BUTLER | SNOW

August 1, 2012

VIA HAND DELIVERY

Hon. Kenneth C. Hill, Chairman
c/o Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: ***Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration under the Telecommunications Act; etc.***
Docket No. 03-00585

Dear Chairman Hill:

Pursuant to the Authority's June 14, 2012, *Notice of Filing Comments*, enclosed please find the original plus thirteen (13) copies of *Joint Comments of CMRS Providers*. An extra copy is also attached to be filed-stamped for our records.

Should you have any questions concerning this filing, or require additional information, please do not hesitate to let me know.

Very truly yours,

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC

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clw
Enclosures

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration under the Telecommunications Act; Petition for Arbitration of BellSouth Mobility, LLC, BellSouth Personal Communications, LLC and Chattanooga MSA Limited Partnership, collectively dba Cingular Wireless; Petition for Arbitration of AT&T Wireless PCS, LLC dba AT&T Wireless; Petition for Arbitration of T-Mobile, USA, Inc., Petition for Arbitration of Sprint Spectrum LP dba Sprint PCS*

Docket No. 03-00585

COMMENTS OF JOINT CMRS PROVIDERS

Pursuant to the Tennessee Regulatory Authority's (the "Authority") Notice of Filing Comments dated June 14, 2012 (the "Notice"), the Joint CMRS Providers[1] respectfully submit the following comments.

I. INTRODUCTION

In brief, there is no need for this docket to remain open or for any further substantive action by the Authority. The only substantive outstanding issue in this proceeding since the issuance of the Authority's Order of Arbitration Award in January 2006[2] has been the establishment of an appropriate, permanent compensation rate for the termination of intraMTA traffic exchanged between the parties. That issue was critical both in terms of how the parties would compensate one another on a prospective basis and how the parties would "true up" the differences, if any, between the interim rate established in the *Arbitration Order*

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[1] The Joint CMRS providers are Cellco Partnership d/b/a Verizon Wireless; T-Mobile, USA, Inc. dba T-Mobile; and Sprint Spectrum LP d/b/a Sprint PCS. Since this docket was filed, Cingular Wireless and AT&T Wireless have merged and now do business as AT&T Mobility. AT&T Mobility filed separate comments on July 23, 2012.

[2] *In re Petition for Arbitration of CELLCO Partnership dba Verizon Wireless, et al.*, Docket No. 03-0585, *Order of Arbitration Award* (January 12, 2006) (the "*Arbitration Order*").

and that permanent rate.[3] However, the Federal Communications Commission's ("FCC") recent *Connect America Fund Order* establishes bill and keep as the appropriate form of compensation for traffic to or from a CMRS provider that is otherwise subject to reciprocal compensation.[4] Thus, the sole outstanding critical issue has been resolved.[5]

At most, all that is required of the Authority at this time is to enter an order closing the docket confirming, consistent with the *Connect America Fund Order*, that bill and keep shall be the permanent form of compensation applicable to all intraMTA traffic exchanged among CMRS Providers and RLECs on a prospective basis and for purposes of true-up. Alternatively, the Authority could simply close the docket.

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[3] The interim rate established in the *Arbitration Order* was the reciprocal compensation rate set for BellSouth in the Authority's Permanent Pricing proceeding, Docket No. 97-01262. *See Arbitration Order* at p. 41. As discussed below, see Section III.2, the universal refusal/failure of the RLECs to bill the CMRS providers at the interim rate established in the *Arbitration Order* only simplifies the process of closing this docket since no true-up is necessary.

[4] *See In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket N). 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10- 208, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-161, ¶¶ 995-999 (rel. Nov. 18, 2011) (the "*Connect America Fund Order*")(discussing the justifications for an immediate transition to bill and keep as well as how the FCC has address the potential concerns of rural, rate-of-return LECs).

