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May 6, 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:

AT&T Mobility's reply brief is enclosed.

AT&T Mobility appreciates the Hearing Officer's decision to recommend that the schedule include this one last brief, which has provided an important last opportunity to clarify potential confusion and set the record straight in this long-pending docket. As discussed in AT&T Mobility's brief:

- Much of the RLECs' brief is devoted to arguments that no longer matter now that the FCC has decided that carriers are to be compensated for the type of traffic at issue using "bill-and-keep" compensation;

- The RLECs urge the TRA to establish a retroactive rate – inconsistent with the FCC's decision and therefore in violation of federal law – and to do so using a process that also violates federal law; and

- The RLECs' requests are so inconsistent with the law that, if the TRA were to grant them, this case (already pending for ten years due to the RLECs' dissatisfaction with the TRA's decisions regarding an interim rate) would surely drag on for years to come as the parties litigate on appeal.

Thankfully, the FCC has decided the underlying legal issue that governs the one, last item to be addressed in this docket. As a result, the TRA can simply order the parties to: (1) implement bill-and-keep in their interconnection agreements as the FCC has directed; and (2) close this docket.

Very truly yours,

Joelle Phillips

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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

REPLY OF AT&T MOBILITY

AT&T Mobility[1] files this Reply to the Final Brief of the Tennessee Rural Coalition.

I. SUMMARY OF ARGUMENT

There is nothing left for the TRA to decide in this Section 252(b) arbitration proceeding. Federal law expressly provides that:

> In resolving by arbitration under [Section 252(b)] any open issues and imposing conditions upon the parties to the agreement, ***a State commission shall ensure that such resolution and conditions meet the requirements of section 251..., including the regulations prescribed by the [FCC] pursuant to section 251....***[2]

FCC regulations effective July 1, 2012, mandate that intraMTA traffic be exchanged with wireless carriers on a "bill-and-keep" basis – *i.e.*, neither carrier bills the other for the traffic they exchange. Accordingly, the TRA must order bill-and-keep as the compensation mechanism in this proceeding.[3]

Bill-and-keep also applies to traffic exchanged subject to the TRA's Arbitration Order of January 12, 2006. That Order established an "interim" rate for traffic exchanged during the

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[1] Cingular Wireless and AT&T Wireless merged after this case began and now operate as AT&T Mobility.

[2] 47 USC §252(c)(1)(emphasis added).

[3] Bill-and-keep is mandatory for ***arbitrated*** interconnection agreements; carriers are always free to negotiate rates, terms and conditions of their own choosing. 47 C.F.R. § 20.11(b). While this proceeding has been pending, AT&T Mobility and certain RLECs ***voluntarily negotiated*** compensation rates that differed from bill-and-keep and that, by agreement of the parties, are not subject to true-up under the TRA's order. As of July 1, 2012, those negotiated rates were replaced with bill-and-keep.

pendency of this proceeding, and required that those payments be subject to "true-up" to put the carriers in the position they would have been in had the final outcome of this proceeding – bill-and-keep – been in place during that interim period.[4] Regarding that true-up, again, there is nothing for the TRA to decide.

AT&T Mobility and most of the RLECs never entered any contracts to implement the TRA's interim rates and have not paid one another for the traffic they exchanged while this docket was pending. That is exactly the position they would have been in had bill-and-keep been in place in the interim, and, consistent with the TRA's Arbitration Order, neither carrier has any refund obligation to the other. AT&T Mobility and a few RLECs have entered into contracts that, among other things, required the carriers to pay one another for the traffic they exchanged while this docket was pending, subject to true-up based on the final rate established by the TRA in this arbitration proceeding. The carriers will simply refund the amounts they have paid one another while this docket has been pending such that, after the refunds have issued, the end result will be the same as if bill-and-keep had been in effect from the time the agreement was entered.[5]

As explained below, the TRA can simply order the parties to (1) implement bill-and-keep in their interconnection agreements; and (2) close this long-pending docket.

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[4] In re Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless, et al., Docket No. 03-00585, *Order of Arbitration Award,* p. 41 (Jan. 12, 2006)(*"Arbitration Order"*).

[5] AT&T Mobility does not expect refund obligations with those RLECs to be disputed, nor does it expect disputes with other RLECs AT&T Mobility inadvertently paid absent a formal contract. If disputes arise, the carrier involved can initiate a complaint proceeding to address that specific problem; there is no need keep this docket, which has been pending for nearly a decade, open any longer.

