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April 22, 2013

Hon. James M. Allison, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of Cellco Partnership, etc.*
Docket No. 03-00585

Dear Chairman Allison:

Enclosed is the Initial Brief of AT&T Mobility.

The only issue remaining in this nearly ten-year-old docket is whether the TRA still needs to establish a permanent rate for traffic exchanged between the RLECs and AT&T Mobility, to replace the interim rate the TRA set in 2006.

As explained in the attached brief, there is now nothing left for the TRA to decide. The FCC's October 27, 2011 *Connect America* established "bill-and-keep" as the appropriate compensation mechanism for the type of traffic at issue here. The FCC's decision is binding, and states are not permitted to require a different rate in interconnection agreements.

During the pendency of this case, the RLECs elected not to bill AT&T Mobility at the TRA's interim rate for traffic AT&T Mobility sent to them, but instead exchanged traffic on a bill and keep basis. While the RLECs may have hoped the FCC would establish some higher rate that would have forced AT&T Mobility to make a substantial "true up" payment, that did not happen. Instead, and as explained in the brief, the FCC has clearly directed that the traffic at issue is to be exchanged on a bill-and-keep basis.

Thus, the RLECs have no legitimate claim that AT&T Mobility is required to make any payment to them for the traffic at issue. The RLEC claims should be denied and this matter closed.

Very truly yours,

Joelle Phillips

1078453

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

INITIAL BRIEF OF AT&T MOBILITY

New Cingular Wireless PCS, LLC, and its Commercial Mobile Radio Service ("CMRS") affiliates, d/b/a AT&T Mobility,[1] files this Initial Brief in response to the TRA's recent order in the above-styled docket.

1. Introduction

The sole remaining issue in this nearly ten-year-old case is whether the interim compensation authorized by the TRA's previous order can be trued-up to any permanent rate other than the bill and keep compensation recently ordered by the Federal Communications Commission ("FCC"); in other words, does the TRA have authority to order any permanent compensation under a section 251/252 interconnection agreement other than bill and keep?[2]

By previous order, the TRA established an interim rate to be billed by both the Rural Local Exchange Carriers ("RLECs") that comprise the Tennessee Rural Independent Coalition and AT&T Mobility until a permanent rate was established, at which time all interim payments

[1] Since this docket was filed, Cingular Wireless and AT&T Wireless have merged and now do business as AT&T Mobility.

[2] The traffic at issue in this pleading is "non-access" or "intraMTA" traffic, also known as "local" traffic, exchanged between a CMRS provider and a Local Exchange Carrier.

would be trued-up to the permanent rate. The FCC has now determined, however, that the appropriate permanent compensation for the traffic at issue is bill and keep, which means that the carriers will not pay each other for this type of traffic; they shall instead recover their costs from their respective customers. Thus, federal law does not allow the TRA to choose any form of compensation other than bill and keep. Any true-up ordered in this case must conform to the bill and keep requirement.

Because of this legal rule, the TRA need not require true-up at all, because the parties have operated throughout the ten years of this docket on exactly the bill and keep arrangement that the FCC now requires. As discussed below, the RLECs never issued bills using the TRA's interim rate (because they apparently did not believe it was high enough) and chose instead to exchange traffic without payments – just as they would have under the bill and keep arrangement the FCC adopted. Accordingly, there are no interim payments to true-up or reconcile with the permanent bill and keep rate that the FCC requires.

In essence, the RLECs gambled that they might undermine their argument that a higher rate should apply if they accepted (even on an interim basis) the TRA's interim rate – so they held out in hopes that the FCC would set a higher rate. That gamble did not pay off, because the FCC chose a lower rate (bill and keep).

Whatever the RLECs' reasoning, the parties have been operating for many years in the manner the FCC adopted. There is no reason for the TRA to alter that arrangement, assuming the TRA had the authority, which it does not, especially since attempting to establish and apply a different rate now would require evidence, such as billing records showing minutes of use, which may no longer exist and cannot be verified due to the passage of time.

To close this docket, the TRA must approve interconnection agreements between AT&T Mobility and the RLECs. The TRA should therefore order the parties to submit for approval interconnection agreements containing bill and keep compensation provisions, with no true-up, and otherwise conforming to the TRA's previous orders in this proceeding. Once the TRA has approved the agreements, this docket should be closed.

