BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 13, 2014

IN RE:

PETITION FOR ARBITRATION OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, PETITION FOR ARBITRATION OF BELLSOUTH MOBILITY LLC; BELLSOUTH PERSONAL COMMUNICATIONS, LLC; CHATTANOOGA MSA LIMITED PARTNERSHIP; COLLECTIVELY D/B/A CINGULAR WIRELESS, PETITION FOR ARBITRATION OF AT&T WIRELESS PCS, LLC D/B/A AT&T MOBILITY; PETITION FOR ARBITRATION OF T-MOBILE USA, INC., PETITION FOR ARBITRATION OF SPRINT SPECTRUM L.P. D/B/A SPRINT PCS	)	**DOCKET NO. 03-00585**

FINAL ORDER OF ARBITRATION AWARD

This matter came before Chairman James M. Allison, Director Kenneth C. Hill and Director David F. Jones of the Tennessee Regulatory Authority ("Authority" or "TRA"), the Panel of Arbitrators ("Arbitration Panel" or "Panel") assigned to this docket, on September 9, 2013, for establishing a permanent reciprocal compensation rate for traffic exchanged between the parties during the period prior to July 1, 2012.

RELEVANT BACKGROUND AND TRAVEL OF THE CASE

In 2003, several commercial mobile radio service providers ("CMRS Providers"[1]) petitioned the Authority to arbitrate certain controversies that prevented the execution of interconnection and reciprocal compensation agreements ("ICAs") with many rural and small local exchange companies,

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[1] BellSouth Mobility, LLC; BellSouth Personal Communications, LLC; Chattanooga MSA Limited Partnership, collectively d/b/a Cingular Wireless; and AT&T Wireless PCS, LLC d/b/a AT&T Wireless (now, together "AT&T Mobility"); Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint"), CELLCO Partnership d/b/a Verizon Wireless ("Verizon Wireless"), and T-Mobile USA, Inc. ("T-Mobile") (collectively, "CMRS Providers" or "Petitioners").

collectively, the Tennessee Rural Coalition ("Coalition" or "RLECs"[2]) (together with the CMRS Providers, "Parties"). On January 12, 2006, the Authority panel of Directors, serving as an Arbitration Panel, issued an *Order of Arbitration Award* memorializing its decisions on the numerous issues that were raised during the arbitration.[3] As to the CMRS Providers' Issue 8, which involved the pricing methodology to be used to set a reciprocal compensation rate for the transport and termination of non-access telecommunications traffic exchanged between the parties, a majority of the arbitration panel found that rates should be based on forward-looking economic costs and ordered the use of a Total Element Long Range Incremental Cost ("TELRIC") study or price model, consistent with 47 C.F.R. § 51.705 (2001) and thereby, rejected the RLECs pricing proposal that incorporated embedded costs. Further, finding that the risk of either party being unduly enriched or left inadequately compensated would be mitigated, the Panel adopted an interim reciprocal compensation rate equal to that established for BellSouth in TRA Docket No. 97-01262,[4] which is subject to true-up upon the setting of a permanent rate. Finally, the Panel voted to commence additional proceedings in order to establish a permanent cost-based rate.[5]

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[2] The Tennessee Rural Coalition consists of a group of rural and small local exchange companies as follows: Ardmore Telephone Company, Inc.; Ben Lomand Rural Telephone Cooperative, Inc.; Bledsoe Telephone Cooperative; CenturyTel of Adamsville, Inc.; CenturyTel of Claiborne, Inc.; CenturyTel of Ooltewah-Collegedale, Inc.; Concord Telephone Exchange, Inc.; Crockett Telephone Company, Inc.; DeKalb Telephone Cooperative, Inc.; Highland Telephone Cooperative, Inc.; Humphreys County Telephone Company; Loretto Telephone Company, Inc.; Millington Telephone Company; North Central Telephone Cooperative, Inc.; Peoples Telephone Company; Tellico Telephone Company; Tennessee Telephone Company; Twin Lakes Telephone Cooperative Corporation; United Telephone Company; West Tennessee Telephone Company, Inc.; and Yorkville Telephone Cooperative.

[3] *See Order of Arbitration Award* (January 12, 2006) (memorializing decisions rendered by the TRA Arbitration Panel during its regularly scheduled Authority Conference held on January 12, 2005).

[4] *See In re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, Docket No. 97-01262 (June 23, 1997).

[5] *Order of Arbitration Award*, pp. 38-41 (January 12, 2006).

On June 23, 2006, as provided under 47 U.S.C. § 251(f)(2) of the Telecommunications Act ("Act," "Federal Act," or "Communications Act"),[6] the Coalition filed a *Petition* ("*Petition for Suspension of TELRIC*") that sought to modify and suspend certain aspects of the requirements of 47 U.S.C. § 251(b)(5)[7] insofar as those requirements could be considered to obligate Coalition members to establish charges for the transport and termination of telecommunications traffic on the basis of a TELRIC pricing methodology.[8] On August 29, 2006, the Arbitration Panel designated TRA Docket No. 06-00228 as the proceeding in which it would consider the *Petition for Suspension of TELRIC* and transferred all related filings to the new docket file. On July 9, 2007, a majority of the panel found that the existence, availability, and use of an alternative, less burdensome, pricing method would be consistent with the public interest, convenience, and necessity, and granted the Coalition's *Petition for Suspension of TELRIC*, as amended.[9] In so doing, the panel effectively reversed its earlier decision that a TELRIC pricing methodology, specifically, must be used to establish reciprocal compensation traffic rates in ICAs between the CMRS Providers and RLECs.[10]

Upon the resolution of TRA Docket No. 06-00228, during which the instant docket had been held in abeyance, proceedings could commence to establish a permanent rate in accordance with the

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[6] 47 U.S.C. § 251(f)(2) (1996), in pertinent part, states:

> (2) SUSPENSION AND MODIFICATIONS FOR RURAL CARRIERS. - a local exchange carrier with fewer that 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition.