A. Unless Carriers Agree Otherwise, FCC Regulations Mandate the Bill-and-Keep Compensation Mechanism for Exchanging IntraMTA Wireless Traffic

The primary purpose of this – or any – Section 252(b) arbitration is to establish the *prospective* rates, terms and conditions of interconnection agreements between parties.[6] Once arbitrated issues are addressed, the parties incorporate the TRA's rulings into interconnection agreements to be reviewed and approved by the agency.[7] The sole remaining arbitrated issue for the TRA to decide in this proceeding is the permanent reciprocal compensation rate for intraMTA traffic exchanged between the parties, and, as thoroughly explained at pages 7-9 of AT&T Mobility's Initial Brief, the FCC has mandated that intraMTA traffic be exchanged with wireless carriers on a bill-and-keep basis.[8] All parties, including the RLECs, agree. The TRA, therefore, should order the parties to execute interconnection agreements implementing bill-and-keep, on a permanent basis, for all intraMTA traffic they exchange.[9]

B. The TRA's Arbitration Order of January 12, 2006, Provides that this Permanent "Bill-and-keep" Compensation Mechanism Applies Retroactively to the Traffic the Parties Have Exchanged While this Proceeding Has Been Pending.

The TRA's January 12, 2006 Arbitration Order established an ***interim*** reciprocal compensation rate the parties could use until the TRA decided the permanent rate to be set forth in their interconnection agreements.[10] The TRA's Arbitration Order made clear, however,

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[6] 47 U.S.C. §252(c).

[7] 47 U.S.C. §252(e)

[8] 47 C.F.R. § 20.11(b) provides that "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."

[9] The TRA should reject the RLEC's novel suggestion that the TRA adopt a monetary rate to apply for traffic exchanged after July 1, 2012, *if the FCC is reversed on appeal.* RLECs' Final Brief, p. 10. The TRA has no authority to adopt a hypothetical rate under the assumption that federal law may change in the future. Instead, the TRA must follow current federal law, which requires that all intraMTA traffic exchanged between the RLECs and AT&T Mobility be subject to bill-and-keep. As a hypothetical matter, should that law change as a result of pending appeals, the Parties and TRA would then be subject to the terms of that federal court ruling, but the same thing can be said of every FCC order under appeal. Engaging in such a speculative "what if" approach here would serve no purpose other than to create confusion and fuel further litigation.

[10] *Arbitration Order,* p. 41.

that the ***interim*** rate was to be "trued up" to whatever final compensation mechanism the TRA ultimately established in this proceeding.[11] In other words, each carrier that accepted payments – whether the RLEC or AT&T Mobility – was on notice that, depending on the TRA's final ruling in this docket, it would either: break even (if the TRA established a permanent rate that was the same as the paid rate); receive additional payments in the future (if the TRA established a permanent rate that was higher than the paid rate);[12] or pay refunds in the future (if the TRA's permanent rate was lower than the paid rate).[13] Of course, some carriers that preferred certainty rather than an interim arrangement entered into interconnection agreements with AT&T Mobility (and other wireless carriers) establishing permanent compensation; those agreements are not subject to true-up. Other carriers opted to wait for "true-up" to whatever permanent compensation mechanism was ultimately established by the TRA.

The RLECs ignore this simple concept and instead devote much of their brief to arguing about what the "correct" reciprocal compensation rate should have been prior to July 1, 2012, but all of that is – and always has been – irrelevant. The TRA never suggested that it would establish two rates – one that applied to traffic exchanged prior to its final ruling and one that

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[11] *Id.*

[12] The RLECs' suggestion that establishment of a lower permanent comes as an unfair surprise is especially difficult to square with the actual deliberations and statements of the TRA Directors in this case. When the 2006 Arbitration Order was being deliberated Director Tate voted to establish bill-and-keep at that time. Likewise, 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. *Arbitration Order,* p. 40.