On reconsideration, the FCC modified the effective date of the transition to bill and keep from December 29, 2011 to July 1, 2012. *See In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket N). 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10- 208, *Order on Reconsideration,* FCC 11-189, ¶¶ 5-8 (rel. Dec. 23, 2011) (the "*Connect America Fund Recon. Order*"). See also n. 12, infra.

[5] Indeed, bill and keep is the appropriate form of compensation in this docket regardless of the FCC's recent actions and its application seems appropriate in this case. *See e.g., id., supra,* FCC 11-161, at ¶¶ 740-759 (discussing the public policy benefits of bill and keep); see also, discussion in Section III.2 below.

After providing some additional background on this docket in the following section, the Joint CMRS Providers will address each of the specific issues identified in the Notice in Section III below.

II. BACKGROUND

While the Notice focuses on events that have occurred in this docket during the past six years since the issuance of the *Arbitration Order*, the docket has actually been pending since November of 2003. At that time, a group of CMRS providers petitioned the Authority pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act") to arbitrate the unresolved issues that had prevented these companies from entering into interconnection and reciprocal compensation agreements with the RLECs. Although the *Arbitration Order* resolved most of the issues between the parties, it did not establish a permanent rate for the exchange and termination of intraMTA traffic between the parties. Instead, it established an interim rate (subject to true-up) and left the establishment of a permanent, forward-looking rate to further proceedings.[6]

Since the issuance of that Order, however, the RLECs have consistently and repeatedly refused to enter into any agreements containing the interim rate and, perhaps even more strikingly, failed to bill the CMRS Providers at that interim rate for any traffic exchanged during these years.[7] Although various parties have managed to execute interconnection agreements

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[6] *See Arbitration Order* at pp. 40-41.

[7] Indeed, the RLECs (unsuccessfully) challenged the Authority's jurisdiction to establish such a rate, interim or otherwise. *See id.* at pp. 7 – 12.

at *negotiated* rates with some RLECs since the issuance of the *Arbitration Order*,[8] in many cases the RLECs and the CMRS Providers have been compensating one another for the exchange of intraMTA traffic on a de facto bill and keep basis.

III. COMMENTS

The Notice requested that parties comment on four specific issues, each of which is discussed below:

1. Issues that must be resolved in order to bring this docket to resolution.

There are no further issues that need to be resolved in this docket. As noted above, and as the Authority is aware, the primary outstanding issue in this docket was the establishment of permanent compensation rates for the exchange of intraMTA traffic between the CMRS Providers and the various RLECs. Those rates would then be used to determine how the parties would compensate one another on a prospective basis as well as calculating any required true-up for any payments or billings made at the interim rate established by the Arbitration Order and the permanent rate.[9] While the methodology to be used in establishing those rates is not entirely clear in light of the Authority's decision to grant the RLECs' 251(f)(2) Petition,[10] the

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[8] The FCC has generally recognized that the adoption of bill and keep does not in and of itself void the terms of existing interconnection agreements. *See Connect America Fund Order, supra*, at ¶ 1000. The impact of the *Connect America Fund Order* on those agreements depends primarily on future negotiations between the parties and any change of law provisions in the agreements. Thus, the Authority does not need to be concerned with those few interconnection agreements negotiated by the parties since the issuance of the *Arbitration Order*.

[9] *See Arbitration Order* at pp. 40-41 ("Given the lack of cost or traffic studies upon which to implement permanent rates, interim rates that are subject to true-up are appropriate").

[10] *In re Petition of the Tennessee Rural Independent Coalition for Suspension and Modification Pursuant to 47 U.S.C. 251(f)(2), Docket No. 06-00228, Order Granting Suspension of Requirement to Utilize TELRIC Methodology in Setting Transport and Termination Rates* (June 30, 2008) (the "*Suspension Order*").

central outstanding issue was the establishment of permanent rates. That issue, however, has now been resolved by the FCC as discussed in the next section.

2. The impact, if any, of the Federal Communications Commission's Order on Intercarrier Compensation and Universal Services on this proceeding.

