
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter)
)
Developing a Unified Intercarrier) CC Docket No. 01-92
Compensation Regime)
)
T-Mobile et al. Petition for Declaratory)
Ruling Regarding Incumbent LEC)
Wireless Termination Tariffs)

To: The Commission

**OPPOSITION TO MISSOURI SMALL TELEPHONE
COMPANY GROUP PETITION FOR RECONSIDERATION**

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SUMMARY

The Missouri Small Telephone Company Group (“MoSTCG”) ostensibly asks for reconsideration and for the “clarification” that 47 U.S.C. § 252(i) obligates a CMRS provider to make available to any requesting rural ILEC any agreement in its entirety to which the CMRS provider is a party and which has been approved by a state commission pursuant to 47 U.S.C. § 2529(e) upon the same rates, terms, and conditions provided in the agreement. Thus, MoSTCG would have the Commission impose an obligation on CMRS providers of the kind Congress only imposed on LECs and 47 C.F.R. § 51.809 placed only on ILECs.

MoSTCG explicitly requests that the Commission amend 47 C.F.R. § 20.11 to mirror the current requirements imposed on ILECs by rule § 51.809. Hence, MoSTCG has filed a petition for rulemaking masquerading as a petition for reconsideration. The Commission cannot make a substantive change in § 20.11 in this proceeding without violating the notice-and-comment requirements of 5 U.S.C. § 553. It should dismiss the MoSTCG’s “petition for reconsideration” as requesting relief that cannot be granted, or treat it as a petition for rulemaking.

The procedures set forth in 47 U.S.C. § 252, which govern the negotiation and arbitration of interconnection agreements, apply by their terms exclusively to ILECs. Because ILECs are parties to every agreement approved by a state commission under § 252(e)(1), only ILECs are subject to the § 252(i) requirement that a LEC must make available an interconnection, service, or network element provided under a state commission-approved agreement to any other requesting carrier upon the same terms as provided in the agreement. The Commission “reinterpreted” § 252(i) to authorize an “all-or-nothing” rule that forces a requesting carrier to adopt an interconnection agreement in its entirety, taking all rates and terms, and conditions from the adopted agreement. Like § 252(i), the Commission’s all-or-nothing rule applies only to

ILECs, and CMRS providers are not ILECs. To impose § 252(1) obligations on CMRS providers as MoSTCG advocates, the Commission must effectively rewrite the statute.

The Commission is without authority to adopt MoSTCG's proposed ILEC "opt in" rule, because it defies the clearly expressed intent of Congress, as well as the plain language of § 252(i). The only justification offered by MoSTCG for its proposal is that it will provide rural ILECs with "equal rights" or the "same procedures" enjoyed by CMRS providers. However, Congress purposefully chose not to provide ILECs with the same rights it gave other telecommunications carriers. Because that choice is clearly expressed in the statute, the Commission would act unlawfully if it bestowed the same rights on rural ILECs that Congress gave exclusively to their competitors.

To fulfill their obligation to establish reciprocal compensation arrangements with CMRS providers under 47 U.S.C. § 251(b)(5), rural ILECs may initiate the negotiation and arbitration process under new rule § 20.11(f). Hence, there is no need for rural ILECs to have the right to opt in to the state-approved reciprocal compensation agreements of CMRS providers. All that the rule proposed by MoSTCG will accomplish is to allow rural ILECs to circumvent the negotiation and arbitration process that § 20.11(f) now allows them to invoke.

If a rural ILEC opts in to a reciprocal compensation agreement of a wireless carrier under MoSTCG's proposed rule, the rates for the transport and termination of traffic would be based on the cost of service of the rural ILEC that negotiated the agreement. The resulting reciprocal compensation arrangement between the requesting rural ILEC and the wireless carrier would not be cost-based, thus violating the pricing standards of 47 U.S.C. § 252(d).