[7] 47 U.S.C. § 251(b)(5) assigns to local exchange carriers, "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

[8] *Petition for Suspension of TELRIC* (June 23, 2006) (later amended to include a Supplemental Statement, filed in support of the RLECs' request to suspend the use of a TELRIC pricing methodology on October 2, 2006, that included company-specific information and documentation).

[9] *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) (2-1 decision)(Dir. Ron Jones, dissenting).

[10] *Id.*

Order of Arbitration Award.[11] Following the departure of Director Pat Miller, who presided as Hearing Officer in this docket, the voting panel appointed the Authority's General Counsel, or designee, to serve as the new Hearing Officer on October 20, 2008.[12] Thereafter, the Parties engaged in negotiations and did not file any requests or additional evidence of economic costs, to move the Authority to set a final rate. Thus, the docket appeared dormant for a time.

In addition, as a result of the rapid rise in new telecommunications technology and the corresponding shift in consumer usage and demand, disputes occurred nationwide over the assessment of compensation for the exchange of telecommunications traffic between carriers. As a result, while filings were few in TRA Docket No. 03-00585, the Federal Communications Commission ("FCC") was actively engaged in an ongoing and immense evaluation that, once concluded, was anticipated to comprehensively reform universal service and intercarrier compensation. Finally, on November 18, 2011, the FCC released its long-awaited *Report and Order and Further Notice of Proposed Rulemaking* ("*USF/ICC Transformation Order*"). Since that time, the FCC has modified its Order several times.[13]

The *USF/ICC Transformation Order* contains the extensive and complex decision of the FCC to reform and modernize the federal universal service and intercarrier compensation systems. Over thirty (30) appeals for review of the *USF/ICC Transformation Order* are now consolidated in the

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[11] On September 11, 2006, the Arbitration Panel ordered that TRA Docket No. 03-00585 be held in abeyance pending resolution of the RLECs' *Petition for Suspension of TELRIC. Order on Reconsideration and Holding Docket in Abeyance* (July 21, 2008).

[12] *Order Appointing a New Hearing Officer* (October 27, 2008).

[13] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund, Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC 17663 (November 18, 2011); pets. for review pending sub nom. *In re: FCC 11-161, No. 11-9900* (10th Cir. filed Dec. 8, 2011). *See also Connect America Fund et al., Order on Reconsideration*, 26 FCC Rcd. 17633 (Dec. 23, 2011); *Second Order on Reconsideration*, 27 FCC Rcd. 4648 (Apr. 25, 2012); *Third Order on Reconsideration*, 27 FCC Rcd. 5622 (May 14, 2012); *Fourth Order on Reconsideration*, 27 FCC Rcd. 8814 (July 18, 2012); *Fifth Order on Reconsideration*, 27 FCC Rcd. 14549 (Nov. 16, 2012); and *Sixth Order on Reconsideration*, 28 FCC Rcd. 2572 (rel. Feb. 27, 2013).

U.S. Court of Appeals for the 10th Circuit.[14] For purposes of this docket, the *USF/ICC Transformation Order* held that, as of July 1, 2012, bill-and-keep[15] would be the default compensation methodology for transport and termination of non-access telecommunications traffic exchanged between local exchange carriers, including RLECs, and CMRS providers.[16]

On June 14, 2012, the Hearing Officer issued a *Notice of Filing Comments* requesting that the parties file comments identifying the outstanding issues, addressing the impact of the *USF/ICC Transformation Order* on those issues, if any, and recommending a process to bring the docket to conclusion. Thereafter, comments were filed in the docket file by AT&T Mobility on July 23, 2012, and by Sprint, Verizon Wireless, T-Mobile, jointly, and the Coalition on August 1, 2012.

In their comments, the CMRS Providers noted that, in its *USF/ICC Transformation Order*, the FCC determined that non-access telecommunications traffic between CMRS providers and LECs is to be exchanged pursuant to a bill-and-keep arrangement.[17] For carriers operating under the terms of an ICA, the FCC required transition to bill-and-keep by July 1, 2012.[18] Further, the FCC reasoned that as carriers without an ICA already receive no compensation, implementation of bill-and-keep was not likely to disrupt these carriers' operations, regardless of the date on which it became effective.[19] Thus, as to carriers operating without an ICA, bill-and-keep simply maintains the status quo.

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[14] *Pennsylvania Public Utility Commission v. FCC, Case No. 11-9585* (10th Cir.) (Review filed December 5, 2011).
[15] In practice, bill-and-keep means that the parties will not charge one another for applicable telecommunications functions and services.
[16] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 26 FCC 17663, *USF/ICC Transformation Order*, ¶¶ 995-97 (November 18, 2011) (setting transition date on December 29, 2011); and, 26 FCC Rcd. 17633, *Order on Reconsideration*, ¶¶ 5-8 (December 23, 2011) (modifying transition date to July 1, 2012).
[17] *Comments of AT&T Mobility*, p. 1 (July 23, 2012).
[18] *Id.* at 2-3.
[19] *Comments of Joint CMRS Providers*, p. 5, footnote 13 (July 23, 2012).

