at&t

Robert Culpepper
General Attorney

AT&T Tennessee
333 Commerce Street
Suite 2101
Nashville, TN 37201-1800

T: 615.214.6300
F: 615.214.7406

August 5, 2014

Hon. Herbert Hilliard, Chairman
Tennessee Regulatory Authority
502 Deaderick Street
Nashville, TN 37238

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

Dear Chairman Hilliard:

Pursuant to the Authority's *Order Granting Motion for Clarification,* please find enclosed an original and four copies of *AT&T Mobility's Response in Opposition to RLEC's Brief in Support of their Proposed Language for Interconnection Agreement.* A copy of the same has been served on all parties of record.

Very truly yours,

Robert Culpepper by Cotaneous w/permission

Robert Culpepper

Enclosure

1054426

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 d/b/a Sprint PCS*

Docket No. 03-00585

AT&T MOBILITY'S RESPONSE IN OPPOSITION TO RLECS' BRIEF IN SUPPORT OF THEIR PROPOSED LANGUAGE FOR INTERCONNECTION AGREEMENT

AT&T Mobility respectfully submits this brief in response to the Tennessee Rural Coalition Interconnection Agreement Brief in Support of RLEC Language ("RLEC Br.").

INTRODUCTION

The RLECs rely heavily on propositions that have nothing to do with the questions presented by their proposed contract language. They stress, for example, that "the entirety of this proceeding has been about the determination of and payment of a reciprocal compensation rate,"[1] and that "the CMRS carriers . . . initiated the instant proceeding in 2003 for the very purpose of determining . . . the rates, terms and conditions on which . . . the carriers[']networks are interconnected . . . and to make arrangements for the payment of reciprocal compensation."[2] Such propositions are irrelevant. The RLECs' proposed language raises only two issues: (1) Are RLECs that failed to enter into any sort of agreement with AT&T Mobility to implement the Authority's 2006 Award, and that failed to bill AT&T Mobility the interim rates the Authority

[1] RELC Br. at 1.

[2] *Id.* at 2.

established in that Award, now entitled to a "true-up"[3] to the interim rates they never billed? (2) Should charges for traffic exchanged during the 2004-2012 Historical Period be exempt from the parties' agreement to limit back-billing to two-years? Unless the Authority's 2006 or 2014 Awards answer both questions in the affirmative, the Authority must reject the RLECs' proposed language, because the only language that can lawfully be included in the parties' ICA is language that implements the determinations the Authority made in those two Awards.

The Authority did not rule in either of the prior Awards that RLECs that failed to bill AT&T Mobility the interim rate could later obtain a "true-up" for the traffic they failed to bill, or that RLECs could bill for that traffic many years after the fact notwithstanding the parties' agreement that traffic more than two years old cannot be billed. *See* Section I *infra*. Nor, as AT&T Mobility has demonstrated, can the Authority address those questions now, because they were not presented in the arbitration. *See* AT&T Mobility Brief in Opposition to RLECs' Proposed Language for Interconnection Agreement ("AT&T Br.") at 8-11.

Even if the Authority could properly consider the issues raised by the RLECs' proposed language, it would have to reject the RLECs' novel proposal for a "true-up" of amounts never billed (Section II, *infra*), and it would also have to reject the RLECs' proposed exception to the agreed two-year limitation on back-billing (Section III, *infra*).

Nor can the Authority properly grant the RLECs' request for an order directing AT&T Mobility to pay them the amounts they claim are owed. The only question before the Authority now, and the only question that federal law allows the Authority to answer at this stage of the proceedings, is whether the ICA the parties submit for approval should include the language

[3] "True-up" is in quotes because, as we discuss below, what the Non-Conforming RLECs are asking for is not really a true-up.

proposed by the RLECs. In the absence of an approved ICA, there cannot be a claim for breach of an ICA.

ARGUMENT

I. THE AUTHORITY HAS NOT RULED ON THE ISSUES PRESENTED BY THE RLECS' PROPOSED LANGUAGE.

The 2006 Award did not say or imply anything about the right of an RLEC that chose to *not* enter into an agreement that conformed with that Award and *not* bill AT&T Mobility at the interim rate to claim a "true-up" for amounts it did not bill and AT&T Mobility did not pay because AT&T Mobility was not billed. Nor did that Award rule that the two-year limitation on back-billing would not apply during the continuation of this proceeding. Those questions simply were not presented to the Authority. Furthermore, it was implicit in the 2006 Award that the RLECs *would* enter into agreements conforming with that Award (as the RLECs have admitted),[4] that they *would* bill AT&T Mobility pursuant to those agreements at the interim rates the Authority had set, and that the two-year back-billing limitation would apply. AT&T Mobility does not know why many RLECs refused to comply with the 2006 Award, but that was those RLECs' choice. In any event, there was no reason for the Authority to decide in 2006, and the Authority did not decide, that an RLEC that did not act in conformity with that Award could later bill for traffic outside the two-year back-billing limitation, or that an RLEC that failed to bill would years later be entitled to a claimed "true-up."[5]

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[4] *See* AT&T Br. at 14.