Until the Commission adopted new rule § 20.11(f), it was recognized that CMRS providers did not have an affirmative duty to enter into agreements under 47 U.S.C. § 252. If the

Commission adopts MoSTCG's proposed § 20.11(g), CMRS providers will not only have the duty to enter into agreements with ILECs that are negotiated or arbitrated under § 252, they will be obliged to enter into agreements with ILECS that were neither negotiated nor arbitrated. To impose that obligation on CMRS providers would contravene the express terms of § 252(i) and deprive CMRS providers of procedural rights given them by Congress.

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**OPPOSITION TO MISSOURI SMALL TELEPHONE
COMPANY GROUP PETITION FOR RECONSIDERATION**

Smith Bagley, Inc., Midwest Wireless Communications, L.L.C., and Easterbrooke Cellular Corp., by their attorneys and pursuant to § 1.429(f) of the Commission's Rules ("Rules"), hereby jointly oppose the petition for reconsideration ("Petition") filed by the Missouri Small Telephone Company Group ("MoSTCG") with respect to the Commission's Declaratory Ruling and Report and Order released February 24, 2005 in the above-captioned proceeding. *See Developing a Unified Intercarrier Compensation Regime*, 20 F.C.C.R. 4855 (2005) ("*Declaratory Ruling*"). In opposition thereto, the following is respectfully submitted:

INTRODUCTION

Departing from the text of the statute, the Commission held for the first time that an incumbent local exchange carrier ("ILEC") may request interconnection from a commercial mobile radio service ("CMRS") provider and invoke the negotiation and arbitration procedures set forth in § 252 of the Communications Act of 1934, as amended ("Act") by the Telecommunications Act of 1996 ("1996 Act"). *See Declaratory Ruling*, 20 F.C.C.R. at 4864-

65. MoSTCG now wants the Commission to depart specifically from the text of § 252(i) of the Act, which states:

A local exchange carrier ["LEC"] shall make available any interconnection, service, or network element provided under an agreement approved under this [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.¹

MoSTCG asks the Commission to "clarify" that § 252(i) obligates a CMRS provider to "make available without unreasonable delay to any requesting *rural* ILEC any agreement in its entirety to which the CMRS provider is a party that is approved by a state commission pursuant to [§] 252 of the Act upon the same rates, terms, and conditions as those provided in the agreement." Petition, at 4 (¶ 7) (emphasis added).² In other words, MoSTCG would have the Commission impose an obligation on CMRS providers of the kind Congress only imposed on ILECs and § 51.809(a) of the Rules placed only on ILECs. *See* 47 C.F.R. § 51.809(a).

MoSTCG ostensibly asks for reconsideration and for a "clarification." However, MoSTCG also admits that the Commission has not considered whether ILECs have a right to "opt in" to state-approved agreements with wireless carriers. *See* Petition, at 2-3 (¶ 4). That particular issue is tangential to the matter of intercarrier compensation generally and to the issues specifically addressed in the *Declaratory Ruling*. Indeed, MoSTCG explicitly requests that the

¹ 47 U.S.C. § 252(i). Despite its language, § 252(i) does not apply to LECs, because only ILECs can make available an interconnection, service or network element provided under an agreement adopted by negotiation pursuant to § 252(a), or arbitration under § 252(b), and approved by a state commission under § 252(e). The Commission correctly construed § 252(i) to apply only to ILECs. *See* 47 C.F.R. § 51.809(a).

² MoSTCG is not consistent with respect to the exact "clarification" or rule "modification" it seeks. Its proposed new rule § 20.11(g) would allow a requesting rural ILEC to "opt in" to any state-approved agreement in which a CMRS provider is a party. *See* Petition, at 4 (¶ 6). However, MoSTCG also requests the Commission "to make clear that rural ILECs may opt in to wireless carrier agreements with another small rural ILEC in the same state." *Id.* at 5. Thus, it is unclear whether MoSTCG's opt-in right would apply to a CMRS provider's agreements with any ILEC or with just "another small rural ILEC."

