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January 22, 2004

VIA ELECTRONIC FILING
Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Notice of Ex Parte Presentation -- CC Docket Nos. 96-262, 01-92*

Dear Ms. Dortch:

On January 21, 2004, Helgi C. Walker of Wiley Rein & Fielding, and L. Charles Keller and the undersigned of this firm, on behalf of Verizon Wireless, met with Commissioner Jonathan Adelstein and senior legal advisor Lisa Zaina to discuss the above-referenced dockets. In the meeting, we explained that CMRS carriers such as Verizon Wireless were not put on notice by either the *CLEC Access Order*[1] ("Order") or the *Sprint v. AT&T*[2] case that the FCC may view their pre-existing arrangements with CLECs for routing of 8YY traffic[3] as improper. Our presentation is summarized in more detail below.

- CMRS carriers and CLECs legitimately believed that their 8YY arrangements were lawful.
  - CMRS-CLEC arrangements for the routing of 8YY traffic have been <u>commonplace</u> in the industry for years – they exist between multiple, unaffiliated CLECs and multiple, unaffiliated CMRS carriers.
  - CMRS-CLEC contracts for 8YY traffic <u>predate</u> both *CLEC Access Order* and *Sprint Order* by years. They were not a response to, nor an "end-run" around, either order.

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[1] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

[2] *Petitions of Sprint PCS and AT&T Corp. for Declaratory Rulilng Regarding CMRS Access Charges*, 17 FCC Rcd 13192 (2002).

[3] *See Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, Public Notice, 17 FCC Rcd 19046 (2002) (seeking comment, *inter alia*, on the petition of US LEC regarding the routing of CMRS-originated 8YY traffic).

- The FCC has approved joint provision of access pursuant to ATIS's MECAB standards (*see, e.g., Elkhart Tel. Co.*, 11 FCC Rcd 1051 (1995)), including the "single-bill, single-tariff" arrangement. MECAB specifically contemplates joint provision of access and the sharing of access revenues by LECs and CMRS providers. No FCC order has ever stated an intention to overrule these decisions.
- In 1996, the FCC specifically considered LEC-CMRS joint access arrangements, acknowledged their existence, asked parties to describe them, and did not suggest that such arrangements were in any way improper. *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 (1996) ("We also invite CMRS providers and LECs to describe existing arrangements under which CMRS providers are compensated for originating and terminating interstate interexchange traffic that transits a LEC's network.").
- The *Sprint* decision permitted CMRS carriers to collect access charges: "Sprint PCS is correct that neither the Communications Act nor any Commission rule prohibits a CMRS carrier from attempting to collect access charges from an interexchange carrier." *Sprint v. AT&T*, 17 FCC Rcd 13192, 13195 ¶ 7 (2002).
- The *Sprint* decision simply did not address (or disturb the Commission's prior endorsement of) the type of joint provisioning or revenue-sharing arrangements at issue in the current proceeding. In fact, *Sprint* <u>distinguished</u> the situation presented there, where the CMRS carrier had attempted directly to bill the IXC (finding the CMRS carrier needed a contract to do so) from the situation considered in the *LEC-CMRS Interconnection NPRM*, where the CMRS carrier and the IXC were exchanging traffic indirectly through a LEC (tentatively concluding that CMRS carriers should be permitted to collect access charges in the same manner as LECs). *Sprint*, 17 FCC Rcd at 13196 & n.29 ("The Commission's tentative conclusion was limited to situations in which the IXC and the CMRS carrier are indirectly interconnected and exchange traffic through a LEC.") In the LEC-CMRS Interconnection NPRM, the Commission explicitly recognized that LECs and CMRS providers may enter into contracts setting forth the terms for joint arrangements for providing interstate access. *LEC-CMRS Interconnection NPRM*, 11 FCC Rcd at 5074-76, para. 116.
- The Order specifically states that the benchmark applies to 8YY traffic: "We will apply the benchmark to both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic…." ¶ 56.

- The Order did not make clear that the benchmark only applies when the CLEC serves the end-user customer.
  - The benchmark for CLEC access rates was intended to be a <u>comprehensive solution</u> to CLEC access charges: "Given the state of the marketplace for CLEC access services, and our judgment that more serious developments could loom in the future if we do not take action, we are persuaded of the need to revisit these issues in a global fashion…. It

now appears that the best means of proceeding is to … provid[e] a bright-line rule that will facilitate effective enforcement." *CLEC Access Order*, ¶ 25. There is no indication that the Commission was intending to address only a subset of CLEC access scenarios.

- Until mid-December 2003, no party had ever argued in either of these proceedings that references to "end-user customers" in the Order limit the scope of the availability of the benchmark.
- Every reference to "end-user customers" in the Order is for some other purpose. There is no indication that these references were intended to narrow the application of the benchmark as a comprehensive solution to CLEC access rate issues.
  - Paragraph 58 states that CLECs are permitted "to tariff the benchmark rate for their access services only in the markets where they have operations that are actually serving end-user customers on the effective date of these rules."
    - This paragraph solely describes the "new markets rule" – restricting CLECs' use of the glide path down to the ILEC rate (rather than the target ILEC rate itself) in markets where they were already serving customers on the date of the Order. It cannot be read as a broad limit on the scope of the Order.
    - Nowhere does the Order say the CLEC has to be providing service directly to the end user for the benchmark to apply.
    - Verizon Wireless is informed that CLECs in fact generally had end-user customers in MSAs where they also accepted CMRS 8YY traffic. Thus, ¶ 58 specifically <u>permits</u> CLECs to use the benchmark in such markets for CMRS 8YY traffic.
  - In several places, the Order states that the goal of the benchmark is to address CLECs' monopoly power over their end user customers (s*ee, e.g.*, ¶ 38-39). This does not show that the benchmark should not apply to CMRS 8YY traffic, however, since CLECs had the same monopoly power with respect to 8YY traffic from CMRS carriers with whom they had routing arrangements.
  - In discussing 8YY traffic, the NPRM attached to the Order acknowledges that some CLEC 8YY traffic may be generated by aggregators that are not the CLEC's end-user customers. Order ¶ 103. *See also* Order ¶ 100.

- Finding that CLECs were not permitted to tariff the benchmark rate for CMRS-originated 8YY traffic would effectively invalidate these CLECs' benchmark tariffs. The Filed Rate Doctrine precludes the FCC from retroactively invalidating tariffs. 47 USC §§ 203-205.
- Even if the Commission concludes that CLEC-CMRS agreements for the routing of 8YY traffic should not be permitted, the equities strongly favor a prospective-only decision.
  - A decision with retroactive effect would impose a significant burden on the FCC to adjudicate a large number of complicated cases about the propriety of CLEC rates for CMRS 8YY traffic carried in the past. The Order was specifically designed to prevent

this: "It now appears that the best means of proceeding is to restructure and partially deregulate the environment in which CLECs provide access service, providing a bright-line rule that will facilitate effective enforcement…. We are concerned that a flood of unreasonable-rate complaints could overtax the Commission's resources to deal with such proceedings…." ¶ 25.

- IXCs would receive a windfall if they could recover their access charges for 8YY traffic – for which they have charged their own toll-free customers.

In conformance with the Commission's ex parte rules, this document is being filed electronically in the above-referenced dockets. Please direct any questions regarding this filing to the undersigned.

Sincerely yours,

/s/

Kathryn A. Zachem

cc (by email): Commissioner Jonathan Adelstein
Lisa Zaina