2. Summary of Argument

1. Effective July 1, 2012, the Federal Communications Commission ("FCC") established bill and keep as the default compensation mechanism for all intraMTA traffic exchanged between AT&T Mobility and the RLECs.
2. By previous order, the TRA established an interim rate to be billed by both RLECs and AT&T Mobility until a permanent rate was established, at which time all interim payments would be trued-up to the permanent rate.
3. The RLECs refused to bill AT&T Mobility at the interim rate. Since AT&T Mobility's bills to the RLECs were to be based on the RLECs' bills, the refusal meant that AT&T Mobility could not issue bills to the RLECs.
4. Thus, since January 1, 2005, AT&T Mobility and the RLECs have exchanged traffic on a bill and keep basis.
5. The only issue left for decision in this matter is whether the TRA may retroactively require Mobility and the RLECs to have exchanged intraMTA traffic, for the period January 1, 2005 to July 1, 2012, on something other than a bill-and keep basis.
6. Under federal law, the TRA cannot order a reciprocal compensation rate other than bill and keep unless the parties agree otherwise. The parties in this case have not so agreed.

7. Since the final rate in the interconnection agreements between AT&T Mobility and the RLECs must be at bill and keep, and since by this Authority's order, all interim payments must be trued-up to the final rate, neither the RLECs nor AT&T Mobility are entitled to any true-up.

8. Apart from the above federal requirements, other factors militate against the establishment of rates other than bill and keep:

    a. Under still applicable federal law, rates other than bill and keep must be established by means of traffic studies entered into the record of an evidentiary proceeding. In a proceeding such as this – already pending for *ten years* – there is no compelling policy reason to require several more years of discovery, briefing, hearings and appeals.

    b. Because the RLECs failed to bill pursuant to the interim rate established many years ago by the TRA, any bills now issued by the RLECs would involve traffic exchanged as long ago as eight years, thus making such bills unverifiable by either AT&T Mobility or the TRA. AT&T Mobility should not be prejudiced in such fashion, and the RLECs should not profit, because of the RLECs' intentional failure to comply with a previous order of the TRA.

3. Facts

AT&T Mobility exchanges traffic with the RLECs indirectly through AT&T Tennessee's "tandem switches." That means that, when an AT&T Mobility customer calls an RLEC's landline customer, the call is handed off to AT&T Tennessee, who in turn hands the call to the RLEC. For several years, BellSouth (AT&T Tennessee's predecessor), whose network was "in the middle" of this transfer, paid the inter-carrier compensation for traffic it handed to the RLEC,

even when that traffic started on another network. At that time, BellSouth paid the RLECs for terminating traffic from Cingular Wireless (AT&T Mobility's predecessor) but did not pay Cingular for terminating the RLECs' traffic. Thus, the RLECs received compensation, but Cingular did not.

The rise in wireless traffic made this practice unsustainable. Consequently, BellSouth gave notice that it would no longer pay the RLECs for terminating Cingular's traffic. The RLECs complained to the TRA, which crafted a compromise. Recognizing that the RLECs and CMRS carriers needed to develop their own inter-carrier compensation arrangements in the face of rising wireless traffic – but also recognizing that no such arrangements were in place at the time – the TRA ruled that BellSouth should continue paying the RLECs for terminating Cingular traffic until December 31, 2004, giving the RLECs and Cingular an opportunity to negotiate interconnection agreements in which each compensated the other directly for traffic termination, as required by federal law.[3]

Negotiations proved futile, however, and Cingular and several other wireless carriers came to the TRA for help, filing Petitions for Arbitration under federal law, asking, *inter alia*, that the TRA establish bill and keep as the compensation method by which *both* the RLECs and wireless carriers would be compensated for terminating the other's traffic.

On January 1, 2005, pursuant to the TRA's order, BellSouth ceased paying the RLECs for termination of Cingular's traffic. Up to that date, and in fact to the present, Cingular and its successor in interest, AT&T Mobility, have never received compensation from either BellSouth or the RLECs for terminating the RLECs' traffic.

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[3] In re Generic Docket Addressing Rural Universal Service, *Order Granting in Part the Petition for Emergency Relief and Request for Standstill Order by the Tennessee Rural Independent Coalition*, Docket No. 00-00523, p. 18 (May 6, 2004).

