STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 159

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Rural Telephone Companies for Modification Pursuant to 47 USC 251(f)(2)	))))	ORDER GRANTING MODIFICATION UNDER SECTION 251(f)(2)

BY THE COMMISSION: On September 20, 2005, Citizens Telephone Company, Ellerbe Telephone Company, MEBTEL, Inc., Town of Pineville, d/b/a Pineville Telephone Company, and Randolph Telephone Company (collectively, Petitioners or Rural ICOs) filed for modification of certain aspects of requirements under 47 USC §251(b)(5) [reciprocal compensation] pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 (the Act). Specifically, the Rural ICOs asked that they be relieved of any requirement that they provide total element long-range incremental cost (TELRIC) studies to any requesting carrier with respect to reciprocal compensation until such time as the Federal Communications Commission (FCC) has made its final ruling in CC Docket No. 01-92, concerning intercarrier compensation. Section 251(f)(2) reads as follows:

"(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS.—A local exchange carrier with fewer than 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. 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—
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> "(i) to avoid a significant adverse economic impact on users of telecommunications services generally;
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> "(ii) to avoid imposing a requirement that is unduly economically burdensome; or
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> "(iii) to avoid imposing a requirement that is technically infeasible; and
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> "(B) is consistent with the public interest, convenience, and necessity.
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> The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers."

The Petitioners identified themselves each as Rural Telephone Companies (RTCs) under Section 153(37) of the Act and, with the exception of MEBTEL, Inc., as having only a single exchange, and ranging in size from 1,968 access lines to 21,200 access lines.

The Petitioners noted that, effective January 2004, there had been a Settlement Agreement between various Independent Telephone Companies (ICOs), including Rural ICOs, concerning indirect traffic routed to ICOs through third-party local exchange companies (LECs) for termination by ICOs. Among other things, the Settlement Agreement addressed compensation with Commercial Mobile Radio Service (CMRS) providers. Since early 2005, Rural ICOs and various CMRS providers have been actively negotiating for a follow-on interconnection agreement (ICA) to the Settlement Agreement; but, according to the Rural ICOs, the CMRS providers are unwilling to pay a reciprocal compensation rate that the Rural ICOs can accept. In connection with the negotiations, the CMRS providers are insisting that the Rural ICOs provide a cost study to the CMRS providers showing each Rural ICO's forward-looking incremental (i.e., TELRIC) costs for terminating this traffic.

The Rural ICOs argued that the imposition of such requirements would be unduly economically burdensome for them and that, in any event, they are not legally required to produce TELRIC studies at this time. The Rural ICOs further noted that in CC Docket No. 01-92, the Federal Communications Commission (FCC) is undertaking to develop rules to establish a unified intercarrier compensation regime.

In addition to modifying TELRIC requirements relating to establishment of reciprocal compensation arrangements, the Rural ICOs maintained that the Commission should also establish a default reciprocal compensation rate that any CMRS provider or Rural ICO can utilize in billing for termination of local traffic and, further, modify any existing requirement to allow any RTC, for purposes of determining reciprocal compensation, to establish its costs by using data based on something other than a forward-looking TELRIC study.

Specifically, the Rural ICOs stated that the Commission should do the following:

A. The Commission should establish a default reciprocal compensation rate that any CMRS provider or Rural ICO which does not have an agreement in effect with a particular CMRS provider or Rural ICO can elect to utilize for traffic exchanged between them. The default reciprocal compensation rate should be in the range of $0.0175 to $0.02 per minute of use (MOU). While individual CMRS providers and individual Rural ICOs would be free to mutually agree to utilize other rates, the Commission-established default rate would be in effect until individual parties establish a different rate, with the default rate thereafter being subject to true up to the "new" rate established by the parties' agreement;

B. With regard to the default reciprocal compensation rate, the Commission should further rule that if a Rural ICO or a CMRS provider elects to use that default rate in exchange traffic with any other carrier, either party to such traffic exchange shall be able to attempt to establish through arbitration that a higher or lower rate should be utilized; and

C. In the event of any arbitration involving reciprocal compensation to be paid to a Rural ICO for termination of local telecommunications traffic, including

such traffic originated by CMRS providers, the Commission should allow any RTC to utilize cost data not based on a forward-looking TELRIC study. Instead, given the varying circumstances of RTCs, the Commission should generally allow RTCs to use reasonable alternatives to TELRIC studies approved by the Commission in the context of company specific arbitrations, including the following:

Such reasonable alternatives to be utilized by RTCs, in lieu of TELRIC studies, could be based on data readily available to the Rural ICOs and could include the following:

(i) Average schedule RTCs could use cost data derived from NECA settlements, which could serve as a surrogate for actual cost data for such companies. The FCC has a procedure in Part 61.39 of its rules allowing average schedule companies to use average schedule settlements as a surrogate for cost, in order to establish interstate access rates under federal incentive regulation options;

(ii) An RTC could use an average of interstate and intrastate NECA rates for that company;

(iii) An RTC could adopt the TELRIC alternative study or data previously approved by the Commission for any other similarly situated RTC; and

(iv) An RTC could generate cost information, based on alternative sources, including but not limited to embedded cost information or other readily available data.

Pending action on the Rural ICOs' Petition, the Rural ICOs requested that the Commission should, as provided for by Section 251(f)(2)(B), "suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers."

On October 4, 2005, the Commission issued an Order Seeking Comments, which also provided for a temporary exemption of the Rural ICOs' obligation to calculate reciprocal compensation on a TELRIC basis. In the Order, the Commission noted that the filing in this docket by the Rural ICOs actually consisted of two distinct, but interrelated, parts. The first is the petition of a named subset of RTCs, the Rural ICOs, to be relieved of certain aspects of Section 251(b)(5), concerning reciprocal compensation, pursuant to the provisions of Section 251(f)(2) of the Act because otherwise they would be subject to an undue economic burden. The second is more generic and seeks specific relief for the Rural ICOs and RTCs generally through the establishment of a default reciprocal compensation rate.

The Commission stated its belief that both of these matters could be considered at the same time and with the greatest efficiency by way of supplemental filings by the individual Rural ICOs to establish the nature and extent of the alleged undue economic burden and by way of comments in reply and rebuttal on the exemption request and the generic question of relief.

Rural ICO Supplemental Filings

As directed, on November 4, 2005, the Rural ICOs made supplemental filings on the issue of the alleged undue economic burden asserted to be associated with any requirement that the Rural ICOs conduct TELRIC studies. In brief, the Rural ICOs argued that the imposition of a TELRIC requirement would impose both undue financial burdens, in terms of the direct cost, and operational burdens, in terms of the personnel and resources that would have to be diverted. The burden is magnified because the CMRS' demand for studies is likely to be repetitive and cyclical inasmuch as the agreements under discussion have a two-year term.

First, the Rural ICOs noted that they are entitled to seek and receive relief under Section 251(f)(2) of the Act since they meet the definition of "rural telephone companies" under the Act and can show that they would be unduly economically burdened.

Second, the Rural ICOs argued that the economic burden of having to conduct TELRIC studies is in fact an undue and excessive economic burden. The Rural Companies stated that they had contacted consulting firms that perform cost studies and received proposals from John Staurulakis, Inc. (JSI), attached as Tabs 1-3 of their filing. The estimated costs have been quantified per company as follows: Citizens ($28,000 @ 21,200 access lines); Ellerbe ($19,000 @ 2,412 access lines); MEBTEL ($40,000 @ 15,271 access lines); Pineville ($18,000 @ 1,968 access lines); and Randolph ($25,000 @ 4,624 access lines). The Rural ICOs noted that the cost estimates are limited to the cost of preparing the studies and do not include the costs of defending the studies, preparing testimony, or appearing to testify in an arbitration hearing. Furthermore, as shown by an attached proposal to Pineville from Mid South Consulting Engineers, attached at the end of Tab 1 of their filing, the smaller ICOs, such as Pineville, Ellerbe and Randolph, have such a small number of employees that in all probability it would be necessary for them to engage an additional consultant just to assemble the information necessary for JSI or other consultants to perform a TELRIC study.

To put the matter in even sharper perspective, the Rural ICOs noted that the affidavit filed on behalf of Ellerbe, attached at Tab 2, shows that the cost to Ellerbe of having JSI conduct a TELRIC study (estimated at $7.87 per access line, not including the expense of having any other consultant assist the company in gathering the data) could approach or exceed the total reciprocal compensation Ellerbe received from all CMRS providers in 2004 when it was being compensated at a negotiated rate of $0.015 per minute. Reciprocal compensation is intended to cover a carrier's costs of terminating another carrier's traffic, not the cost of performing studies or arbitrating reciprocal compensation rates. By seeking to have the Rural ICOs perform TELRIC studies, it appears that the CMRS providers are attempting to use economic leverage to demand TELRIC studies so as to force the rural companies to accept lower reciprocal compensation rates rather then incur the cost of the studies. Indeed, experience before the Tennessee Regulatory Authority (TRA) in *Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration under the Telecommunications Act of 1996, TRA Consolidated*

Docket No. 03-00585 illustrates the extravagant detail with which the CMRS desire to have TELRIC studies conducted.