The FCC has now clearly, and unequivocally, determined that transport and termination for intraMTA traffic between a CMRS provider and a local exchange carrier will be pursuant to a "bill and keep" arrangement; i.e., the parties will not charge one another for those functions and services.[11] Although the FCC initially made bill and keep the default as of December 29, 2011, it subsequently determined that the transition to bill and keep for carriers that were *already operating under the terms of an interconnection agreement* would be July 1, 2012.[12] For those carriers operating without an interconnection agreement, like the RLECs who refused to enter into agreements (or even bill at the interim rate established by the Authority), bill and keep is already in effect.[13]

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[11] *See* 47 C.F.R. § 51.705(a) ("Notwithstanding any other provision of the Commission's rules, by default, transport and termination for Non-Access Telecommunications Traffic exchanged between a local exchange carrier and a CMRS provider within the scope of §51.701(b)(2) shall be pursuant to a bill and keep arrangement, as provided in §51.713."); *see also Connect America Fund Order, supra,* FCC 11-161 at ¶995.

[12] *See Connect America Fund Recon Order, supra.,* FCC 11-189 at¶¶ 5-8.

The FCC modified the effective date, in part, to harmonize the bill and keep default with the initiation of the transitional recovery mechanism. However, the rationale for bill and keep goes well beyond the tie with the transitional recovery mechanism anticipated in the Order. *See e.g., id.* at ¶¶ 740-759.

[13] As the FCC noted in discussing extending the effective date of the bill and keep default to parties with interconnection agreements, "[i]n contrast, carriers exchanging LEC-CMRS non-access traffic without an interconnection agreement do not receive such compensation today, so we find no likelihood of marketplace disruption." *Id.* at ¶ 8.

Accordingly, the FCC has established the default rate and it should be applied both prospectively in terms of any future interconnection agreements and retroactively in terms of determining any "true up" for payments made under the interim rate.[14]

Even if the Authority were to determine, however, that the FCC's decision to establish bill and keep in the *Connect America Fund Order* was not necessarily dispositive for purposes of establishing the "true up" in this case, the Joint CMRS Providers believe that "bill and keep" is the appropriate form of compensation prior to July 1, 2012 for a variety of reasons:

- The FCC has determined that bill and keep is the appropriate compensation mechanism for all wireless traffic and has articulated numerous public policy benefits – including for example the fact that it is less burdensome, it is market-based, it is consistent with cost causation principles, it benefits consumers and it eliminates arbitrage and market distortions - that support its application in this docket.[15]

- Bill and keep was recognized by the FCC even prior to the *Connect America Fund Order* as a legitimate form of compensation for intraMTA traffic where the traffic between parties appears to be balanced.[16] In this proceeding, the RLECs failed to establish any type of traffic imbalance in the underlying arbitration[17] and thus the Authority, under the previous version of the Federal Rules, had the discretion to assume the traffic to be balanced and subject to bill and keep.[18] Indeed, the Authority already determined that bill and keep was the appropriate

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[14] As a practical matter, the Authority does not need to address the true up issue in closing this docket since, as noted above, in many cases no agreement was reached so no payments were made. In those cases where an RLEC billed at a negotiated rate, this issue is dictated by the terms of the parties' agreement.

[15] *See Connect America Fund Order, supra,* FCC 11-161, at ¶¶ 740-759.

[16] *See e.g.,* 47 C.F.R. § 51.705(a)(3) and §51.713 (prior to revisions adopted in the *Connect America Fund Order*).

[17] See *Arbitration Order* at pp. 40-41 ("Given the lack of cost or traffic studies upon which to implement permanent rates...").

[18] *See id.* at § 51.713 (c) (prior to revisions adopted in the *Connect America Fund Order*).

form of compensation where the traffic between CMRS Providers and the RLECs is *de minimis*.[19]

- The RLECs have never complied with the Authority's explicit direction to bill at an interim rate and consequently many of them have been compensated at bill and keep, as have the Joint CMRS Providers, since the issuance of the *Arbitration Order* in January 2006. Leaving aside a host of practical and legal barriers to establishing some alternate rate for the period between January 12, 2006 and July 1, 2012, these RLECs should be estopped from asserting that they are now entitled to anything other than bill and keep for that time period.