In addition, the CMRS Providers asserted that, even if the TRA determined it should proceed to set rates for the period prior to July 1, 2012, bill-and-keep is the appropriate method of compensation and should be imposed.[20] In the absence of specific ICAs between the Parties, and asserting that the RLECs have failed to bill traffic at the interim rate set by the TRA, the CMRS Providers contended that bill-and-keep was already in effect between them and the RLECs.[21] Therefore, the CMRS Providers asserted that no further action is required by the TRA and asked that the docket be closed.[22]

In its comments, the RLECs noted that it had continued its attempts to negotiate ICAs with the CMRS Providers, as encouraged by the Authority, but had achieved only limited success in resolving this matter.[23] Asserting that the interim rate established by the Authority was too low to entice some CMRS Providers to negotiate a settled rate, the Coalition urged the Authority to set a permanent rate for the historical period using, as a benchmark, the market-based rates that have come from successful carrier negotiations.[24] The RLECs acknowledged that the *USF/ICC Transformation Order* preempts state authority to prospectively set rates after June 30, 2012, but contended that state jurisdiction over rate disputes prior to July 1, 2012, is not affected.[25] As such, the RLECs requested additional time to reach an amicable resolution or conclude its negotiations with the CMRS Providers.[26] Thereafter, the RLECs, on behalf of the Parties, twice requested an extension of time to

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[20] *Comments of Joint CMRS Providers*, p. 6 (July 23, 2012).
[21] *Id.* at 5.
[22] *Id.* at 8-9.
[23] *Comments of Tennessee Rural Coalition*, pp. 2-4 (August 1, 2012).
[24] *Id.* at 2-6.
[25] *Id.* at 7.
[26] *Id.* at 8.

continue negotiations and postpone the deadline for reporting the progress of the parties' negotiations.[27]

On December 3, 2012, AT&T Mobility reported that the Parties had tentatively reached an agreement as to new ICAs, structured in compliance with the FCC's recent ruling and which would be effective for traffic exchanged after June 30, 2012, but continued to disagree about compensation for traffic prior to July 1, 2012.[28] AT&T Mobility asserted that, as the arbitration had been requested so that ICAs would be established with the RLECs as required under 47 U.S.C. § 252, and the FCC's *USF/ICC Transformation Order* has established bill-and-keep as the *de facto* compensation arrangement, it is a waste of TRA time and resources to engage in a lengthy cost proceeding to set rates for historical traffic that ultimately must be trued-up to bill-and-keep. In addition, AT&T noted that if the RLECs wish to litigate whether they are entitled to true-up interim compensation accrued during the historical time period to something other than bill-and-keep, the RLECs should initiate the appropriate complaint docket.[29]

Also, on December 3, 2012, the RLECs reported that while several ICAs had been successfully negotiated with Sprint, have been approved, or are pending approval by the Authority, the RLECs had not reached agreements with the other CMRS providers.[30] The RLECs asserted that although many of the significant arbitration issues were determined by the Authority, the permanent reciprocal compensation rate to be employed during the historic period of October 2004 through June 2012 remained outstanding. Once the permanent rate was determined and the interim rate trued-up, this matter could be concluded.[31] Further, the RLECs asserted that it considers a rate of $0.015

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[27] *See* Letter to Hearing Officer filed October 2, 2012 (notifying Hearing Officer that Parties are in agreement to extend time to continue negotiations through November 1, 2012); *see also* Letter to Hearing Officer filed November 1, 2012 (notifying Hearing Officer that Parties agree to extend time for negotiations through December 1, 2012).
[28] *Status Report of AT&T Mobility*, p. 1 (December 3, 2012).
[29] *Id.* at 1-2.
[30] *Status Report of Tennessee Rural Coalition and Motion to Set Status Conference*, pp. 1-2 (December 3, 2012).
[31] *Id.* at 3.

(1.5¢) to be fair and just and suggested the exchange of final best offers ("FBOs") between the parties followed by a presentation of the FBOs for decision during a status conference before the Hearing Officer.[32]

On December 10, 2012, responding to the Coalition's report, T-Mobile opposed using FBOs, and the RLECs proposed that a status conference be held to bring the docket to conclusion.[33] Despite mentioning that negotiations had revived mid-October 2012, T-Mobile contended that the outstanding issue in this docket has been resolved by the *USF/ICC Transformation Order* and that the docket should be closed.[34] On December 13, 2012, in response to AT&T Mobility's report, the RLECs disagreed with the assertion that it had tentatively resolved the issues needed to establish new ICAs with AT&T Mobility.[35] In addition, the RLECS asserted that while they continue to negotiate with the CMRS Providers, they are not close to agreement and, therefore, agree that the docket should proceed for resolution before the Authority.[36]

HEARING OFFICER REPORT AND RECOMMENDATION

The Hearing Officer convened a Status Conference with the Parties on March 11, 2013.[37] During the Status Conference, the RLECs confirmed, for the record, that it had resolved all outstanding claims with Sprint and that Sprint indicated it would no longer be actively involved in the docket.[38] In addition, the Parties agreed that at the time the TRA adopted an interim rate for reciprocal compensation, subject to true-up, it also ordered, but has not yet convened, additional

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[32] *Id.* at 5-7.
[33] *Response of T-Mobile USA, Inc. to Status Report and Motion to Set Status Conference of Tennessee Rural Coalition* (December 10, 2012).
[34] *Id.* at 2.
[35] *Response of Tennessee Rural Coalition to Status Report of AT&T Mobility*, p. 1 (December 13, 2012).
[36] *Id.* at 1-2.
[37] *Notice of Status Conference* (February 27, 2013).
[38] By email on February 27, 2013, Ms. Susan Berlin, Counsel for Sprint PCS, informed the Hearing Officer that Sprint had resolved all of its outstanding issues with the RLECs in this docket and would no longer be participating in the status conference.

proceedings to establish a permanent rate.[39] The Parties further agreed that, pursuant to the FCC's *USF/ICC Transformation Order*, beginning July 1, 2012, non-access telecommunications traffic is exchanged according to a bill-and-keep arrangement. Thus, the remaining issues to be resolved by the Panel are a determination of a permanent reciprocal compensation rate and the true-up from the interim rate.

Nevertheless, despite their agreement, the Parties remained sharply divided as to the appropriate way in which the Panel should resolve these issues, as shown by their distinctly contrasting recommendations noted in the Parties' filed comments, and discussed above. The CMRS Providers asserted that, consistent with the FCC's order, the Authority should close the docket and/or find that bill-and-keep should be applied to traffic exchanged prior to July 1, 2012. Conversely, the RLECs urged the Authority to set a permanent rate, and calculate any true-up, using market-based rates as a benchmark.