When BellSouth stopped paying the RLECs, the TRA stepped in to establish a temporary solution until Cingular and the RLECs could finalize interconnection agreements. On January 12, 2006, the TRA adopted the BellSouth reciprocal compensation rate of $0.0024609 per minute of use as an "*interim rate,*" which the RLECs and Cingular were required to pay for the termination of each other's traffic while the TRA held further hearings to determine a final, reciprocal rate.[4] The interim rate was to apply for traffic exchanged January 1, 2005, forward. Once the TRA established a permanent rate, payments made under the interim rate were ordered to be trued-up.[5]

The interim rate was lower than the RLECs wanted, and they refused to issue bills to Cingular. Since Cingular's bills to the RLECs were to be based upon traffic factors applied to the RLECs' bills, Cingular could not issue interim bills to the RLECs. Accordingly, since the interim rate was established, neither Cingular nor the RLECs have been paid by the other for terminating the other's traffic. This is, in practice, exactly what a "bill and keep" arrangement is.

While refusing to issue bills, the RLECs filed a petition, asking the TRA to waive the federal requirement that rates for transport and termination be established pursuant to the FCC-adopted methodology of TELRIC ("Total Element Long Run Incremental Cost"). On June 30, 2008, the TRA ruled that rates need not be established pursuant to TELRIC.[6] While the RLECs litigated the issue of whether rates must be TELRIC – and litigated the issue of what sort of cost

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[4] Director Tate voted to establish bill and keep as the compensation method. Directors Miller and Jones voted to establish compensation based on forward-looking cost studies applying the FCC's Total Element Long Run Incremental Cost ("TELRIC") methodology. *See* In re Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless, et al., Docket No. 03-00585, *Order of Arbitration Award,* p. 40 (Jan. 12, 2006) ("Arbitration Award").

[5] Arbitration Award, p. 41.

[6] In re Petition of the Tennessee Rural Independent Coalition for Suspension and Modification Pursuant to 47 U.S.C. 251(f)(2), Docket No.06-00288, *Order Granting Suspension of Requirement to Utilize TELRIC Methodology in Setting Transport and Termination Rates,* p. 21 (June 30, 2008) ("Suspension Order").

studies the RLECs would need to provide in order to justify rates – the RLECs never took steps to move the case at the TRA forward from that point to establish permanent rates.[7]

In the meantime, however, while this docket was dormant, in November 2011, (followed by a supplemental order in December of that same year) the FCC ruled that starting July 1, 2012, the default compensation for non-access traffic exchanged between local exchange carriers and wireless carriers was to be on a bill and keep basis.[8] The FCC cited numerous policy reasons for why bill and keep was an appropriate compensation for this traffic, and the RLECs all participated in the FCC proceeding either directly or indirectly.[9]

4. Issue

Since July 1, 2012, federal law has established bill and keep as the default compensation rate for non-access traffic exchanged between AT&T Mobility and the RLECs – i.e., neither party bills the other for transport and termination. This case thus involves only one issue: can the TRA approve interconnection agreements between Mobility and the RLECs that apply retroactively to traffic exchanged from January 1, 2005, to July 1, 2012, and that contain a reciprocal compensation rate other than bill and keep?

5. Argument

A. The TRA Cannot Establish a Permanent Rate other than Bill and Keep.

The TRA's jurisdiction in this matter derives from the Telecommunications Act of 1996, 47 U.S.C. §§ 251-252 (the "Act"), which requires the TRA, in deciding arbitration issues, to

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[7] *See* Hearing Officer's Report and Recommendation, p. 4, March 27, 2013.

[8] In re Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, WC 10-90, FCC 11-161 (Oct. 27, 2011) ("Connect America"); In re Connect America Fund, *Order on Reconsideration*, WC 10-90, FCC 11-189 (Dec. 23, 2011).

[9] Appeals of the FCC's orders have been consolidated at the 10th Circuit, which has not yet issued an opinion.

"ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."[10]

In determining that bill and keep shall be the default rate for non-access traffic exchanged between local exchange carriers and wireless carriers, the FCC cited 47 C.F.R. § 20.11(b), which requires "mutual" and "reasonable" compensation for the exchange of traffic between landline carriers and CMRS providers. The FCC "clarif[ied] that the terms 'mutual compensation' in section 20.11 and 'reciprocal compensation' in section 251(b)(5) and Part 51 are synonymous when applied to non-access LEC-CMRS traffic."[11] The Commission then "adopt[ed] bill-and-keep as the immediately applicable default compensation methodology for non-access traffic between LECs and CMRS providers under section 20.11 and Part 51 of our rules."[12]

The FCC required the LECs and all other carriers to exchange non-access traffic with wireless carriers on a bill and keep basis in part because application of the FCC's rules "has been a continuing and growing source of confusion and dispute," and because "CMRS providers have raised concerns that as a result, costly litigation is proliferating and the incidence of intraMTA traffic stimulation is growing."[13]

Accordingly, pursuant to section 252(c)(1), the TRA may not establish any rates other than bill and keep for this traffic, because such a ruling would not "meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251.*"[14]

The TRA simply cannot grant the relief sought by the RLECs – the establishment of permanent rates other than at bill and keep. Pursuant to 47 C.F.R. § 20.11(b), a regulation that

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[10] 47 U.S.C. § 252 (c)(1).
[11] Connect America, ¶ 990.
[12] *Id.*, ¶ 987.
[13] *Id.*, ¶ 977.
[14] 47 U.S.C. § 252 (c)(1)(emphasis added).

the TRA must follow in establishing rates for the RLECs: "Local exchange carriers and commercial mobile radio service providers shall exchange Non- Access Telecommunications Traffic, as defined in § 51.701 of this chapter, under a bill-and-keep arrangement, as defined in § 51.713 of this chapter, unless they mutually agree otherwise." AT&T Mobility and the RLECs have not agreed otherwise.

47 U.S.C. § 252(c)(1) requires the TRA to implement this rule *even for traffic exchanged prior to the effective date of the rule.* The Act does not grant the TRA any exceptions. Section 252(c)(1) does not require the TRA to "meet" the regulations prescribed by the FCC in effect on the date that traffic was exchanged. The statute requires the TRA to adhere to the "regulations prescribed by the Commission" – no exceptions. If the rules change, as in this case, the TRA is required to adhere to the change.

Further, as discussed above, since AT&T Mobility and the RLECs have exchanged traffic on a bill and keep basis since January 1, 2005, no true-up, pursuant to the previous TRA order, is required.

B. Establishing a Rate Would Require a Cost Docket.

As noted above, the RLECs have argued several times in this case about the manner in which the TRA should establish permanent rates. The RLECs objected to rates established by TELRIC methodology and objected to the preparation of cost studies that would explain the costs they incur to handle this traffic. It appears that the RLECs are asking the TRA to adopt rates not through cost studies but rather by looking at negotiated rates in filed interconnection agreements with other parties. However, such an approach would violate 47 U.S.C. § 252(c)(1), quoted above, as well as other federal law and the TRA's own order suspending the application of TELRIC, the relevant portion stated below:

> IT IS THEREFORE ORDERED THAT: The *Petition* of the Tennessee Rural Independent Coalition, as amended its *Supplemental Statement,* requesting suspension or modification pursuant to 47 U.S.C. § 251(f)(2) of certain aspects of the requirements of 47 U.S.C. § 251(b) of the Communications Act of 1934, as amended the Telecommunications Act of 1996, to the extent that those requirements have been interpreted as requiring them to establish charges for transport and termination of any telecommunications traffic on the basis of a Total Element Long Range [sic] Incremental Cost methodology, and as ordered by the arbitration panel in its *Order of Arbitration Award,* Docket No. 03-00585, is granted.[15]

The TRA did not rule that cost studies *per se* would not be required. On the contrary: "The TRA notes that the decision to suspend the TELRIC requirement set forth previously in the *Arbitration Order* does not foreclose the opportunity of the parties or TRA to utilize a forward-looking model or a variation thereof in the setting of a permanent rate for reciprocal compensation in the underlying *Arbitration Docket.*"[16]

The TRA thus did not suspend the entirety of the following FCC regulation:

> An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.[17]

The TRA only suspended the requirement that charges for transport and termination be based on TELRIC; i.e., that rates must be "forward-looking." The TRA *did not suspend the requirement that rates must be established pursuant to a cost study.*

Likewise, the TRA did not suspend the following federal requirement:

> Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review.[18]

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[15] Suspension Order, p. 21 (emphasis added).
[16] *Id.*, p. 20.
[17] 47 C.F.R. § 51.505(e) (emphasis added).
[18] 47 C.F.R. § 51.505(e)(2).