- Further action in this docket would be a needless waste of the Authority's and the parties' time and resources. Although cost studies were generally required under the prior regime established by the FCC to determine reciprocal compensation rates under the Act, that is no longer the case, at least with respect to CMRS interconnection. To engage in such an undertaking, in light of the FCC's recent pronouncements on bill and keep and the RLECs' refusal to accept interim compensation at the rate previously adopted by the Authority, would at a minimum be wasteful and otherwise inappropriate, if not unlawful.

3. Rate-setting methodologies available to the Authority given its decision suspending the use of TELRIC in docket No. 06-00228.

In the context of the exchange of intraMTA traffic between CMRS Providers and local exchange carriers, the only rate-setting methodology currently available is bill and keep. Section 51.705 (a) has been modified, as noted above, to make bill and keep the exclusive compensation methodology for this type of traffic. The Authority's *Suspension Order* cannot alter federal law.

[19] *See Arbitration Order* at p. 44 ("As to this issue, the Arbitrators voted unanimously that the parties should exchange *de minimis* amounts of traffic on a bill and keep basis").

Similarly, the *Suspension Order* did not alter the previous requirements of Section 51.705 which provided three possible methodologies for setting transport and termination rates:

(a) forward looking rates based on cost studies;
(b) default proxies;[20] and
(c) bill and keep.

In the *Suspension Order* the Authority recognized this when it decided to suspend the requirement to use a TELRIC costing methodology but acknowledged that neither the parties nor the Authority was foreclosed from using a "forward looking model or a variation thereof."[21] Thus, even under the prior rules, the Authority would still be required to establish rates based on some form of forward-looking cost studies or to adopt bill and keep.[22]

4. The procedural steps necessary to bring this matter to conclusion.

As noted above, the Authority can close this docket without any further activity by confirming, consistent with the *Connect America Fund Order* and *the Act*, that the final compensation rate for all intraMTA traffic between CMRS Providers and an RLEC will be based on bill and keep and that no true-up is required under the terms of the *Arbitration Order* for the reasons set forth herein. Alternatively, the Authority could simply close the docket in light of the recent developments at the FCC.

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[20] The availability of default proxies is, at best, unsettled and thus is not discussed as a viable option under the prior regulations. *See Iowa Utilities Bd. V. F.C.C.*, 219 F.3d 744, 757 (8th Cir. 2000) ("We conclude the proxy prices cannot stand and, for the foregoing reasons, vacate rules 51.513, 51.611, and 51.707."); *aff'd in part, rev'd in part, remanded by Verizon Communications V. FCC,* 535, U.S. 467 (2002) (cost proxies are not addressed); *vacated in part by Iowa Utils. Bd. V. FCC*, 310 F.3d 957 (8th Cir. 2002) (vacated on other grounds). In any event, the Authority has not developed any cost proxies for these purposes.

[21] *See Suspension Order* at p. 20.

[22] *See* 47 C.F.R. § 51.705 (a) (subsequently revised in the *Connect America Fund Order*).

IV. CONCLUSION

For the reasons discussed above, the Joint CMRS Providers request that Docket 03-00585 be closed consistent with these comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2012, a true and correct copy of the foregoing has been served on the parties of record, via the method indicated:

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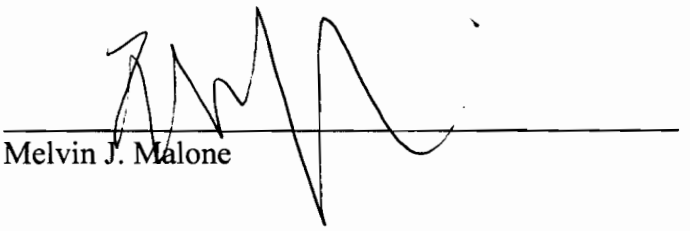

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