On March 27, 2013, the Hearing Officer entered a Procedural Schedule to finalize preliminary procedural matters and bring the docket before the Panel for resolution.[40] The Hearing Officer ordered that Initial Briefs and Reply Briefs be filed for consideration by the Panel.[41] In addition, the Hearing Officer further ordered that, after the briefing deadlines passed, the docket would be presented to the Panel on the briefs and written record alone during an upcoming Authority Conference. In lieu of oral arguments, the Parties would be available before the panel's deliberations to answer any questions the Panel or TRA Staff may have.[42]

The *Hearing Officer's Report and Recommendation* was accepted by the Panel at the Authority Conference held on April 8, 2013. Based on the *Hearing Officer's Report and Recommendation*, the Panel needed to resolve the following remaining issues:

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[39] *See Hearing Officer Report and Recommendation*, pp. 8-9 (March 27, 2013).
[40] *Id.* at 10.
[41] *Id.*
[42] *Id.*

1. Establish a permanent reciprocal compensation rate and/or methodology to be applied to traffic exchanged between the Parties during the period prior to July 1, 2012 (historical period of October 2004 through June 2012); and

2. True-up of the interim rate, as necessary.

These issues require the Panel, sitting as arbitrators, to establish a permanent rate for transport and termination of calls between AT&T Mobility and the Coalition for the interim period. The interim rates were based upon BellSouth's (now d/b/a AT&T Tennessee) transport and termination rates established in TRA Docket No. 97-01262.

On April 15, 2013, the RLECs, Verizon Wireless and T-Mobile jointly filed a motion requesting a one-week extension to the briefing schedule because those parties had tentatively reached agreements and believed they could finalize arrangements that week.[43] The Hearing Officer granted the motion and extended the briefing deadlines so that Initial Briefs would be due April 22, 2013 and Reply Briefs due May 6, 2013.[44] Subsequently, the RLECs finalized agreements with Verizon Wireless and T-Mobile, which left AT&T Mobility as the only remaining CMRS provider with whom the RLECs could not reach an agreement.

Issue 8: What is the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of indirect or direct traffic during the period prior to July 1, 2012 (historical period of October 2004 through June 2012)?

POSITIONS OF PARTIES

The Parties have set forth their arguments in full in the record of this docket, in their pre-hearing memoranda, in Briefs submitted on April 22, 2013 and in Reply Briefs submitted on May 6, 2013. The following section is intended as a brief summary of the positions of the RLECs and AT&T Mobility in this matter.

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[43] *See Motion for One Week Extension for Filing of Briefs and Request for Expedited Approval*, pp. 1-2 (April 15, 2013).
[44] *See Order Granting Extension of Briefing Schedule* (April 16, 2013).

AT&T Mobility

Rather than submitting a final best offer, AT&T Mobility submitted a legal argument that compensation should be zero as a result of implementing a bill-and-keep arrangement.

AT&T Mobility's main argument is that the FCC *USF/ICC Transformation Order* mandates the TRA to order bill-and-keep[45] and is precluded from ordering any other type of compensation arrangement.[46] Moreover, AT&T Mobility argues that any true-up ordered must also conform to the bill-and-keep requirement.[47] In support of its argument, AT&T Mobility states the parties have been *de facto* operating under bill-and-keep for years because the parties have been not billing or paying any compensation.[48]

AT&T Mobility asserts that pursuant to the FCC's new interpretation of section 252(c)(1) of the Federal Act, the TRA is precluded from establishing rates other than bill-and-keep because such ruling would not meet the requirements of Section 251 as clarified by the FCC. AT&T Mobility goes on to state that the TRA should implement bill-and-keep even for traffic exchanged prior to the effective date of the FCC's *USF/ICC Transformation Order*.[49]

In addition, AT&T Mobility argues that the following factors preclude the establishment of rates other than bill-and-keep:

> a. Under still applicable 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, hearing and appeals.
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> 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

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[45] Bill-and-keep means that carriers do not pay each other for this traffic, but instead recover their own costs from customers.
[46] *Initial Brief of AT&T Mobility*, p. 2 (April 22, 2013).
[47] *Id.*
[48] *Id.*
[49] *Id.* at 8-9.

> either AT&T or the TRA. AT&T should not be prejudiced in such fashion, and the RLECs should not profit, because of the RLEC's intentional failure to comply with a previous order of the TRA.[50]

AT&T Mobility goes on to argue that while the RLECs refused to issue bills for the interim rate, the RLECs filed a petition requesting that the TRA waive the federal requirements requiring that rates for transport and termination be established using TELRIC.[51] AT&T Mobility further asserts that even though the TRA ruled in favor of the RLECs in TRA Docket No. 06-00228, meaning that other studies could be considered, the RLECs never took steps to move the case forward.[52]

According to AT&T Mobility, if the TRA chooses to establish a new permanent rate, then a cost proceeding would be required because adopting rates based upon negotiated rates, as the Coalition suggests, violates the Federal Act.[53] Moreover, AT&T Mobility also refers back to the TRA's Final Order in Docket No. 06-00228, wherein the TRA did not rule that cost studies would not be used in setting a permanent rate, but rather the TRA only suspended the requirements that TELRIC had to be used.[54] Accordingly, AT&T Mobility argues that even if the TRA could adopt rates other than bill-and-keep, the TRA would need to determine a cost methodology, apply that data to the RLECs data and hold an evidentiary hearing based upon the new studies.[55]

AT&T Mobility maintains that since no billing records have been exchanged, any rates adopted other than bill-and-keep would require the new rates to be applied to traffic records as far back as 2005.[56] AT&T Mobility contends that verifying the accuracy of those minutes would be

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[50] *Id.* at. 4.
[51] *Id.* at 6.
[52] *Id.* at. 6-7.
[53] *Id.* at 8-9.
[54] *Id.* at 10.
[55] *Id.* at 11.
[56] *Id.*

highly problematic, and discovery would be needed to ensure accuracy of records. AT&T Mobility claims such investigation and discovery would be costly and time consuming.[57]