[5] Any RLEC that wanted to enter into an ICA that conformed with the 2006 Award was entitled to do so. Just as AT&T Mobility cannot now refuse to enter into ICAs that conform with the 2006 Award and the 2014 Award, AT&T Mobility could not have refused in 2006 to enter into an ICA that conformed with the 2006 Award with any RLEC that wanted such an ICA. The RLECs assert, however, that "[w]hile many of the RLECs started down a path of entering into AT&T's proferred formal agreements" – in truth, of course, some RLECs went all the way down that path (*see* AT&T Br. Exhibit 1) – "for some it was an unnecessary hurdle, since it would be resolved upon entry of a final TRA order and was unnecessary." RLEC Br. at 12. That assertion cannot be squared with the RLECs' admission that "federal law expressly

Nor did the Authority decide any such thing in the 2014 Award – again, because the issues were not raised. The RLECs point to the statement in the 2014 Award that "the interim rates previously established in this docket should be trued up to the proposed RLEC compensation rate of $0.012 (indirect) and $0.008 (direct) for Traffic terminated between October 2004 and June 2012."[6] But that statement does not say anything about RLECs that did not bill the interim rate. Indeed, those RLECs are not asking for a true-up of the interim rates at all. Instead, they are asking for full, initial payment at the newly-established permanent rates for traffic exchanged more than two years ago – **not** for a "true-up," *i.e.*, payment of an amount based on the difference between the interim rates properly billed and paid and the permanent rates established in the 2014 Award.

The RLECs also quote the Authority's statement in the 2014 Award that "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."[7] This is irrelevant, however, to the asserted rights of RLECs that failed to enter into an ICA after the 2006 ruling. If anything, it demonstrates that the issues of (1) failure to bill and (2) application of the agreed two-year limitation on back-billing to the Historic Period are not before the Authority, because otherwise those issues would have been addressed.

Finally, the RLECs quote the Authority's statement in the 2014 Award that, "the difference between the interim rate and the final rate would then be trued up, meaning the parties

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and unambiguously requires that parties submit . . . an interconnection agreement" conforming with an arbitration award (*see* AT&T Br. at 14), nor does it justify their failure to enter an ICA.

[6] RLEC Br. at 3, 7-8, quoting 2014 Award at 25.

[7] RLEC Br. at 7, quoting 2014 Award at 9.

would owe each other the final rate retroactively."[8] That statement does not support the RLECs' position here. Rather, it is part of the Authority's 2014 recap of what the Authority did in 2006. When the Authority set the interim rate in 2006, it did not imagine that RLECs would entirely disregard the 2006 Award, not bill AT&T Mobility, and eight years later claim entitlement not to a true-up of amounts previously paid, but to bill at the newly established permanent rate for traffic exchanged more than two years ago.

The RLECs are entitled to an ICA that reflects the decisions the Authority made in the 2006 Award and the 2014 Award, no more and no less.[9] With the inclusion of the language for ICA section 5.1.3 to which AT&T Mobility has agreed, the RLECs will have that. The additional language the RLECs propose reflects RLEC views on matters that the Authority did not decide in the 2006 Award or the 2014 Award and, as AT&T Mobility demonstrated in its initial brief,[10] cannot properly address now.

II. IF THE AUTHORITY NONETHELESS ADDRESSES THE TWO ISSUES NOT PREVIOUSLY RAISED, IT SHOULD REJECT THE RLECS' CLAIM TO A "TRUE-UP" FOR TRAFFIC NEVER BILLED AT THE INTERIM RATE.

Section 5.1.3 of the ICA states, in language on which the parties have agreed:

> [T]he following rates are applicable to traffic exchanged between TN RLEC and AT&T during the Historic Period (October 2004 through June 2012) and are to be trued up ***to the interim rates paid by AT&T.***[11]

The RLECs are bound by that language. Thus, true-up applies only to "interim rates paid by AT&T." This is consistent with the 2006 Award and, as discussed, the 2014 Award changed

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[8] RLEC Br. at 11, quoting 2014 Award at 21.

[9] Subject to AT&T Mobility's right to appeal.

[10] AT&T Br. at 8-11.