Third, the Rural ICOs argued that there are reasonable alternatives to TELRIC studies. The Rural ICOs noted that the majority of Rural ICOs are "average schedule" companies rather than "cost companies," meaning that the companies have elected to have their costs determined on averages, rather than company-specific information, and they do not track cost information the way that cost companies do. Thus, the "average schedule" Rural ICOs would not have available the kind of data that would be expected to be useful in a TELRIC study. This is illustrated by an affidavit of Michael Skrivan filed on behalf of MEBTEL, attached at Tab 3 of the Rural ICOs' filing. MEBTEL is now a "cost company", but it was "average schedule" until earlier this year. An "average schedule" company uses formulas, based on the average costs for telephone operations, to establish its interstate costs, instead of performing a cost separations study. Those average interstate costs establish an "average schedule" company's interstate settlements from the NECA Common Line and Traffic Sensitive Pools. The interstate settlement revenue includes all forms of federal universal service funding, including interstate common line support, local switching support, and high cost loop funding. Mr. Skrivan prepared a transport and termination cost study for MEBTEL in one day, which showed that the appropriate reciprocal compensation rate for MEBTEL is $0.0180 per minute. This illustrates that there are reasonable alternative study methodologies available to cost companies, utilizing readily available data, such as cost separations data, as well as for average schedule companies, which allow for direct or surrogate based establishment of an appropriate reciprocal compensation rate.

Accordingly, the Rural ICOs requested that they be relieved of the TELRIC study requirement until such time as the FCC has made its final ruling in CC Docket 01-92 . (The FCC released a rulemaking notice in this docket on March 3, 2005). In the interim, the Commission should establish a default reciprocal compensation rate which any CMRS provider or Rural ICO can elect to utilize as well as approving alternative means or methods by which Rural ICOs can provide acceptable cost data in the event of arbitration of reciprocal compensation rate issues.

COMMENTS

Public Staff stated that it believed a modification of the requirements set forth in Section 251(b)(5) is appropriate for the Rural ICOs, since they have provided sufficient information for the Commission to conclude that the cost and expense of providing data in sufficient detail upon which a TELRIC study may be performed is unduly economically burdensome, and it is not in the public interest that the Rural ICOs should be subject to this requirement. Accordingly, the Commission should exempt the Rural ICOs from the requirement to use a TELRIC study to determine reciprocal compensation rates as set forth in FCC Rule 51.705(a)(1). This exemption should continue until the FCC has made its final ruling in CC Docket No. 01-92 regarding intercarrier compensation. At that time, the Commission should review the Rural ICOs' exemption, either upon its own motion or upon motion from one of the parties. The Public Staff, though, rejected the Rural ICOs' proposal that RTCs generally should be included in the grant of an exemption. The

exemption statute contemplates a case-by-case review, and no basis has been presented for expanding the exemption to any one other than the Rural ICOs.

Moreover, based on the information currently available, the Public Staff stated that it cannot recommend a specific rate or even a procedure for determining the reciprocal compensation rates for the Rural ICOs. There is inadequate information in the record for that. Nevertheless, the Public Staff did have some basic recommendations on how a study should be structured by the Rural ICOs when determining reciprocal compensation rates. An alternate study to determine such rates should be forward-looking to the extent feasible. To that end, the Public Staff recommended that the Commission establish the following guidelines for use by the Rural ICOs in producing an alternate study for calculating reciprocal compensation rates:

1. The cost data should be easily obtainable, verifiable, and reflect only the direct costs associated with the transport and termination of traffic.
2. The cost data may be a surrogate of the company's cost, but should be forward looking and reflect an efficient network to the extent practicable.
3. The rates for transport and termination of traffic should be usage based.
4. The capital costs and structure should reflect the cost and structure approved by the Commission in previous decisions in Docket No. P-100, Sub 133d.
5. Depreciation should reflect the economic lives and net salvage values within the ranges established by the FCC.
6. The study should include a reasonable allocation of common costs to be added to direct costs.
7. The study should not include retail costs, opportunity costs, or revenues to subsidize other services.