In its *Reply of AT&T Mobility*, AT&T Mobility reiterated the positions taken in its Initial Brief focusing mainly on its presumption that the TRA cannot order rates other than bill-and-keep. Furthermore, AT&T Mobility asserts that bill-and-keep is not unfair because no money has exchanged hands thus far, so no one will be harmed monetarily if bill-and-keep is ordered.[58]

RLECs

In its Brief, the RLECs state the recent FCC order is not applicable to traffic before July 1, 2012, and rather than propose cost-based rates, the RLECS propose a market rate based upon negotiated contracts with other providers.[59] Moreover, the RLECs state they have settled this issue with all other wireless carriers except for AT&T Mobility.[60] Unable to settle, the RLECs request the Authority set a reciprocal compensation rate of $0.012 per minute for indirect connection and $0.008 per minute for direct connection with AT&T Mobility and order an immediate true-up.[61] The RLECs argue that AT&T Mobility is obligated to pay reasonable transport and termination rates during the period in question for using the RLECs' facilities to complete telephone calls. By refusing to negotiate a rate or pay the interim rates, the RLECs claim AT&T Mobility has pocketed monies resulting in a windfall.[62]

The RLECs refute AT&T Mobility's position that setting a rate other than bill-and-keep would violate federal law. According to the RLECs, AT&T Mobility offers no legal justification that the FCC's *USF/ICC Transformation Order* applies retroactively to the period in question in this

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[57] *Id.*
[58] *Reply of AT&T Mobility*, pp. 5-6 (May 6, 2013).
[59] *Final Brief of Tennessee Rural Coalition*, p. 2 (April 22, 2013).
[60] *Id.* at 1.
[61] *Reply Brief of the Tennessee Rural Coalition*, p. 10 (May 6, 2013).
[62] *Final Brief of the Tennessee Rural Coalition*, pp. 13- 14 (April 22, 2013).

docket.[63] The RLECs contend the FCC's directive is prospective and no mention is made of bill-and-keep applying retroactively.[64] The RLECs agree that the FCC's new Rule 20.11(b), as set forth in the FCC's *USF/ICC Transformation Order*, requires bill-and-keep prospectively from July 1, 2012 forward.[65] The RLECs argue, however, that the previous FCC Rule 20.11 (b), which was in effect prior to July 1, 2012, contained very different requirements.[66] The Rule in effect during the time the instant issue was pending is as follows:

> FCC Rule 20.11(b):
> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.
> (2) A Commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.[67]

The RLECs insist the rule in effect prior to the *USF/ICC Transformation Order* must be followed because it was the law for the period in question.[68]

The RLECs refer back to the Authority's original arbitration award in this docket as requiring TELRIC compliant studies to implement the above rule regarding fair compensation. As a result of the Authority's order requiring TELRIC based rates, the RLECs sought suspension of the FCC's pricing formula. In June 2008, the Authority suspended the TELRIC requirement recognizing there were alternative, less expensive means to determine the appropriate rate.

With the TELRIC requirements lifted, the RLECs contend the remaining FCC requirement in FCC Rule 20.11(b)(2) simply requires that the compensation rate be reciprocal and reasonable.[69] The

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[63] *Reply Brief of the Tennessee Rural Coalition*, p. 7 (May 6, 2013).
[64] *Id.* at 6-7.
[65] *Id.* at 7-8.
[66] *Id.* at 8.
[67] *Id.*
[68] *Id.*
[69] *Final Brief of the Tennessee Rural Coalition*, p. 16 (April 22, 2013).

RLECs also refute AT&T Mobility's claim that rates must be based on costs should the Authority choose to establish a permanent rate other than bill-and-keep. The RLECs refer to a U.S. Fourth Circuit Court of Appeals decision dismissing this argument raised by AT&T Mobility in North Carolina wherein the court stated:

> The CMRS Providers' construction, which would require the rates of compensation to 'comport' with § 252(d)(2)(A) whenever the duty to establish reciprocal compensation under § 251(b)(5) is in effect is unsustainable. It would leave the RLECs 'with a draconian choice – they could either ... receive no compensation for terminating cell phone traffic on their network, or they could perform expensive and time consuming TELRIC cost studies despite the Act's plain language permitting modification of FCC regulations.[70]

Since TELRIC requirements have been lifted and the RLECs contend that rates must only meet the reasonable test, the RLECs ask the TRA to employ a two-prong test to determine reasonableness.[71] The RLECs state the TRA should first review the publically filed rates that have been negotiated between the RLECs and Wireless carriers.[72] The RLECs claim the market-based midpoint rate is $0.02.[73] The RLECs provided the current status of the petitioning CMRS parties as follows:

Verizon Wireless: Fully settled with all RLECs and final agreements are approved or are pending TRA approval or awaiting final execution. Final rates for Verizon have been agreed at $0.015 (Loretto), $0.0125 (United) and $0.0115 (Highland).

Sprint. Fully settled with all RLECs and final agreements are approved or are pending TRA approval. Final rates for Sprint have been agreed at $0.015 (Loretto and Dekalb) and $0.0115 (Highland) for indirect connection.

T-Mobile. Fully settled with all RLECs. Loretto, North Central, United, Dekalb and the TEC Companies (Crockett, Peoples and West Tennessee) have agreed to all settlement terms and are finalizing the agreements.