[13] While the FCC's choice of bill-and-keep and rejection of other compensation alternatives is well-supported, no one was certain about what the FCC would decide. In fact, parties such as AT&T and rural carriers presented their views in a lengthy administrative proceeding, which the Hearing Officer accurately described in her recent March 27 Report and Recommendation. As she noted, the FCC's "extensive" order is the product of an "immense evaluation" resulting in the FCC's decision to comprehensively reform intercarrier compensation. *See* Hearing Officer's Report at 4. Had the FCC chosen a default monetary compensation rate of a penny per minute or more, as many rural carriers argued in the federal docket, then AT&T would now owe true-up compensation to the RLECs at that rate. Or had the RLECs chosen to move forward with this docket since the 2008 Suspension Order, the TRA might have set a final rate before federal law changed. Based on statements in their Final Brief, however, the RLECs apparently chose to wait in hope that the FCC would set a higher monetary rate than the TRA. *See* RLEC's Final Brief, p. 9 ("Th[is] docket stalled because the interim rate remained too low.").

applied to traffic exchanged thereafter. Instead, the Arbitration Order provided that one and only one rate would apply, and that the ***interim*** rate would ***trued up*** to that permanent rate.[14] The RLECs invite the TRA to commit reversible error by disregarding its own (never challenged) Arbitration Order some seven years later.[15]

C. True-up to Bill-and-Keep is not Unfair to the Parties

Next, the RLECs argue that the TRA's planned true-up to bill-and-keep somehow would be unfair because "[f]or this privilege of using the RLECs' networks, *AT&T Mobility owes fair and reasonable compensation to the RLECs, but has paid nothing.*"[16] But that argument[17] is merely the pot calling the kettle black, because the RLECs also used AT&T Mobility's network in the same manner during the same period yet paid nothing. That is hardly "unfair." Rather, and as the FCC explained, it just means that each carrier recovers its call termination costs from its own end-user customers:

> We reject claims that a default rate set via a bill-and-keep methodology under any circumstances would be inadequate because it would be less than the actual cost of terminating calls that originate with a CMRS provider. As we explain

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[14] The RLECs' argument that "[t]he FCC's preemptive change of tack is not retroactive," RLECs' Final Brief, p. 26, is misplaced. The issue in this proceeding is what reciprocal compensation rate should be incorporated into the carriers' final interconnection agreements, and under federal law, that rate must be bill-and-keep. Once that decision is made, it is not the federal law that requires those rates to be applied to traffic exchanged while this proceeding has been pending (as the RLECs wrongly suggest) – instead, it is the TRA's Arbitration Order of 2006 that imposes that requirement. And as explained above, that Order requires (and always has required) that it is the permanent rate incorporated into the parties interconnection agreements (i.e. bill-and-keep) that applies to traffic exchanged during that interim period (absent some other agreement between the carriers). In other words, the issue of "who owes whom what" for traffic exchanged in the past is determined *by the previous TRA true-up order.*

[15] The RLECs' plea for two different rates (one to apply prior to July 1, 2012, and another to apply after) is inconsistent with the both the Arbitration Order and the law, as explained throughout this Reply Brief.

[16] RLECs' Final Brief, p. 1 (emphasis in original).

[17] As explained above, some RLECs negotiated interconnection agreements with AT&T Mobility providing for compensation other than bill-and-keep, at least until the change of law occasioned by the FCC's order mandating bill-and-keep. Those RLECs and AT&T Mobility compensated each other while this proceeding has been pending, and, under the terms of their agreements, they will retain those payments instead of truing-up. Those RLECs recognized the risk that, depending on what permanent rate was established, the true up might require them to refund instead of providing additional payments. They chose avoiding the risk of being required to refund their payments (and minimizing legal fees) over gambling on litigation in hopes of additional payments.

above, a bill-and-keep regime requires each carrier to recover its costs from its own end-users.[18]

The RLECs nonetheless argue that bill-and-keep is somehow unfair to them because they contend that AT&T Mobility sent more traffic to the RLECs than they sent to AT&T Mobility, suggesting that had the parties made interim payments to each other, the RLECs would have been net recipients. That argument fails, however, for at least three reasons.