With respect to the Rural ICOs' request that a default reciprocal compensation rate be established, the Public Staff was concerned that such a rate could be construed as nothing more than a tariffed rate under another name and may therefore conflict with the FCC's ruling in *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* CC Docket No. 01-92, Declaratory Ruling and Order, FCC 05-42 (rel. Feb. 24, 2005) (*T-Mobile Order)*, which prohibited the use of tariffs to impose intercarrier compensation obligations with respect to local CMRS traffic and favored negotiated agreements instead as being more consistent with the pro-competitive process and policies reflected in the Telecommunication Act of 1996. The *T-Mobile Order* also established that incumbent LECs may initiate requests for interconnection from CMRS providers and specified the rules for the application of interim rates. Thus, LECs are eligible to receive compensation for terminating traffic from CMRS providers once they initiate a request to negotiate an interconnection agreement. The Public Staff stated that an exemption from the TELRIC requirement for setting an interim reciprocal compensation rate naturally follows if the Commission exempts the Rural ICOs from basing the permanent rate on a TELRIC study. Thus, to the extent that the Rural ICOs are granted a suspension of the requirement to determine the transport and termination rates using a TELRIC study, they should likewise receive a similar suspension with respect to the interim reciprocal compensation rate.

The Public Staff stated that it did not believe that a study produced using the guidelines 1 through 7 above would be economically burdensome to the Rural ICOs, and it will enable the CMRS providers and the Commission to review the study for reasonableness. The guidelines impose the requirement that the study to be forward-looking to the extent practicable, without imposing undue expense on the Rural ICOs. The Public Staff recommended that the Commission adopt depreciation expense calculations, capital cost, and capital structure amounts that have been previously approved as TELRIC compliant as set forth in Appendix A of the Public Staff's comments.

Because of the exemption being recommended by the Public Staff, the Commission must also establish an interim rate to be applied to the traffic terminated by the Rural ICOs and the CMRS providers once a request for negotiations has been initiated. The Public Staff recommended that the Commission adopt the rate of $0.015 per minute that was included in the now expired settlement agreement between the Rural ICOs and the CMRS providers. The interim reciprocal compensation rate is temporary and subject to true-up once a permanent rate is established.

The Rural ICOs should be allowed to jointly produce one or more studies should they so desire so as to lower costs for themselves and other parties. Such pooling of resources could produce a study that more closely corresponds to TELRIC than if each Rural ICO were separately to produce a study. Of course, CMRS providers and Rural ICOs may voluntarily negotiate rates that do not conform to the Commission's ultimate conclusion in this proceeding. Nothing in the Commission's decision on this matter should diminish the rights of parties to voluntarily agree to a rate that conflicts with its ruling.

CMRS Providers (consisting of New Cingular Wireless PCS, LLC d/b/a Cingular Wireless, Cellco Partnership, d/b/a Verizon Wireless, on behalf of itself and its affiliates, and Sprint Spectrum LP, as agent for SprintCom, Inc. d/b/a Sprint PCS) argued (1) that the Commission can neither "modify" nor "suspend" the FCC's TELRIC pricing methodology because, under Section 251(f)(2), the Commission is granted authority to modify or suspend only certain of the obligations established by Section 251(b) or (c), and the Section 252(d)(2) TELRIC pricing standards are not among those obligations; (2) that, in any event, even if TELRIC were grounded in Section 251(b)(5), suspension or modification of that obligation would be inappropriate because the payment of reciprocal compensation does not involve "telephone exchange service facilities" as required under Section 251(f)(2); (3) that even if legally entitled to proceed under Section 252(f)(2), the Rural ICOs have not established a case for their obligation being "unduly economically burdensome"; and (4) that the Commission lacks the authority to establish a "default" reciprocal compensation rate applicable to all ICOs or to establish transport and termination rates under any methodology but TELRIC.

With respect to the first argument regarding modification or suspension of obligations under Section 251(b) and (c), the CMRS Providers pointed out that Section 252(d)(2)(A) sets out the pricing standards applicable to Section 251(b)(5) reciprocal compensation arrangements, upon which the FCC has elaborated by rule. The gist of the CMRS Providers' argument is that Section 251(f)(2) by its terms allows a

suspension or modification only as to the obligations under subsection (b) and (c) and not the pricing standards of Section 252(d)(2), which appear in an entirely different section.