[11] *See* Exhibit 1 to RLEC Br., ICA section 5.1.3, showing agreed language, including language quoted above, and disputed language. (Emphasis added.)

nothing in that regard. The Authority should therefore reject the RLECs' proposed language for section 5.1.3 that is inconsistent with the agreed language. The RLECs should not be allowed to do an end-run around the natural consequences of their failure to comply with the Authority's 2006 Award by claiming an absolute right to full payment years after the fact.

III. IF THE AUTHORITY ADDRESSES THE TWO ISSUES NOT PREVIOUSLY RAISED, IT SHOULD REJECT THE RLECS' REQUEST FOR AN EXCEPTION TO THE AGREED TWO-YEAR LIMITATION ON BACK-BILLING.

As AT&T Mobility demonstrated in its initial brief, agreed language in ICA section 5.3.1 prohibits both parties from billing traffic more than two years old; the parties agreed to such a limitation on back-billing, without exception, years ago; and there is no sound reason for creating the exception to that agreed language that the RLECs propose.[12]

The RLECs claim that the agreed limitation is inconsistent with their supposed "absolute" right to charge for all past traffic at the permanent rate now established – no matter how long ago the traffic was exchanged. But that is not a legal argument. Rather, it is a plea for the Authority to rule outside the pleadings and testimony in this matter and to save the Non-Conforming RLECs from their failure to comply with the 2006 Award.

The principal reason for the back-billing limitation is that if traffic is billed long after it is exchanged, the billed party will no longer have access to the records it needs to verify the accuracy of the billing. That concern is not mitigated by the circumstances of this case. On the contrary, the RLECs are asking the Authority to allow them to bill for traffic exchanged as long as nine and a half years ago. If that were permitted, AT&T Mobility would have no way to

[12] AT&T Br. at 12-14.

verify the accuracy of the bills – a problem that would not exist if the RLECs had billed at the interim rate within the two-year limitation period.[13]

IV. THE AUTHORITY SHOULD REJECT THE RLECS' REQUEST FOR AN ORDER REQUIRING AT&T MOBILITY TO PAY.

"[A]ll that remains in this case is the submission of an ICA to the Authority in compliance with the Authority's Orders." That statement, at page 2 of the RLECs' brief, is in accord with the shared understanding reflected in the identical letters the parties submitted with their briefs. **The only matter** that is before the Authority at this point, pursuant to the schedule on which the parties agreed, is the question whether the contract language proposed by the RLECs conforms with the Authority's previous Awards and so should be included in the ICA the parties will later submit for review. As the parties' letters said, "after the Authority has ruled on the disagreement that is the subject of these briefs, the parties will submit ICAs for the Authority's review under section 252(e)(2)," and although the RLECs filed the entire ICA as an exhibit to their brief for the sake of context, "the RLECs are not asking the Authority to approve that ICA at this time."

In their brief, however, the RLECs ask the Authority not only to direct the parties to include the RLECs' proposed language in the ICA, but also to order AT&T Mobility to pay the RLECs the money they claim they are owed "in no more than 10 days after execution of the ICAs."[14]

The Commission should not entertain, let alone grant, that request. The request is not only procedurally improper, but also at odds with one of the most fundamental principles of the

[13] There are, of course, additional reasons for the agreed two-year limitation. The point is that the RLECs have not identified, and cannot identify, any reason to support their proposal to nullify the limitation – other than their failure to comply with the 2006 Award.

[14] RLEC Br. at 17. *See also id.* at 16.

Telecommunications Act of 1996: The obligations imposed by the 1996 Act – including the obligation to interconnect and the obligation to make reciprocal compensation arrangements – are not self-executing. Rather, carriers may enforce the duties imposed by, and avail themselves of the rights accorded by, the 1996 Act *only* by entering into ICAs reflecting those duties and rights and then, if necessary enforcing the terms of those ICAs after they have been approved by the state commission. Accordingly, AT&T Mobility has no obligation today to pay the Non-Conforming RLECs anything, and it will have no such obligation – if ever – unless and until the parties submit a conforming ICA, the Authority approves it, and the RLECs issue bills in accordance with the ICA. Indeed, the ICA provides, in agreed language, that the "Effective Date" of the ICA is the date on which the ICA is approved by the Authority.[15] If after an RLEC enters into an Authority-approved ICA with AT&T Mobility, the RLEC issues an appropriate bill that AT&T Mobility refuses to pay, the RLEC can then pursue a claim for breach of contract, consistent with the terms of the ICA. But no RLEC is entitled to a payment order, or even consideration of a payment order, now.