Commission amend § 20.11 of the Rules by adding three new subsections which mirror the current requirements imposed on ILECs by § 51.809. *Compare* Petition, at 4 (¶ 7) with 47 C.F.R. § 51.809. Thus, MoSTCG has filed a petition for rulemaking masquerading as a petition for reconsideration.

ARGUMENT

I. THE COMMISSION CAN CONSIDER THE PROPOSED RULE CHANGE ONLY IN A NOTICE-AND-COMMENT RULEMAKING

The Commission cannot make a substantive change in § 20.11 at this stage of this proceeding without violating the notice-and-comment requirements of the Administrative Procedure Act (“APA”). The APA provides that when an agency proposes to promulgate a legislative (or substantive) rule, it must give notice to interested parties and allow them an opportunity to comment on the proposed rule. *See* 5 U.S.C. § 553(b)-(c).³ Failure to follow the notice-and-comment procedures of the APA is grounds for invalidating the rule. *See National Organization of Veterans’ Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001).

An APA rulemaking is required when an agency adopts “a new position inconsistent” with an existing regulation, or effects “a substantive change in the regulation.” *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995). Certainly, “new rules that work substantive changes in prior regulations are subject to the APA’s procedures.” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). It has become a “maxim of administrative law” that “an amendment to a legislative rule must itself be legislative.” *Sprint*, 315 F.3d at 374 (quoting

³ The APA expressly states that the notice-and-comment requirements do not apply to “interpretive rules.” *See* 5 U.S.C. § 553(b)(A). A rule that may be promulgated only after compliance with the rulemaking requirements of APA § 553 is a “substantive rule” in APA terms, *see id.* § 553(d), or a “legislative rule” in judicial parlance. *See, e.g., United States Telecom Ass’n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005) (“*USTA*”).

National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992)). Current § 20.11 of the Rules was adopted in a notice-and-comment rulemaking and, therefore, is a legislative rule.⁴ Because they amend a legislative rule, the new subsections (g), (h) and (i) proposed by MoSTCG would constitute legislative rules. See *USTA*, 400 F.2d at 38. For the proposed rule changes to be valid, the Commission must satisfy the notice-and-comment requirements of the APA. See *id.*⁵

As of this date, only notice of the filing of five petitions for reconsideration of the *Ruling* has been published in the Federal Register. See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 70 Fed. Reg. 34766-02 (2005). Notice has not been given that MoSTCG is proposing a substantive “modification” of § 20.11 or that the Commission has the proposed rule change under consideration. In particular, no notice has been published in the Federal Register that includes, *inter alia*, “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). Absent compliance with the notice-and-comment requirements of the APA, the Commission cannot “modify” § 20.11 as proposed by MoSTCG.⁶ The Commission should dismiss the Petition as requesting relief that

⁴ Section 20.11 was adopted by the Commission’s Second Report and Order in GN Docket No. 93-252. See *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, 1520-21, corrected, 9 FCC Rcd 2156 (1994).

⁵ The APA requires that: (1) “[g]eneral notice of the proposed rule making shall be published in the Federal Register,” 5 U.S.C. § 553(b); (2) after Federal Register notice has been given, the Commission “shall give interested persons an opportunity to participate in the rule making through submission[s],” *id.* § 553(c); (3) “[a]fter consideration of the relevant matters presented,” the Commission “shall incorporate in the rules adopted a concise general statement of their basis and purpose,” *id.*; and (4) a “substantive rule” shall be published “not less than 30 days before its effective date.” *Id.* § 553(d).

⁶ See *Sprint*, 315 F.3d at 377 (case remanded for Commission’s “utter failure” to follow notice-and-comment procedures); *Syncor International Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997) (case remanded with instructions to vacate rule adopted without notice and comment);

cannot be granted, or treat it as a petition for rulemaking under § 1.401 of the Rules and follow the procedures required by the APA.

