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October 27, 2004

Ms. Tamara Preiss, Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

**Re: CC Docket Nos. 01-92 and 95-116
Ex Parte Presentation**

Dear Ms. Preiss:

During the meeting between staff of the Wireline Competition Bureau and representatives of John Staurulakis, Inc. ("JSI") held on September 27, 2004 in which Sprint's Petition for Declaratory Ruling in CC Docket No. 01-92 was discussed, you posed the question, "Why Should a Commercial Mobile Radio Service ("CMRS") carrier meet a rural local exchange carrier ("RLEC") at the RLEC's facilities in the provision of local number portability?" The JSI representatives responded by demonstrating that under existing rules, RLECs do not have an obligation to route calls to other telecommunications carriers' numbers to an out of service area point of interconnection ("POI") that is unilaterally dictated by the other carriers.¹ Even if the Commission determines that RLECs have such an obligation, RLECs should not be required to bear the costs associated with an out of service area POI. To impose such costs on RLECs would be in violation of the Communications Act of 1934, as amended (the "Act"). The following provides additional information to support this response.

¹ The calls being referenced are ones that originate on the RLEC's network and are destined for numbers that appear as local based on the associated RLEC rate center designation by the carrier.

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I. Section 251(a) Obligations Cannot be more Burdensome than Section 251(c) obligations

In the meeting, JSI representatives demonstrated that because Section 251(c)(2) does not require an out of service area POI, the less burdensome Section 251(a) couldn't require an out of service area POI. The following supports this construction of Section 251. The Commission repeatedly has stated:

Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligations on incumbent LECs. Thus, section 251 of the Act 'create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved.' As explained above, section 251(c) does not require incumbent LECs to transport and terminate traffic as part of their obligation to interconnect. Accordingly, it would not be logical to confer a broader meaning to this term as it appears in the less-burdensome section 251(a).²

Applying this construction of Section 251, it is clear that the Act does not obligate RLECs to route telephone exchange calls to an out-of-network POI. Even under the most restrictive, burdensome interconnection duties, Section 251(c)(2) of the Act, does not require an Incumbent Local Exchange Carrier ("ILEC") to establish an out of service area POI. Section 51.305(a) of the Commission's Rules, which implements Section 251(c)(2), states, "[a]n incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network . . . (2) at any technically feasible point within the incumbent LEC's network . . ."³ According to the Commission's findings, Section 251(a), which applies to all telecommunications carriers,

² *In the Matter of Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc., Complainants, v. AT&T Corporation: Memorandum Opinion and Order*, File No. E-97-003 at para. 25 (rel. Mar. 13, 2001) citing *Guam Public Utilities Commission Petition for Declaratory Ruling concerning Sections 3(37) and 251(h) of the Communications Act: Declaratory Ruling and Notice of Proposed Rulemaking*, 12 FCC Rcd 6925, 6937-38 (1997). The Deputy General Counsel of the FCC also declared that section 251 has a three-tiered hierarchy of escalating obligations. See *Worldcom, Inc. v. FCC*, Case No. 00-1002, transcript of oral argument at 22 (DC Cir. Feb 21, 2001) ("Section 251 sets forth a hierarchy of responsibilities that various carriers have and it's sort of an increasing obligation that depends on the status, the marketplace status of the various carriers").

³ 47 C.F.R. § 51.305(a) (*emphasis supplied*).

including ILECs, cannot be more burdensome than 251(c). Consequently, Section 251(a) cannot require a rural telecommunications carrier to route calls to an out of service area POI.

Furthermore, it would be against the rules of statutory construction to interpret Section 251(a) as requiring an out of service area POI. As the Commission has stated, “[i]t is a well-settled rule of statutory construction that the plain language of a statute must not be applied in a manner that produces results that are inconsistent with the clear intent of Congress.”⁴ To interpret Section 251(a) as requiring rural telephone companies to establish a POI outside of their networks would be contrary to Congressional intent when it determined under the Telecommunications Act of 1996 (“1996 Act”) that rural telephone companies should not be under more burdensome interconnection requirements than ILECs subject to Section 251(c) requirements. Under the 1996 Act, an ILEC must provide for interconnection at any technically feasible point within its network.⁵ An ILEC that is considered a “rural telephone company,” however, is exempt from this and other 251(c) requirements.⁶ The exemption terminates when the rural telephone company receives a bona fide request that its state commission determines is not unduly economically burdensome, technically infeasible or inconsistent with statutory universal service requirements.⁷ At no point, however, does the 1996 Act impose more burdensome requirements on rural telephone companies than it does ILECs. Accordingly, to interpret Section 251 as requiring a rural telephone company to honor an out of service area POI designated by a CMRS provider would be inconsistent with the underlying statutory purpose.⁸ Therefore, it is crucial the Commission clarifies that a

⁴ Federal-State Joint Board on Universal Service: Fourteenth Order on Reconsideration, 14 FCC Rcd 20106, para. 22 (1999) (“Fourteenth Order on Recon”).

⁵ See 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a).

⁶ See 47 U.S.C. § 251(f)(1).

⁷ See *Id.*

⁸ Fourteenth Order on Recon at para. 22 & n. 57 citing *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1898) (“it is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers”); see also *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-455 (1989) (“where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope.”); *United States v. American Trucking Associations*, 310 U.S. 534,

carrier's unilateral rating and routing designation for its numbering resources do not obligate an RLEC to honor such designations would be consistent with the statute.⁹

The scenario raised by the Bureau where the scope of 251(a) is bisected also creates an untenable interpretation of the statute. As we understand this scenario, the word "direct" in 251(a) would refer to a general duty, and the word "indirect" in 251(a) would represent a specific duty that allows use of an out of network POI dictated by the requesting carrier. The harmony of Section 251(a) is strained by the very specific interpretation of "indirect" and the general use of "direct." Applying anything other than general requirements for both "direct" and "indirect," in accord with the hierarchy discussed above, would upset statutory construction by creating a nullity in 251(c)(2). This occurs because any method of interconnection, including direct, could be dictated by a requesting carrier under 251(a) thereby avoiding the necessity of 251(c)(2)(A).