With respect to the second argument, the CMRS Providers maintained that, even if this were not the case, the terms of subsection (f)(2) are applicable only as to "telephone exchange service facilities," and payment of reciprocal compensation is not a "telephone exchange service facility." While acknowledging that the phrase "telephone exchange service facilities" is nowhere defined as such in federal statutes and case law, the CMRS Providers based their argument on the manner in which the words that compose the phrase have been defined or used. Specifically, Section 3(16) of the act defines "Exchange access" as "the offering of access to telephone exchange services or facilities," indicating that "telephone exchange services" is not the same as "facilities." Section 153(29)'s definition of network element indicates that a "facility" is used to provide a telecommunications "service," the facility being the network element. Section 271(c)(1)(A), the famous "Track A," actually uses the phrase "telephone exchange service facilities" to define the "presence of a facilities-based competitor." "Telephone exchange service facilities" are what a "facilities-based provider" uses to supply telephone service. The CMRS Providers' inference is that, viewed in context, Section 251(f)(2) relief can only be granted with respect to the network facilities used to provide telecommunications service. The CMRS Providers further pointed out that not all Section 251(b) and (c) obligations apply to telephone exchange facilities—e.g., obligations to negotiate or the provision of notice of changes. The overall conclusion is that the establishment and payment of compensation is separate and apart from and does not implicate any obligation to provide "facilities" and thus falls outside the ambit of the Section 251(f)(2).

Furthermore, even apart from the legal technicalities of the Act, the CMRS Providers argued that Rural ICOs were "quasi-estopped" from seeking an exemption from or modification of the pricing standards because they are seeking to take two clearly inconsistent positions. In the instant case, the Rural ICOs are seeking the benefits of a statute but are also, at the same time, seeking a waiver or modification of the obligations of the same statute. More specifically, they have served *bona fide* requests for negotiation on the CMRS Providers but are now seeking relief from the pricing standards of the Act. The rural exemption may only be used as a "shield," not a "sword," and CMRS Providers and their customers should not be made to subsidize Rural ICO local service.

With respect to the third argument, the CMRS Providers denied that the Rural ICOs had shown that the reciprocal compensation obligation is "unduly economically burdensome." The Rural ICOs' sole argument, which relates to the alleged costs of producing TELRIC studies, taken at face value, fails to substantiate their claim. The CMRS Providers stated that one aspect of that cost—the two-year renewal—was unlikely because ICAs typically contain "evergreen" provisions allowing the contract to continue indefinitely until affirmatively terminated by a party. They suggested that the costs that the Rural ICOs did show were not significant. They also noted that not a single Rural ICO had submitted any internal financial information in support of its position.

The CMRS Providers further argued that a "bare statement of economic costs" has been held to be generally insufficient to meet the required standard for "undue economic cost." In any event, under the Act, a TELRIC compliant study can be based upon a "reasonable approximation" of costs. This ensures that the production of such a study will not entail an undue financial burden, and places no undue burden on "average schedule" companies. Rural ICO cost studies must, however, employ TELRIC ground rules. The CMRS Providers said they are not seeking elaborate cost models "populated by warehouses of data" but rather "simple and straightforward studies" applying the TELRIC ground rules. The nub of the dispute, according to the CMRS Providers, is that the Rural ICOs do not want to apply the TELRIC ground rules because they generally produce rates much lower than access charges.

Lastly, with respect to the default rate and non-TELRIC methodologies, the CMRS Providers argued that the compensation obligation cannot be enforced outside of an ICA, and Section 251(f)(2) does not allow a state Commission to establish a default reciprocal compensation rate, nor permit transport and termination rates to be set by non-TELRIC methodologies.

AT&T Communications of the Southern States, LLC (AT&T) argued that the Rural ICOs have requested relief which is beyond the jurisdiction of the Commission and for which they have failed to make an adequate showing that they are entitled to relief under Section 251(f)(2), so their Petition should be dismissed. Other things being equal, the Rural ICOs are clearly subject to reciprocal compensation requirements pursuant to Section 251(b)(5). Section 251(f)(2) does permit the Commission to suspend or modify the "application" of the requirements of Section 251(f)(5), but it does not permit the Commission to actually modify the requirements of the Act. The Rural ICO petition should therefore be dismissed. In any case, the Rural ICOs are not entitled to relief under Section 251(f)(2) because the proof they have offered is inadequate. It is also not in the pubic interest. Lastly, AT&T argued that any default reciprocal compensation rate established by the Commission should be based on TELRIC methodology.