II. THE COMMISSION LACKS THE STATUTORY AUTHORITY TO IMPOSE § 252(i) REQUIREMENTS ON NON-ILECS

A. Only ILECs Are Subject To § 252(i) Of The Act And § 51.809(a) Of The Rules

The Act “places certain duties and obligations on various classes of telecommunication[s] providers.” *Verizon North Inc. v. Strand*, 367 F.3d 577, 581 (6th Cir. 2004). For example, § 251 of the Act creates “a three-tiered hierarchy of escalating obligations based on the type of carrier involved.” *E.g., Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd 5726, 5737 (2001), *petition for review denied*, *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003). In the Commission’s view, § 251(a) of the Act imposes “relatively limited obligations” on all telecommunications carriers; § 251(b) imposes “more extensive duties” on LECs; and § 251(c) imposes “most extensive duties” on ILECs. *Guam PUC*, 12 FCC Rcd 6925, 6937 (1997). *See Total Telecommunications*, 16 FCC Rcd at 5737.

Among the most extensive “[a]dditional obligations” imposed on ILECs by § 251(c) are the duties to permit a requesting telecommunications carrier to: (1) interconnect its facilities with the ILEC’s network pursuant to an agreement that meets the requirements of § 252 of the Act, *see* 47 U.S.C. § 251(c)(2); (2) lease unbundled elements of the ILEC’s network pursuant to an agreement that meets the requirements of § 252, *see id.* § 251(c)(3); and (3) purchase telecommunications services at wholesale prices for resale, *see id.* § 251(c)(4). As part of these obligations, ILECs have the “duty to negotiate in good faith” in accordance with § 252 the

United States Tel. Ass’n v. FCC, 28 F.3d 1232, 1236 (D.C. Cir. 1994) (rule set aside for violating notice-and-comment requirements).

particular terms and conditions of agreements to fulfill their duties to provide interconnection, services, or network elements under § 251(c)(2)-(4). *See id.* § 251(c)(1).

Under its plain language, § 251(c) “only extends to ILECs.” *Atlas Telephone Co. v. Oklahoma Corp. Comm’n*, 400 F.3d 1256, 1265 (10th Cir. 2005). *See Implementation of the Local Competition Provisions in the telecommunications Act of 1996*, 11 FCC Rcd 15499, 15994 (1996) (“*Local Competition Order*”).⁷ Thus, the imposition of § 251(c) duties on a carrier that is not an ILEC “would contravene the carefully-calibrated regulatory regime crafted by Congress.” *Guam PUC*, 12 FCC Rcd at 6937-38. In particular, to make CMRS providers subject to such duties “contravenes the express terms of the statute, identifying only ILECs as entities bearing additional burdens under § 251(c).” *Atlas Telephone*, 400 F.3d at 1265.

Since only ILECs must negotiate in accordance with § 252, it follows that only ILECs are subject to § 252. Indeed, in *Central Texas Telephone Coop., Inc. v. FCC*, 402 F.3d 205, 215 (D.C. Cir. 2005), the court recognized that “the procedures set forth in § 252 of the Act, which govern the negotiation and arbitration of interconnection agreements, apply by their terms exclusively to incumbent LECs.” The process is triggered only when an ILEC receives a request for interconnection, services, or network elements pursuant to § 251. *See* 47 U.S.C. § 252(a)(1).⁸

⁷ *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435, 15450 (2001); *Computer III Further Remand Proceedings: BOC Provision of Enhanced Services*, 14 FCC Rcd 4289, 4315 (1999); *Telephone Number Portability*, 12 FCC Rcd 7236, 7304 (1997); *Implementation of the Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, 12 FCC Rcd 5470, 5472 n.9 (1997); *Implementation of the Non-Accounting Safeguards of Sections 272 and 273 of the Communications Act of 1934*, 11 FCC Rcd 21905, 22055 (1996); *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 11 FCC Rcd 18959, 18989 n.121 (1996); *Local Competition Order*, 11 FCC Rcd at 15994; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 14171, 14228 (1996) (“*Local Competition NPRM*”).