The Commission has stated that routing of telephone exchange traffic is clearly addressed under Section 251(c)(2):

Section 251(a) of the Act requires all "telecommunications carriers" to "interconnect directly or indirectly with the facilities and equipment of other

543 (1967) ("even when the plain meaning [of statutory language] d[oes] not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words."). The United States Courts of Appeals and this Commission have followed these precedents. *See, e.g., Environmental Defense Fund v. Environmental Protection Agency*, 82 F.3d 451, 468-469 (D.C. Cir.), *amended on other grounds*, 92 F.3d 1209 (D.C. Cir. 1996) ("because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to Congress's purpose."); *Red River Broadcasting Co. v. Federal Communications Commission*, 98 F.2d 282, 287 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938) ("a well-settled rule of statutory construction enjoins courts not to attribute to the Legislature a construction which leads to absurd results.); *Application of Fox Television Stations, Inc.*, Third Memorandum Opinion and Order, 10 FCC Rcd 8452, 8471 (1995), *recon. denied* 11 FCC Rcd 7773 (1996) (rejecting literal "count-the-shares" methodology for determining whether foreign ownership ceiling in 47 U.S.C. § 310(b)(4) is reached).

⁹ In the context of discussion of Section 251(a), legislative history states, "[n]ew section 251 provides two alternative methods for reaching interconnection agreements." *Pike & Fischer's Communications Regulation*, Senate Bill – New Section 251 – Interconnection. Furthermore, some state commissions have exercised their authority granted under the 1996 Act and suspended intermodal porting obligations of some of the RLECs in their jurisdictions after they found that an out of service area POI is economically burdensome.

telecommunications carriers." Section 251(c)(2) imposes interconnection obligations on incumbent LECs for purposes of transmitting and routing telephone exchange or exchange access traffic.¹⁰

In the Local Competition Order, the Commission interpreted the Section 251(a)(1) duty to "interconnect" as referring "solely to the physical linking of two networks, and not to the exchange of traffic between networks."¹¹ An attempt to apply routing duties, which is the process by which the exchange of traffic is performed on interconnected facilities, to Section 251(a)(1) is not in harmony with the statute nor Commission discussion of routing duties. Routing duties do not lie under the rubric of Section 251(a).

II. The Commission's Intermodal LNP Order Does Not Require an RLEC to Route Calls Outside of Its Network

Interpretation of the Commission's Intermodal LNP Order¹² to affirm any obligation of an RLEC to route calls to a POI outside of the RLEC's network is misapplied. In its Intermodal LNP Order, the Commission cited commenters' concerns that "when wireless carriers establish a point of interconnection outside of a rural LEC's

¹⁰ Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. Sec. 160 for ADSL Infrastructure and Service \ 13 FCC Rcd 24011 (August 7, 1998), at 45.

¹¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: First Report and Order*, 11 FCC Rcd 15499 at para 176 (1996) (Local Competition Order).

¹² *See Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues: Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 95-116; FCC 03-284 (rel. Nov. 10, 2003) ("Intermodal LNP Order").

serving area, a disproportionate burden is placed on rural LECs to transport originating calls to the interconnection points” and that “requiring wireline carriers to port telephone numbers to out-of-service area points of interconnection could create an even bigger burden.”¹³ In finding that these issues were outside the scope of the intermodal LNP proceeding, the Commission stated, “[w]e make no determination, however, with respect to the routing of ported numbers, because the requirements of our LNP rules do not vary depending on how calls to the number will be routed after the port occurs.”¹⁴

Accordingly, in its Intermodal LNP proceeding, the Commission did not require that calls be routed to a POI outside of the RLEC service area. Any attempt to imply that the Commission has declared a requesting carrier may dictate an out of network POI to route LNP traffic is over broad. The Commission’s decision is limited to rating of calls and specifically declined to address the routing of LNP traffic.

III. Nothing in Current Rules Entitle the Requesting Carrier to Choose Between Direct or Indirect Method of Interconnection Based on Its Economic Choice

Nothing in the current rules entitle the requesting carrier to dictate direct or indirect method of interconnection based on its economic choice. In the Local Competition Order, the Commission stated,

Regarding the issue of interconnecting ‘directly or indirectly’ with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under 251(a) differ from the obligations under section 251(c). Unlike section 251(c), which applies to all incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunications carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (*e.g.*, two non-incumbent LECs interconnecting with an incumbent LEC’s network) satisfies a telecommunications carrier’s duty to interconnect pursuant to section 251(a).¹⁵

¹³ Intermodal LNP Order at para. 39 *citing* Comments of the National Exchange Carrier Association and the National Telecommunications Cooperative Association.

¹⁴ *Id.* at para. 40 (*emphasis supplied*).

¹⁵ Local Competition Order at para. 997.

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In its Petition, Sprint seeks to impose its interconnection costs on RLECs by relying on a non-existent right to obtain indirect interconnection with RLECs for routing of RLEC originated calls to Sprint. In the Local Competition Order, the Commission rejected this approach. Nothing in the Act or Commission Rules require RLECs to bear the cost associated with an out of service area POI if a carrier chooses to connect indirectly with an RLEC.

We would be pleased to provide any additional information or answer any questions.

Respectfully submitted,

/s/ John Kuykendall

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