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DATE: March 8, 2005

TO: Division of Commission Clerk and Administrative Services

FROM: Paul V. Vickery, Engineering Specialist IV, Division of Competitive Markets & Enforcement

RE: Docket No. 050125-TP

Please include the attached email from Tom Mccabe of TDS Telecom and the memorandum from the Law Offices of Bennet & Bennet, PLLC, in the docket file. If you have any questions, I can be reached at 413-6592

cc: Jason Rojas, Office of the General Counsel

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Paul Vickery

From: David Dowds
Sent: Thursday, March 03, 2005 8:30 AM
To: Laura King; Sally Simmons; Paul Vickery
Subject: RE: BellSouth Transit Tariff

OK w/me

-----Original Message-----
From: Laura King
Sent: Thursday, March 03, 2005 8:25 AM
To: David Dowds; Sally Simmons; Paul Vickery
Subject: RE: BellSouth Transit Tariff

What about Tuesday at 9:00 in 260A?

-----Original Message-----
From: David Dowds
Sent: Wednesday, March 02, 2005 10:34 AM
To: Sally Simmons; Laura King
Subject: FW: BellSouth Transit Tariff

Thoughts? Want to discuss?
-----Original Message-----
From: Tom Mccabe
Sent: Wednesday, March 02, 2005 10:30 AM
To: David Dowds
Subject: BellSouth Transit Tariff

David:

As you may be aware, the FCC recently issued its decision regarding LEC terminating tariffs for CMRS traffic. Although the FCC found that the tariffs were not unlawful, they did find that on a going forward basis they would be unlawful, and that negotiation is the appropriate mechanism.

This is exactly the problem we are facing with BellSouth's transit traffic tariff. Although the FCC ruling was specific to wireless termination tariffs, I see little difference. A week ago Monday, the small LECs met with BellSouth to discuss their proposed contract they provided us regarding transit fees. Needless to say we object to both the type of traffic include (ISP bound traffic), and the rate. In our efforts to discuss an appropriate rate (although they did not say they would not be willing to change the
rate) they stated that they see little reason to negotiate given that they have a approved tariff.

Although BellSouth's tariff letter indicated that the tariff would be used as a default for those companies electing not to negotiate an agreement, BellSouth has indicated to us that they would begin billing the tariff rate effective with the March bill cycle. Based on the FCC ruling it would appear that Bell's tariff violates the Acts requirement to negotiate in good faith.

I have attached a summary of the FCC wireless tariff decision. I would appreciate any thoughts? Thanks

BENNET & BENNET PLLC

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MEMORANDUM

TO: **Bennet & Bennet Clients**

FROM: **Carri Bennet, cbennet@bennetlaw.com**
Ken Johnson, kjohnson@bennetlaw.com

DATE: **March 1, 2005**

FCC TERMINATES WIRELESS TERMINATION TARIFFS; CHANGES LEC CMRS COMPENSATION RULES

The Federal Communications Commission (FCC or Commission) has released a Declaratory Ruling and Report and Order (Order) concluding that, while wireless termination tariffs filed by local exchange carriers (LECs) are not unlawful, they should be discontinued in favor of mutual negotiations in the future.[1] The FCC ruling was spurred by a petition for declaratory ruling jointly filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners asking the Commission to reaffirm "that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic." The wireless carriers' petition was spurred by a growing number of small, rural LECs filing state tariffs seeking compensation for terminating wireless calls in the absence of a negotiated interconnection agreement.

BACKGROUND

Prior to the Telecommunications Act of 1996 (1996 Act), the Commission established rules governing LEC interconnection with commercial mobile radio service (CMRS) providers. Pursuant to its authority under Section 201(a) of the Communications Act of 1934 (Act), the Commission adopted rules requiring mutual compensation for the exchange of traffic between LECs and CMRS providers codified, for the most part, in Section 20.11 of the FCC's rules. In particular, the rules required the originating carrier, whether LEC or CMRS provider, to pay reasonable compensation to the terminating carrier in connection with traffic that terminated on the latter's network facilities. Generally, CMRS carriers paid a premium to access LEC bottleneck facilities in the monopoly era.

[1] *In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, FCC 05-42 (February 24, 2005) (Order).

After the passage of the 1996 Act, in the *Local Competition First Report and Order*, the Commission determined that Section 251(b)(5) obligated LECs to establish reciprocal compensation arrangements for the exchange of intraMTA traffic between LECs and CMRS providers. The Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) was subject to reciprocal compensation obligations under Section 251(b)(5), rather than interstate or intrastate access charges. Although Section 251(b)(5) and the Commission's reciprocal compensation rules reference an "arrangement" between LECs and other telecommunications carriers, including CMRS providers, the rules do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other. Because LECs cannot obligate CMRS carriers to negotiate interconnection agreements pursuant to Section 251(b) since the 251(b) requirements apply only to LECS, carrier disputes have arisen as to whether and how reciprocal compensation payment obligations should be resolved in the absence of an agreement or other arrangement between the originating and terminating carriers.