⁸ After receiving a request for interconnection, services, or network elements, an ILEC may negotiate and enter into a binding agreement with the requesting telecommunications carrier without regard to the standards set forth in § 251(c) and (b), but subject to state commission approval. *See* 47 U.S.C. §

Any interconnection agreement adopted by negotiation must be submitted for approval to the state commission. *See* 47 U.S.C. § 252(e)(1). Copies of all agreements approved by a state commission are made available for public inspection. *See id.* § 252(h). Because ILECs are parties to every agreement approved by a state commission under § 252(e)(1), only ILECs are subject to the § 252(i) requirement that a LEC must make available an interconnection, service, or network element provided under a state commission-approved agreement to any other requesting carrier upon the same terms as provided in the agreement.

The Commission originally implemented § 252(i) by adopting a “pick-and-choose” rule which allowed requesting carriers the right to select among the individual provisions of state-approved interconnection agreements without being required to accept the terms and conditions of the entire agreement. *See Local Competition Order*, 11 FCC Rcd at 16137-38, 16235. The Supreme Court upheld the pick-and-choose rule finding that “it track[ed] the pertinent statutory language almost exactly,” and that the Commission’s interpretation of § 252(i) was the “most readily apparent.” *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 396 (1999). Last year, the Commission “reinterpreted” the same statutory language to authorize an “all-or-nothing” rule that forces a requesting carrier to adopt an interconnection agreement in its entirety, taking all rates and terms, and conditions from the adopted agreement. *See Review of the § 251 Unbundling Obligations of LECs*, 19 FCC Rcd 13494, 13495 (2004). However, even under the Commission’s “more holistic and reasonable reading of the statute,” *id.* at 13498, the language of the new “all-or-nothing” rule makes it applicable only to ILECs.

It is one thing for the Commission to “reinterpret” § 252(i). It is quite another thing for

252(a)(1). During the course of these voluntary negotiations, either party may request the state commission to mediate. *See id.* § 252(a)(2). Either party may petition the state commission to arbitrate “any open issues” during the period from the 135th to the 160th day after the ILEC received the request for negotiation. *See id.* § 252(b)(1).

the Commission to effectively rewrite § 252(i). And that is what the Commission would do if it adopts MoSTCG's approach. The statute and the Commission's current rule apply to ILECs and CMRS providers are not ILECs.⁹

B. The Adoption Of The Proposed Rule Change
Would Be Contrary To The Intent Of Congress

The Commission can only issue rules on subjects over which it has been delegated authority by Congress. *American Library Ass'n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005). Even if a rule applies to a subject over which the Commission has been delegated some authority, the rule would nevertheless exceed that authority if it is "contrary to clear congressional intent" or "utterly unreasonable and thus impermissible." *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) and *Aid Ass'n for Lutherans v. United States Postal Serv.*, 321 F.3d 1166, 1174 (D.C. Cir. 2003)). In this case, the Commission is without authority to adopt MoSTCG's proposed rule, because it defies the clearly expressed intent of Congress, as well as the plain language of § 252(i) of the Act.

The only justification offered by MoSTCG for its proposed "clarification" is that it will provide rural ILECs with "equal rights" or the "same procedures" under the Act as enjoyed by CMRS providers. Petition, at 3 (¶¶ 4, 5). However, as the Supreme Court has recognized, the 1996 Act did not put ILECs on an equal footing with other categories of telecommunications carriers. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 533-34 (2002) (the 1996 Act "proceeds on the understanding that incumbent monopolists and contending competitors are

⁹Section 3 of the Act defines the term "local exchange carrier" to exclude an entity providing CMRS under § 332, "except to the extent that the Commission finds such service should be included in the definition of such term." 47 U.S.C. § 153(26). The Commission has never made that finding. And when it implemented § 251 of the Act, the Commission held that CMRS providers would not be treated as ILECs. *See Local Competition Order*, 11 FCC Rcd at 15996. Furthermore, because CMRS providers do not fall within the definition of an ILEC under § 251(h)(1), the Commission found that they are not subject to the duties and obligations imposed on ILECs. *See id.*