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[70] *Reply Brief of the Tennessee Rural Coalition*, p. 9 (May 6, 2013), quoting *New Cingular Wireless v. Finley*, 674 F.3d 225, footnote 29 (4th Cir. 2012) (emphasis added).
[71] *Final Brief of the Tennessee Rural Coalition*, p. 2 (April 22, 2013).
[72] *Id.*
[73] *Id.*

AT&T Mobility. Highland Telephone, another Tennessee RLEC, was paid by AT&T via a contract at $0.015 negotiated with Cingular Wireless in 2001 prior to being acquired by AT&T in 2003.[74]

The RLECs state the following companies do not have final resolution with AT&T Mobility: Loretto, North Central United and Dekalb, the TDS Companies (Concord, Humphreys County, Tellico and Tennessee Telephone); and the TEC Companies (Crocket, Peoples and West Tennessee.)[75]

The RLECs also provide the additional information regarding rates set in the open marketplace:[76]

Verizon Wireless:

West Kentucky (2011)	$0.0150 (indirect) and $0.0125 (direct)
Ardmore (2011)	$0.0150 (indirect) and $0.0125 (direct)
Dekalb (2009)	$0.0125 (indirect) and $0.0100 (direct)
TEC Companies (2010)	$0.0125 (indirect) and $0.0100 (direct)
North Central (2009)	$0.0125 (indirect) and $0.0100 (direct)
United (2009)	$0.0125 (indirect) and $0.0100 (direct)
TDS Companies (2002)	$0.00830 (indirect)

Sprint:

TEC Companies (2011)	$0.0125 (indirect) and $0.0100 (direct)
TDS Companies (2011)	$0.0100 (indirect)

Nextel:

Ben Lomand (2005)	$0.020

[74] *Final Brief of the Tennessee Rural Coalition*, pp. 11-12 (April 22, 2013).
[75] *Id.* at 12.
[76] *Id.* at 19-20.

US Cellular:

TDS Companies	$0.009 to $0.020

T-Mobile:

TDS Companies	$0.0175

The RLECs also point out that even AT&T agreed to $0.015 in 2001 with Highland Telephone and has also agreed to similar rates in other states.[77]

AT&T Mobility:

TDS Telecom (2005)	Range of $0.005 to $0.044 with an average rate of $0.019
Industry Tel Co. (TX) 2006	$0.012
Pennsylvania RLECS (2006)	$0.017
Riviera Tel (TX) 2007	$0.022 (indirect) and $0.015 (direct)

The RLECs' next prong in the two-part test would be for the Authority to accept the RLECs federal interstate terminating access rate as a reasonable approximation of the cost of Wireless-RLEC traffic because the rate elements are cost based. The RLECs state that the interstate access midpoint rate during the period in question was $0.021.[78]

The RLECs, however, propose as their final best offer a rate of $0.012 for direct interconnection and $0.008 for indirect connection, which they state is well below both the market-based rate and interstate access benchmark.[79] The RLECs also assert that this rate offers AT&T Mobility a lower rate than AT&T Mobility has agreed to pay elsewhere and represents a substantial compromise on the part of the RLECs, whose prior position was $0.021 during arbitration hearings.[80] The RLECs also argue that market-based pricing is good public policy because it maintains competitive neutrality among CMRS carriers, provides RLECs with market value for their services

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[77] *Id.* at 20.
[78] *Id.* at 2.
[79] *Id.*
[80] *Id.*

allowing the RLECS to maintain and improve their networks, and avoids overly expensive and complex cost studies which in turn helps maintain affordable rates.[81]

Moreover, the RLECs state that a market-based approach has previously been adopted by the Authority in its Generic Universal Service Docket wherein the Authority ruled that an interim rate of $0.015 was reasonable based upon approved agreements in the BellSouth region for CMRS traffic transiting BellSouth's network.[82]

The RLECs claim that they have billed AT&T Mobility for 443,382,026 minutes during the period of October 2004 through June 2012 and that AT&T Mobility has never disputed any part of the invoices, including the minutes reported.[83] Furthermore, the billed minutes are created by AT&T Mobility's affiliate local company, BellSouth d/b/a AT&T Tennessee because AT&T Tennessee operates the tandems that indirectly connect the parties.[84] The RLECs argue that AT&T Tennessee records the minutes sent to the RLECs and AT&T Mobility; therefore, AT&T Mobility's claim that minutes are not known is a poor excuse for not paying.[85]

DELIBERATIONS AND CONCLUSIONS

At the regularly scheduled Authority Conference held on September 9, 2013, the Panel considered the remaining issues in the arbitration. The issue of setting final rates for transport and termination and the resulting true-up from the interim rate are the only remaining issues of the twenty-eight (28) issues originally ruled on by the arbitrators. The panel's ruling on this issue only affects AT&T Mobility because the RLECs have negotiated rates for transport and termination with all other mobile providers, except AT&T Mobility.

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[81] *Id.* at 21.
[82] *Id.* ("The majority of the panel found that the 1.5 cent rate is just and reasonable because it reflects negotiated rates existing in approved agreements in the BellSouth region for CMRS traffic transiting BellSouth's network.").
[83] *Reply Brief of the Tennessee Rural Coalition*, p. 5 (May 6, 2013).
[84] *Id.*at 4-5.
[85] *Id.* at 5.

Traffic Terminated Prior to July 1, 2012 is Not Subject to Bill-and -Keep

AT&T Mobility's entire argument that rates should revert to bill-and-keep for the period of October 2004 through June 30, 2012 is predicated solely on the FCC's *USF/ICC Transformation Order* released in December 2011. The FCC order clearly mandates that bill-and-keep will be the default compensation method for all traffic between carriers after July 1, 2012. The order, however, is clearly prospective in nature and does not contain provisions to indicate it applies to traffic terminated prior to July 1, 2012.

