Chief  
Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554