unequal”). To the contrary, Congress intended to reorganize the local retail telephone markets by making ILECs’ monopolies “vulnerable to interlopers” by giving “aspiring competitors every possible incentive to enter [those] markets, short of confiscating the incumbent’s property.” *Verizon*, 535 U.S. at 489. Therefore, § 251 of the Act establishes a “three-tier system of obligations,” *Atlas Telephone*, 400 F.3d at 1262, that plainly distinguishes ILECs from the other telecommunications carriers whose entry into the local market was facilitated by the 1996 Act. *See City of Dallas, Tex. v. FCC*, 165 F.3d 341, 354 (5th Cir. 1999). One such distinction was that ILECs, and only ILECs, are required to negotiate and arbitrate agreements with competing local carriers in accordance with § 252 of the Act. *See Central Texas*, 402 F.3d at 215.

“Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice.” *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Thus, it was for Congress to decide how it would allocate the rights and obligations it created by §§ 251 and 252 among the three types of carriers in order to achieve the opening of the local telecommunications market to competition. The legislative choice was made to give ILECs the fewest rights and the “most extensive duties.” *Guam PUC*, 12 FCC Rcd at 6937. In short, Congress chose to sacrifice the interests of ILECs in favor of the competing interests of other telecommunications carriers. The text of §§ 251 and 252, and particularly § 252(i), as well as the legislative history, unambiguously indicate an intent that only ILECs be saddled with the obligation of making any interconnection, service, or network element available to any requesting telecommunications carrier under the same terms as under a state-approved agreement.¹⁰

¹⁰ “New section 252(i) requires a [LEC] to make available on the same terms and conditions to any telecommunications carrier that requests it any interconnection, service, or network element that the [LEC] provides to any other party under an approved agreement or statement.” H.R. Rep. No. 104-458,

If it had intended to “provide the rural ILECs with equal rights as the CMRS providers,” Petition, at 3 (¶ 4), Congress would not have distinguished between the three types of telecommunications carriers in §§ 251 and 252, and would have imposed the same obligations, and bestowed the corresponding rights, on all telecommunications carriers.¹¹ Congress purposefully chose not to provide ILECs with the same rights it gave other telecommunications carriers. Because that choice is clearly expressed in the statute, the Commission would act unlawfully if it bestowed the same rights on rural ILECs that Congress gave exclusively to other telecommunications carriers under §§ 251 and 252. In other words, the Commission would “run roughshod over the compromise between interest groups that enabled the [1996 Act] to be passed in the first place.” *Wisconsin Bell v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003).

III. THE PROPOSED RULE IS UNNECESSARY AND UNWORKABLE

The primary purpose of § 252(i) is to prevent ILECs from discriminating against less-favored competitors. See *Review of the § 251 Unbundling Obligations of LECs*, 19 FCC Rcd at 13504-05; *Local Competition Order*, 11 FCC Rcd at 16139. There has been no finding that CMRS providers have engaged in any discriminatory practices, or have the ability to discriminate against less-favored ILECs. And there is no evidence that Congress was concerned that wireless carriers may discriminate against ILECs.

To fulfill their obligation to establish reciprocal compensation arrangements with CMRS providers, see 47 U.S.C. § 251(b)(5), rural ILECs may initiate the negotiation and arbitration

at 126 (1996).

¹¹ Congress chose to impose additional obligations on ILECs under §§ 251(c) and 252, and did not delegate authority to the Commission to saddle CMRS providers with those obligations. The Commission cannot presume such a delegation of authority because Congress did not expressly withhold that power. See *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004); *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796, 805-06 (D.C. Cir. 2002).

process under new § 20.11(f) of the Rules. *See* 47 C.F.R. § 20.11(f). Hence, there is no apparent need for rural ILECs to have the right to “opt in” to the state-approved reciprocal compensation agreements of CMRS providers. All that the rule proposed by MoSTCG will accomplish is to allow rural ILECs to circumvent the negotiation and arbitration process that § 20.11(f) of the Rules now allows them to invoke.