As a result of these disputes, LECs have sought assistance from state commissions, requesting that they be compensated for terminating this traffic. Some LECs have asked state commissions to require the Bell Operating Companies (BOCs) to continue paying for termination. For instance, in Tennessee, a number of small LECs filed a petition asking the Tennessee Regulatory Authority to direct BellSouth to maintain all existing settlement arrangements and mechanisms currently in effect. More recently, a LEC in Iowa threatened to block wireless originated traffic routed through a Qwest tandem unless Qwest agreed to pay the LEC tariffed access charges. The state commission in Iowa granted injunctive relief preventing the LEC from blocking the traffic at issue.

Although settlements have been reached in a few cases, many disputes remain unresolved. Hearing about these disputes, many LECs have filed wireless termination tariffs with state commissions in an attempt to be compensated for traffic that originates with CMRS providers. Typically, these tariffs apply only in the situation where there is no interconnection agreement or reciprocal compensation arrangement between the parties. On September 6, 2002, T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners jointly filed a petition for declaratory ruling, which the Commission incorporated into its ongoing intercarrier compensation proceeding. The petitioners and other CMRS providers filing comments on the petition claimed that, by filing these tariffs, the incumbent LECs were acting in bad faith by attempting to preempt the negotiation process contemplated by the 1996 Act and the Commission's rules. The incumbent LECs responded that, in the absence of an agreement or other arrangement, wireless termination tariffs are the only mechanism by which they can obtain compensation for terminating this traffic.

DISCUSSION

T-Mobile and the other wireless petitioners argued that wireless termination tariffs were unlawful since they 1) bypass the negotiation and arbitration procedures established in Sections 251 and 252 of the Act; 2) do not provide for reciprocal compensation to CMRS providers; and 3) contain rates that do not comport with the Total Element Long-Run Incremental Cost

(TELRIC) pricing methodology as required by the Commission's rules. The FCC rejected the petition outright without specifically addressing the petitioner's distinct arguments, finding that the Commission's existing rules do not explicitly preclude tariffed compensation arrangements. The FCC also found that incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. However, on a going forward basis, the FCC amended its rules to make clear the Commission's preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff. In addition, the FCC amended its rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act. The new rules go into effect 30 days after the Order is published in the *Federal Register*, which has not yet occurred.

TARIFFS DEEMED LAWFUL

The FCC's finding that tariffed arrangements were permitted under the existing rules was based on the fact that neither the Commission's reciprocal compensation rules, nor the Section 20.11 mutual compensation rules adopted prior to the 1996 Act, specified the types of arrangements that triggered a compensation obligation. Because the existing compensation rules were silent as to the type of arrangement necessary to trigger payment obligations, the FCC concluded that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff. The FCC rejected arguments that its prior decisions required a different result and thus simply a "reaffirmation" that wireless termination tariffs were unlawful. The wireless petitioners argued that, in 1987 and 1989, the Commission found that an incumbent LEC engages in bad faith when it files unilaterally a CMRS interconnection tariff, and they argued that the Commission should reaffirm that holding in this proceeding. The FCC acknowledged these early decisions, but noted that they were adopted by the Commission prior to the 1996 Act, finding that these early decisions were not dispositive as to what types of arrangements are necessary to trigger payment obligations under existing reciprocal compensation rules.

The FCC noted that wireless termination tariffs did not prevent CMRS providers from requesting reciprocal or mutual compensation at the rates required by the Commission's rules. Accordingly, previously-filed wireless termination tariffs do not violate a CMRS provider's rights to reciprocal or mutual compensation under Section 251(b)(5) and Section 20.11 of the Commission's rules. Thus, CMRS carriers are liable for charges imposed under any such tariffs filed before the effective date of this Order.

TARIFFS UNLAWFUL IN THE FUTURE

Although the Commission denied the CMRS providers' requested ruling under the current rules, it clearly had a policy problem with unilateral wireless termination tariffs. Since the FCC determined that it had no legal basis to eliminate past-filed wireless termination tariffs, it could only eliminate them on a prospective basis by modifying its rules. Stressing a clear "preference for contractual arrangements for non-access CMRS traffic," the Commission ruled that negotiated agreements between carriers are more consistent with the pro-competitive process

and policies reflected in the 1996 Act. Accordingly, the FCC amended Section 20.11 of its rules to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff. Therefore, such existing wireless termination tariffs shall no longer apply upon the effective date of these new rules (30 days after publication in the *Federal Register*, which has not yet occurred).

The FCC justified its rule change pursuant to its plenary authority under Sections 201 and 332 of the Act, the latter of which states 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 . . ." Because of its decision to prohibit the use of tariffs to impose termination charges on non-access CMRS traffic, the Commission deemed it necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today. Accordingly, the FCC also amended Section 20.11 of its rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act. A CMRS provider receiving such a request must negotiate in good faith and must, if requested, submit to arbitration by the proper state commission.

CONCLUSION

The rural incumbent LECs that filed wireless termination tariffs were able to lawfully receive a windfall from CMRS carriers that would not negotiate interconnection arrangements. It was generally the large, nationwide CMRS carriers that refused to negotiate interconnection arrangements with hosts of rural LECs. Now, in accordance with the FCC's new rules, they will be compelled to negotiate.

If you have any questions about this Order, or your interconnection obligations in general, please contact us.

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