In TRA Docket No. 06-00228, the Authority clearly recognized that there is a cost of transporting and terminating calls between mobile providers and landline companies. The FCC has also recognized the significant impact and potential "marketplace disruption" an immediate adoption of bill-and-keep as the default methodology would cause. Initially, in its *USF/ICC Transformation Order* released on November 18, 2011, the FCC adopted bill-and-keep as the immediately applicable default pricing mechanism for non-access traffic between LECs and CMRS providers.[86] However, prior to the implementation of bill-and-keep for non-access traffic on December 29, 2011, the FCC reconsidered its previous ruling.[87] After recognizing that millions of dollars were potentially at stake for incumbent LECs, the FCC was concerned about the ability of carriers to be compensated and thus, reconsidered the issue.[88] On December 23, 2011, the FCC issued its reconsideration order finding that "the supplemental record suggests that the Commission did not accurately assess the impact of its decision to immediately move to bill-and-keep for all LECS for this category of traffic."[89] Consequently, the FCC provided for a transition period and ordered that bill-and-keep

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[86] *In the Matter of Connect Am. Fund A Nat'l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund*, 26 FCC Rcd. 17663 (December 23, 2011).
[87] *Id.* at 17636-17637.
[88] *Id.* at 17636.
[89] *Id.*

would not go into effect until July 1, 2012.[90] There is no mention in the FCC Order that bill-and-keep should be applied retroactively. In fact, the FCC had different rules in place regarding the traffic terminated prior to July 1, 2012 that required reciprocal compensation rates to be paid by each party. The rule in place prior to July 1, 2012 provides:

> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.
>
> (2) A Commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.[91]

The Panel found that although the FCC clearly determined in its *USF/ICC Transformation Order* that compensation for traffic after July 1, 2012 must be based on bill-and-keep, the FCC's order of a bill-and-keep compensation arrangement is not binding on transport and terminating traffic *before* July 1, 2012. Accordingly, the Panel found that a bill-and-keep arrangement is not proper for traffic terminated October 2004 through June 20, 2012, and a final compensation rate should be established.

Since bill-and-keep is not required, the Arbitration Panel now has great latitude in determining final rates for transport and termination. This is especially true in light of the fact that the Authority previously suspended TELRIC requirements.

TELRIC Cost Studies are not Required to set a Rate for Traffic Exchanged During the Interim Period

The Federal Act required that the interconnection rates be based upon TELRIC studies and the Authority originally ordered TELRIC studies to be submitted by the RLECs. During the interim period between ordering TELRIC studies and making a final decision on the studies submitted,

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[90] *Id.*

[91] 47 C.F.R. §20.11 (b) (59 Fed. Reg. 18495, Apr. 19, 1994, as amended at 61 Fed. Reg. 45619, Aug. 29, 1996; 70 Fed. Reg. 16145, Mar. 30, 2005).

which would have taken at least a year or two, the Authority recognized that telephone calls needed to be completed between the parties, therefore, the TRA established an interim rate to be paid until a final rate was determined from the studies. The difference between the interim rate and final rate would then be trued up, meaning the parties would owe each other the final rate retroactively. The Authority established an interim rate based upon an earlier cost proceeding, TRA Docket No. 97-01262, held before the Authority to determine interconnection and other network rates for BellSouth, which is now Bellsouth d/b/a AT&T Tennessee.[92] The proceeding had numerous intervenors, and since there was little common ground among the parties, took years to complete. In establishing rates for over 700 different network rate elements, the Authority chose a specific cost model from those presented by the parties and specifically ruled on numerous data inputs for the chosen cost model, including, but not limited to, costs of network facilities (e.g., cable, wire, poles, switches...), labor rates, network configurations, depreciation rates, maintenance and expense factors, and a fair return on investment.

As stated herein, interconnection rates, and all other rates for network elements established in arbitrations, are established based upon TELRIC studies as mandated by FCC requirements. There is, however, a provision in the Federal Act that allows companies to petition state commissions to suspend the TELRIC requirements. § 251 (f)(2) of the Act provides:

> The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--
> **(A)** is necessary--
> **(i)** to avoid a significant adverse economic impact on users of telecommunications services generally;
> **(ii)** to avoid imposing a requirement that is unduly economically burdensome; or
> **(iii)** to avoid imposing a requirement that is technically infeasible; and
> **(B)** is consistent with the public interest, convenience, and necessity.

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[92] *See In re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, Docket No. 97-01262, *Final Order* (February 23, 2001).

Pursuant to § 251 (f)(2) of the Communications Act, the TRA suspended the requirement that the rates for transport and termination be based on TELRIC, and the Authority encouraged the parties to negotiate. The majority of the panel found that suspending the TELRIC requirements was in the "public interest, convenience and necessity" in light of the "significant time, money and resources already expended, and the genuine probability for additional and substantial costs in the future, combined with the availability of alternative and less burdensome methods of establishing a rate."[93] Once granted, the suspension shall remain in effect as long as the RLECs continue to meet the requirements on which the suspension was based.[94] The Authority has made no determination that suspending the TELRIC requirements for the RLECs is no longer appropriate, thus the suspension remains in effect.

Once it has suspended TELRIC requirements, the Authority has great leeway in setting transport and termination rates and may consider alternative forms of cost studies or other means in choosing rates as long as the rates are just, reasonable and nondiscriminatory.[95] The United States Court of Appeals for the Fourth Circuit has considered this issue and found that once the TELRIC cost study requirement has been suspended, a state commission is free to consider any reasonable evidence and methodology when determining the appropriate rate for call termination. The Court of Appeals held that "the district court did not err in holding that the NCUC [North Carolina Utility Commission] possess statutory authority under 47 U.S.C. § 251(f)(2) to modify the TELRIC guidelines [for RLECs]."[96] The Court stated:

> We find that the language of § 251(f)(2) is plain and unambiguous in authorizing state commissions to modify the TELRIC guidelines for the RLECs. To be sure, the pricing standards of § 252(d)(2)(A) are not specifically mentioned in the language of

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[93] *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) (2-1 decision)(Dir. Ron Jones, dissenting).
[94] *See* 47 U.S.C.A. § 251 (f)(2).
[95] *See* Tenn. Code Ann. § 65-5-101 (2013 Supp.).
[96] *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 248 (4th Cir. 2012).