And the TRA did not suspend the rule that the record of a state proceeding establishing a reciprocal compensation rate *must include a copy of the cost study.*[19]

Thus, even if the TRA could adopt rates other than bill-and-keep (which it cannot, as discussed above), the TRA would be required to: (1) determine the methodology other than TELRIC that would be used to set rates, (2) apply that methodology to the RLECs' data, through the use of cost studies, to determine an individual rate for each RLEC, and (3) hold an evidentiary hearing and create a record for review, including copies of the studies. Federal law requires this. Any rates established without following these federal requirements would be invalid *per se* – in addition to being in conflict with the federal requirements discussed above; i.e. that the TRA cannot order rates that are different than those established by the FCC regulations consistent with Section 251.

C. Application of Rates to the Retroactive Period Would Require the Use of Out-of-Date, Unverifiable Records.

Because the RLECs refused to bill Mobility under the interim rate, *no billing records were created when traffic was exchanged.* If the TRA were to adopt rates other than bill and keep for the retroactive period, then those rates would need to be applied to the actual minutes of use for traffic exchanged as long ago as 2005. Even if the RLECs were to claim to have records going back that far, verifying the accuracy of such records would be highly problematic. The CMRS carriers (and the TRA) would be entitled to investigate the accuracy of such records, and that would require investigation and discovery (all of which would be costly and time consuming).

This is a problem of the RLEC's own making. Had the RLECs complied with the TRA's order and issued monthly bills calculated with the interim rate, then the situation would be very

[19] *Id.*

different. The CMRS carriers could have verified the charges at the time of receipt and either paid or challenged them – the normal process. But the RLECs refused to follow the TRA's direction and are now asking AT&T Mobility and the TRA to accept, without verification, bills so old that no one in the industry would recognize them as reliable.[20] Asking Mobility now to accept bills for traffic as long ago as eight years, with no method of verification, is not only inconsistent with agreed-to contractual language, it also violates the principle that a party who has unequivocally forgone a right or benefit may not later seek to enforce that right.[21]

Again, however, this issue cannot be reached, because federal law prohibits the TRA's adoption of any rate other than bill and keep. Thus, as discussed above, true-up is not required, and no archaic bills need be issued.

6. Conclusion

FCC regulations require AT&T Mobility and the RLECs to exchange non-access traffic on a bill and keep basis, unless the parties agree otherwise, which they have not. In deciding this arbitration, the TRA must comply with this rule, even for traffic exchanged prior to the adoption of the rule. The Act allows no exceptions. Thus, even if it seemed reasonable to open an arduous, expensive and lengthy cost docket, the TRA would be prohibited from establishing a rate other than the FCC-mandated bill and keep rate.

This docket has been pending ten years. The TRA should rule, indeed it is required to rule, that all non-access traffic exchanged between AT&T Mobility and the RLECs, regardless of the date of exchange, is subject to bill and keep, and further require the parties to submit

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[20] In fact bills of this age would not be accepted under the terms of contracts to which the RLECs have agreed. Section IV.B of the contract attached to Cingular's original arbitration petition states: "Neither Party shall bill the other for Traffic that is more than one hundred and eighty (180) days old." **The Parties agreed to this language.** Because of the huge amount of traffic on its network, Mobility generally cannot verify any records more than about 120 days old.

[21] *Chattem, Inc. v. Provident Life & Accident Ins. Co.*, 676 S.W.2d 953, 955 (Tenn. 1984) (citing *Baird v. Fidelity–Phenix Fire Ins. Co.*, 178 Tenn. 653, 162 S.W. 2d 384, 389 (1942)).

interconnection agreements embodying this compensation principle and all other rulings made herein by the TRA. Once the TRA has approved those agreements, the docket should be closed.

Respectfully submitted,

AT&T MOBILITY

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013, a copy of the foregoing document was served on the parties of record, via the method indicated:

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