It is not at all clear how MoSTCG’s proposed ILEC “opt in” rule would work. And it is difficult to see how it “makes sense to allow the rural ILEC to opt in one of the CMRS provider’s existing agreements with another rural ILEC.” *Petition*, at 3 (¶ 4).

Under §252(i), any requesting carrier may avail itself of the terms and conditions negotiated by another carrier for the same “interconnection, service, or network element” once the agreement is approved by a state commission. *See* 47 U.S.C. § 252(i); *Local Competition Order*, 11 FCC Rcd at 16140. Under MoSTCG’s proposed rule, a rural ILEC could opt in to a state-approved agreement under which a wireless carrier obtains “interconnection, service, or network element” from another rural ILEC. By virtue of the all-or-nothing rule, the requesting rural ILEC would likely be adopting an agreement under which another rural ILEC is providing interconnection with its network, transport and termination services, and/or access to its network elements. Effectively stepping into the shoes of the wireless carrier, the requesting rural ILEC would end up taking services from another rural ILEC.

Under the terms of MoSTCG’s proposed § 20.11(g), a CMRS provider would have to make available to a requesting rural ILEC “any agreement in its entirety” that has been approved by a state commission, including agreements with non-rural ILECs. *See* *Petition*, at 4 (¶ 7). Typically, CMRS providers interconnect with a Bell Operating Company (“BOC”) tandem. *See* *Ruling*, 20 FCC Rcd at 4857. Clearly, a rural ILEC would not opt in to an interconnection

agreement between a CMRS provider and a BOC under the all-or-nothing rule, since it would also have to interconnect at the BOC tandem under all the rates, terms, and conditions of the adopted agreement.

MoSTCG's proposed rule would not work even if rural ILECs only opted in to the "existing reciprocal compensation or traffic termination agreements" of wireless carriers. Petition, at 1 (¶ 2). The terms and conditions for such state-approved agreements must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls originating on the other carrier's facilities. 47 U.S.C. § 252(d)(2)(A)(i). Unless the agreement establishes a bill-and-keep arrangement, rates are based generally on the ILEC's "forward-looking costs for transport and termination of traffic." *Local Competition Order*, 11 FCC Rcd at 16040. See 47 C.F.R. §§ 51.705-51.711. If a rural ILEC opted in to a wireless carrier's reciprocal compensation agreement, the rates would be based on the cost of service of the rural ILEC that negotiated the agreement. See *Local Competition Order*, 11 FCC Rcd at 16140. Obviously, the resulting reciprocal compensation arrangement between the requesting rural ILEC and the wireless carrier would not be cost-based in violation of the § 252(d)(2) pricing standards.

CONCLUSION

Until the Commission adopted the *Declaratory Ruling*, it was recognized that CMRS providers did not have an affirmative duty to enter into agreements under § 252. See *Global NAPs, Inc. v. Verizon New England, Inc.*, 396 F.3d 16, 27 (1st Cir. 2005); *Local Competition Order*, 11 FCC Rcd at 16131. New § 20.11(f) of the Rules imposed that affirmative duty on CMRS providers. See *Declaratory Ruling*, 20 FCC Rcd at 4867. If the Commission adopts MoSTCG's proposed § 20.11(g), CMRS providers will not only have the duty to enter into

agreements with ILECs that are negotiated or arbitrated under § 252, they will be obliged to enter into agreements with ILECS that were neither negotiated nor arbitrated. To impose that obligation on CMRS providers in this proceeding would violate the APA, exceed the Commission's delegated authority, contravene the express terms of § 252(i), and deprive CMRS providers of procedural rights given them by Congress.

For all the foregoing reasons, Smith Bagley, Inc., Midwest Wireless Communications, L.L.C., and Easterbrooke Cellular Corp. jointly request that the Commission dismiss or deny the Petition.

Respectfully submitted,

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June 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPPOSITION TO MISSOURI SMALL TELEPHONE COMPANY GROUP PETITION FOR RECSIDERATION was served by first class mail, postage prepaid, this 30th day of June, 2005, upon the following:

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