This Authority has recognized that an effective ICA is a prerequisite to a carrier's enjoyment of the rights conferred by the 1996 Act. In the 2014 Award, the Authority adverted to an FCC statement that "carriers exchanging . . . traffic without an interconnection agreement do not receive such compensation today," and stated, "Thus, as to carriers operating without an ICA, bill-and-keep simply maintains the status quo."[16] The Authority thus recognized that

[15] See ICA section 1.7 in RLEC Br. Exhibit 1.

[16] 2014 Order at 5 & n. 19. (The *Comments of Joint CMRS Providers* cited in footnote 19 was actually filed on August 1, rather than July 23, 2012. The text above quotes an FCC statement that was cited in those comments and that the 2014 Order paraphrased.)

without an ICA, a carrier is entitled to none of the benefits the 1996 Act makes available to carriers that enter into ICAs.

Consistent with this principle, the courts have recognized that the ICA is "the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act." *Mich. Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2002). Accordingly, there can be no claim based on an alleged failure to fulfill the duties imposed by the 1996 Act. *See Goldwasser v. Ameritech Corp.*, 1998 WL 60878, at *11 (N.D. Ill. Feb. 4, 1998) (dismissing such a claim, holds, "These duties exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition. . . . If there are problems with carriers . . . failing to satisfy these duties to their competitors, the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts"), *aff'd on other grounds*, 222 F.3d 390 (7th Cir. 2000).

CONCLUSION

For the reasons set forth above and in AT&T Mobility's initial brief, the Authority should direct the parties to submit for the Authority's review pursuant to section 252(e) of the Telecommunications Act of 1996 an interconnection agreement that includes the agreed language for section 5.3 displayed on page 7 of AT&T Mobility's initial brief, and that does not include the additional language proposed by the RLECs and displayed on that page in boldface type.[17]

Respectfully submitted,

AT&T MOBILITY

By: _____

Robert G. Norred, Jr. (BPR#012740)
Logan-Thompson, P.C.
30 2d Street NW
Cleveland, TN 37311
423-7166261

August 5, 2014

[17] For the sake of completeness, page 7 of AT&T Mobility's initial brief, displayed not only section 5.1.3, but also sections 5.1.1 and 5.1.2. The version of section 5.1.2 that was displayed there, however, did not reflect a modification to that section on which the parties agreed shortly before the initial briefs were filed. The correct agreed language for section 5.1.2 appears in Exhibit 1 to the RLECs' initial brief. Section 5.1.2 has no bearing on the parties' disagreement concerning section 5.1.3.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing pleading has been forwarded to opposing party by U.S. Mail with sufficient postage thereon to carry the same to its destination:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Mark J. Ashby, Esq.
Cingular Wireless
5565 Glenridge Connector, #1700
Atlanta, GA 30342
mark.ashby@cingular.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

James L. Murphy, III, Esq.
Bradley, Arrant, et al.
PO Box 198062
Nashville, TN 37219-8062
jmurphy@babc.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Henry Walker, Esq.
Bradley, Arrant, et al.
PO Box 198062
Nashville, TN 37219-8062
hwalker@babc.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Sue Benedek, Esq.
CenturyLink
14111 Capitol Blvd.
Wake Forest, NC 27587
sue.benedek@centurylink.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Donald L. Scholes, Esq.
Branstetter, Kilgore, et al.
227 Second Ave., N
Nashville, TN 37219
dscholes@branstetterlaw.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Don Baltimore, Esq.
Farris Mathews Bobango, PLC
618 Church St., Ste. 300
Nashville, TN 37219
dbaltimore@farrismathews.com

[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Bill Ramsey, Esq. Neal & Harwell, PLC 150 Fourth Avenue North, #2000 Nashville, TN 37219-2498 ramseywt@nealharwell.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Melvin Malone, Esq. Butler, Snow, et al. 150 Fourth Ave., N, #1200 Nashville, TN 37219-2433 Melvin.malone@butlersnow.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Dulancy O'Roark, Esq. Verizon 5055 North Point Parkway Atlanta, GA 30022 de.oroark@verizon.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Paul Walters, Jr., Esq. 15 E. 1st St. Edmond, OK 73034 pwalters@sbcglobal.net
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Bill Atkinson, Esq. Sprint 3065 Akers Mill Road, SE MailStop GAATLD0704 Atlanta, GA 30339 Bill.atkinson@sprint.com Susan.berlin@sprint.com Joseph.cowin@sprint.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Patricia Armstrong Thomas Long Niesen & Kennard 212 Locust Street, Ste. 500 Harrisburg, PA 17101 parmstrong@tntlawfirm.com

This 5th day of August, 2014.

By _____