First, had the parties made interim payments to each other subject to the TRA's true-up requirement, it would not matter now because the true-up would require the RLECs to refund any net receipts. Second, the TRA never found (and no clear record evidence demonstrates) that the traffic at issue was so out of balance. In fact, over the years the case has been dormant, clear trends in consumer use of and payment for wireless services result in precisely the opposite assumption. The RLECs point to a 70/30 "factor" that was negotiated eight years ago, but is now irrelevant due to bill-and-keep compensation to claim that their landline end-users placed few calls to AT&T's wireless end-users over the last ten years. However, this factor reflects a time when wireless calling patterns were starkly different and were converging toward parity. Even if the factor were relevant, a casual observer of the telecommunications market would recognize that, when wireless calling was priced at several cents per minute, wireless users did not share their cell numbers and sought to reduce the number of wireless calls they received). Flat-rated wireless plans have long been the norm, and wireless users have been steadily on the path to receiving as many calls as they place.[19]

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[18] In re Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking,* WC 10-90, FCC 11-161, p. 373 (Oct. 27, 2011).

[19] The TRA is well within its authority to take administrative notice of these obvious trends, which are commonly reported. The Center for Disease Control, for example, reports that "More than one-third of American homes (35.8%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the first half of 2012—an increase of 1.8 percentage points since the second half of 2011. In addition, nearly one of every six American homes (15.9%) received all or almost all calls on wireless telephones despite also having a landline telephone." Stephen J. Blumberg and Julian V. Luke, *Wireless Substitution: Early Release of Estimates*

Finally, the RLEC's "unfair" arguments are further mitigated by the fact that the same FCC order that mandated "bill-and-keep" in this proceeding has given the RLECs other offsetting benefits: "To ease the move to bill-and-keep for rural, rate-of-return regulated LECs, we adopt an interim default rule limiting their responsibility for transport costs for this category of traffic."[20] The FCC thus relieved the RLECs from paying transit charges when they send traffic to AT&T Mobility through a third-party tandem, directly preempting the TRA's previous holding in this case to the benefit of the RLECs.[21] The RLECs' brief is strangely silent on this point.

D. Even in Circumstances Where the TRA Can Establish Monetary Rates For Exchanging Traffic (Not Present in this Proceeding), Monetary Rates Must be Based on Cost Studies Submitted in an Evidentiary Hearing.

The RLECs not only argue (wrongly) that the TRA can and should establish new rates to apply to traffic exchanged while this proceeding has been pending, they also urge the TRA to do so without bothering to take cost evidence – contending (also wrongly) that the TRA "exempted the RLECs here from the requirement to set rates based upon federally required cost studies."[22] Thus, according to the RLECs, "the TRA can now define a 'reasonable rate' in its own fair-minded discretion."[23] Again, the RLECs are simply wrong.

Current federal law allows the TRA to adopt monetary rates for traffic exchanged between ***landline*** carriers,[24] which is not the case here where wireless traffic is at issue. And

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from the National health Interview Survey, January-June 2012, National Center for Health Statistics, CDC, December 2012, *available at* www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.PDF These data strongly suggest it is just as likely RLEC subscribers are making calls to wireless subscribers as receiving calls from them.

[20] *Id.*, p. 367.

[21] *Arbitration Order,* p. 30. Consequently, the proposed interconnection agreements should be changed to reflect this change of law beneficial to the RLECs. This purposeful FCC change in transit compensation to the benefit of RLECs – and detriment of CMRS providers – helps mitigate adverse effects the true-up to bill-and-keep compensation may entail for the RLECs.

[22] RLECs' Final Brief, p. 6, fn. 10.

[23] *Id.*, p. 2.

[24] 47 U.S.C. § 252(d)(2).

even when the TRA can adopt monetary rates between landline carriers, federal law sets forth the procedural and evidentiary standards the TRA must follow in doing so:

> 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.[25]

Such "written factual record" *must include a cost study* supporting the rates established. There is no such cost study in this proceeding.[26]

The RLECs suggest that the TRA's Suspension Order relieves them of any federal requirement to support rates with a cost study, but they are wrong. The Order simply waives or modifies the requirement for a cost study based on TELRIC methodology – it does nothing to suggest that the rate need not be supported by any cost study at all (as the RLECs erroneously claim).[27] What the RLECs are asking the TRA to do, therefore, would be invalid *per se.*[28]

E. Factual Inaccuracies in the Initial Briefs Should be Corrected.

The RLECs' brief contains inaccurate factual assertions. While these misstatements do not impact the outcome of this proceeding, they merit at least a brief response to correct them.

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[25] 47 C.F.R. § 51.505(e)(2).

[26] *Id. (*emphasis added).