> § 251(f)(2), which only allows "rural carriers" to "petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c)." It is plain from the broader context of the statute, however, that modification of § 251(b)(5), explicitly provided for in the statutory provision at issue, includes the authority to modify the pricing standards elucidated in § 252(d)(2)(A) and the accompanying regulations . . . . The ability to modify the application of the requirement(s) of § 251(b)(5) must therefore include the ability to modify the TELRIC pricing requirements for the RLECs.[97]

The interim rate established by the Authority in TRA Docket No. 97-01272 was a cost-based rate which used TELRIC cost methodology. The Authority, however, granted the petition of the RLECs to suspend the requirement that the transport and termination rates be based upon TELRIC. Excluding the TELRIC requirement allowed the parties to present alternatives to TELRIC-based rates for consideration by the Panel. It also gave the arbitrators wide latitude in establishing compensation rates for transport and termination because the FCC rules, absent the TELRIC requirement, essentially provides that the state commission approve mutual compensation rates that are just, reasonable and nondiscriminatory.

The Interim TELRIC Transport and Termination Rates are not Appropriate as the Final Rate

On January 12, 2006 the Authority established an interim compensation rate for transport and termination based upon TELRIC rates adopted for BellSouth in a previous docket. The Authority, however, recognized that rural company costs could be much higher and thus required TELRIC cost studies to be filed by the RLECs in order to establish final rates based on TELRIC. Pursuant to a provision in Federal Act, however, the Authority approved the RLECs' request to suspend the TELRIC requirement for establishing compensation rates for transport and termination.

The interim TELRIC rates for transport and termination were based upon BellSouth's costs, which due to economies of scale are predictably much lower than the costs for the RLECs. Accordingly, if the Authority were to adopt rates based upon TELRIC, updated studies for the

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[97] *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 249-251 (4th Cir. 2012).

RLECs would certainly be needed. The Panel has recognized the time and costs associated with doing TELRIC cost studies when it suspended this requirement. Furthermore, the Panel should not adopt a TELRIC rate that is most likely not representative of RLEC costs. In addition, neither party has suggested that the interim TELRIC rates for transport and termination be adopted and continued as the final rate.

The RLECs' Proposed Transport and Termination Rates are Just and Reasonable

Upon the determination that a bill-and-keep arrangement is not required under federal law for calls terminated prior to July 1, 2012 and is otherwise not a viable option because of the costs associated with transport and termination, and after reasoning that the interim TELRIC rates should not be adopted as the final compensation rates, the Panel reviewed the rates proposed by the RLECs.

The RLECs were granted relief from the TELRIC requirement by the Authority and were then encouraged to negotiate with the mobile carriers for a final compensation rate for transport and termination. It appears the RLECs were successful in the negotiation process with all carriers except for AT&T Mobility. The RLECs propose to base their proposed transport and termination rates with AT&T Mobility on those negotiated rates with other CMRS providers and, as pointed out by the RLECs, the Authority previously has chosen rates based upon negotiated rates contained in agreements. In TRA Docket No. 00-00523, there was a similar issue involving compensation rates between BellSouth and the RLECs.[98] BellSouth was seeking to terminate compensation rates paid to the RLECs which had been previously agreed upon. The contracts, however, were terminating and the issue of whether BellSouth should continue paying compensation was before the Authority. The existing negotiated contractual rates were $0.015. The Authority reasoned and ultimately ruled that

[98] *See In re: Generic Docket Addressing Rural Universal Service*, Docket No. 00-00523, *Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, p. 12 (September 1, 2004).

"the 1.5 cent rate is just and reasonable because it reflects negotiated rates existing in approved agreements in the BellSouth region for CMRS traffic transiting BellSouth's network."[99]

The Panel considered the fact that Verizon and Sprint have significant bargaining power compared to the RLECs, and the mere fact that those providers were able to reach agreements with the RLECs indicates a measure of reasonableness within the marketplace. Moreover, the fact that all mobile carriers, except for AT&T Mobility, and the RLECs negotiated similar rates further indicates a measure of reasonableness and that those rates reflect the market. The RLECs also state that the interstate terminating access rates serve as a reasonable benchmark and that the mid-point interstate access rate during the interim period was $0.021. The RLECs, however, are proposing rates that are below those previously negotiated with other carriers and interstate rates, thereby indicating further compromise on the part of the RLECs. AT&T Mobility refused to submit a FBO or offer any rate for consideration other than bill-and-keep. For the reasons set forth herein, the Panel of Arbitrators voted unanimously to adopt the transport and termination rates proposed by the RLECs, which is $0.012 per minute for indirect traffic and $0.08 per minute for traffic exchanged.

The Panel finds that the supporting information filed in the record by the RLECs, specifically the rates negotiated with other mobile providers provides a reasonable basis on which to establish final rates. This fact coupled with the fact that AT&T Mobility did not present FBOs and thus, proposed no viable alternative final rate, leads the panel to find that the RLECs proposed compensation rates of $0.012 for indirect traffic and $0.08 for direct traffic are just, reasonable and nondiscriminatory. Accordingly, based on these findings and the record in this docket, the panel voted unanimously that the interim rates previously established in this docket should be trued-up to the proposed RLEC compensation rates of $0.012 (indirect) and $0.008 cents (direct) for traffic terminated between October 2004 and June 2012.

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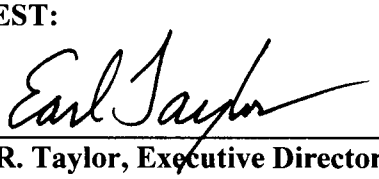
[99] *Id.*

IT IS THEREFORE ORDERED THAT:

The foregoing Final Order of Arbitration Award reflects the Arbitrators' resolution of Issue No. 8. The resolution contained herein complies with the Telecommunications Act of 1996 and is supported by the record in this proceeding.

Chairman James M. Allison, Director Kenneth C. Hill and Director David F. Jones acting as Arbitrators concur.

ATTEST:



Earl R. Taylor, Executive Director