[27] *See* 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) ("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.")(emphasis added).

[28] The RLECs' Final Brief, at pages 17-18, cites Mississippi and North Carolina cases for the proposition that the TRA may dispense with the federal requirements for factual hearings and cost studies when establishing reciprocal compensation rates. AT&T Mobility was a party to both cases. As the RLECs note, the Mississippi decision, dispensing with cost studies, was reversed on appeal. The North Carolina Commission, on the other hand, suspended TELRIC but required parties to submit non-TELRIC cost studies and held a full evidentiary hearing. The only issue on appeal was whether the Commission had authority to suspend TELRIC methodology – not whether it needed to conduct cost studies.

The RLECs wrongly claim that "the calling minutes exchanged by AT&T Mobility and the RLECs are known and have been agreed to by the parties."[29] "The calling minutes exchanged by AT&T Mobility and the RLECs" were never "agreed to by the parties." Instead, ***in confidential settlement negotiations***, AT&T Mobility offered to accept the RLECs minutes of use calculations ***if*** the RLECs would accept AT&T Mobility's proposed rate. Since the RLECs did not accept the proposed rate, AT&T Mobility did not accept the proposed minutes.[30]

The RLECs' brief further implies that each RLEC complied with the TRA's order, billed AT&T Mobility the TRA-designated interim rate on a monthly basis, and that AT&T Mobility arrogantly ignored the bills and the TRA directive. That is not the case. The RLECs' billing histories are unique to each carrier, and AT&T Mobility's response to each carrier likewise varied. On April 12, 2007, AT&T Mobility filed an Interim Rate Accounting in this docket, noting bills received from each RLEC, the payments made or not made, and the reasons for the different treatment. As the Accounting indicates, AT&T Mobility never received a bill from any RLEC at the interim rate as of April 12, 2007; nor did it receive TRA instruction to change its payment methodology.

From April 2007 until August, 2012, except for the TDS companies, Mobility never received any invoices that applied the TRA's interim rate, but did receive invoices from a few RLECs reflecting other rates of the RLECs' choosing.[31] Additionally, during settlement negotiations, the RLECs submitted a summary spreadsheet purporting to show traffic

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[29] *Id.*, p. 15.

[30] AT&T Mobility is unsure why RLECs have chosen to disclose confidential settlement negotiations, but they cannot complain if AT&T Mobility is forced to make disclosures to correct inaccurate characterizations about those negotiations. AT&T Mobility limits its disclosure from such negotiations to the discreet point made by the RLECs.

[31] AT&T Mobility's initial brief asserted that no billings or payments had taken place among any of the parties. That statement needs to be clarified. There have been payments made under certain specific carrier agreements, but, as a general matter, AT&T Mobility and the RLECs never implemented the TRA's interim rate on any wide-scale basis. The statement in AT&T's initial brief was intended to apply to that circumstance. *See* fns 3 and 17, *infra*.

exchanged with AT&T Mobility over the past seven years. AT&T Mobility requested supporting documentation, and the RLECs then submitted after-the-fact "invoices" that purported to reflect that period.

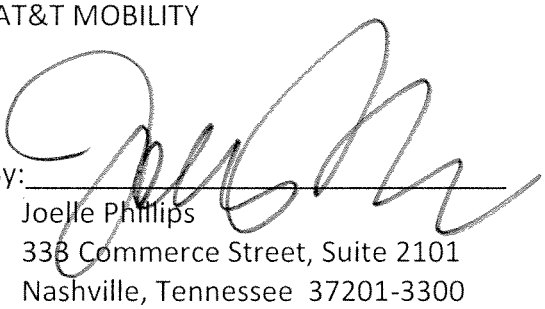
At this point, however, none of that controversy about the RLECs' billing matters. The FCC has mandated bill-and-keep as the appropriate compensation mechanism, and the TRA has ordered that interim rates be "trued up" to those final rates. No money is due for any minutes, so the number of minutes exchanged or billed is irrelevant.

CONCLUSION

For the reasons set forth above and in AT&T Mobility's Initial Brief, the TRA should require the parties to implement interconnection agreements providing for bill-and-keep on a permanent basis and close this docket.

Respectfully submitted,

AT&T MOBILITY



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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, a copy of the foregoing document was served on the parties of record, via the method indicated:

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