The Southeastern Competitive Carriers Association (SECCA) argued that, regardless of their status as rural telephone companies, Rural ICOs do have duties under Sections 251(a) and (b), including the establishment of reciprocal compensation. The issues raised by the Rural ICOs are preferably raised in the context of individualized negotiations and/or arbitrations. The Rural ICOs certainly bear the burden of proof under Section 251(f)(2) to demonstrate that their TELRIC studies represent an undue burden. While SECCA does not dispute the accuracy or methodology of the Rural ICOs' raw cost estimates regarding TELRIC cost studies, the Rural ICOs have not provided sufficient context to show that TELRIC studies represent an undue economic burden. While it may be that a full-blown TELRIC cost study along the lines of what other incumbent LECs have filed to support UNE rates may be inappropriate for some rural carriers, these carriers nevertheless bear the burden of supporting proposed rates based on verifiable cost information. The Commission should insist upon a study based on forward-looking costs, reflective of an efficient network, using data that is verifiable. Finally, concerning interim rates, the FCC has already prescribed interim reciprocal compensation rates which are presumptively valid in the absence of an otherwise agreed-upon rate and final

determination in the intercarrier compensation proceeding. Thus the Rural ICOs' request for an interim default rate is unnecessary and potentially in conflict with the rate regime already established by the FCC.

Verizon South, Inc. (Verizon) stated that it opposed any attempt by the Rural ICOs to request relief as to ICAs with Verizon, which is an ILEC and not a CMRS. Under FCC rules, in ILEC-to-ILEC ICAs, reciprocal compensation rates are presumptively symmetrical and based on the forward-looking costs of the larger ILEC. Thus, a rural ILEC negotiating an ICA with another ILEC need not produce a TELRIC cost study unless it chooses to claim that its own forward looking costs of transporting and terminating local calls are higher than the ILECs' costs. The Rural ICOs have offered no justification for why the presumption of symmetrical reciprocal compensation rates is an undue economic burden. However, the Rural ICOs have language in their Petition asking to be relieved of the obligation to provide TELRIC cost studies "[i]n the event of any arbitration involving reciprocal compensation to be paid to a Rural ICO for termination of local telecommunications traffic, including such traffic originated by CMRS providers." Thus the traffic referred to could extend to traffic originated by other types of carriers, including Verizon. Naturally, Verizon opposes any attempt by the Rural ICOs to request relief for ICAs with Verizon, as they appear to do in their Petition.

RURAL ICO REBUTTAL COMMENTS

The Rural ICOs summarized their rebuttal comments by stating that they were entitled to a modification of the reciprocal compensation requirements under Section 251(f)(2) because they have shown that it would impose an undue economic burden on them. Specifically, they are seeking relief from the requirement that they provide TELRIC studies. The Rural ICOs clarified that the relief that they are seeking is on their behalf and on behalf of Barnardsville, Saluda Mountain, and Service Telephone Companies (TDS Companies). They emphasized that they are not attempting to avoid doing cost studies altogether, and they stated that they agree with the guidelines for alternative cost studies put forth by the Public Staff. The Commission should establish an interim transport and termination rate for CMRS. The Public Staff's cost study guidelines are workable and could yield a reasonable approximation of ICO costs without being unduly burdensome to the Rural ICOs. They noted that, since July 1, 2005, the CMRS providers have not paid any reciprocal compensation to RTCs with which they do not have ICAs. The net balance of wireless traffic flows from the CMRS networks to the ILECs by indirect means, and thus the CMRS Providers are net payers of reciprocal compensation. Reciprocal compensation is not a large source of revenue for the Rural ICOs, but it is an important one.

The Rural ICOs dealt with both the legal arguments made by the CMRS Providers and other intervenors and the arguments about the adequacy of proof in support of the request for modification of the reciprocal compensation obligation pursuant to Section 251(f)(2).

Legal. The Rural ICOs contended that they are not presently obligated to provide TELRIC studies because of the Section 251(f)(1) rural exemption. The (f)(1) exemption

provision is keyed to relief from the requirements of 251(c). The Rural ICOs pointed out that, under Section 251(c)(1), they are not subject to the duty to negotiate "the particular terms and conditions of agreements to fulfill the duties described *in paragraphs (1) through (5) of Section 251(b), until the Commission has made the findings required by Section 251(f)(1).*" (emphasis added). The plain language of Section 251(c)(1) extends the rural exemption to the duty to negotiate with regard to the duties imposed in Section 251(b)(1) through (5), Section (b)(5) being the reciprocal compensation obligation.

The Rural ICOs further argued that if, as the CMRS Providers contend, a TELRIC study is required to establish a reciprocal compensation arrangement, then the TELRIC study is subject to modification under Section 251(f)(2). It is not possible to establish reciprocal compensation arrangements without establishing the rate to be paid for the transfer and termination of telecommunications traffic. Moreover, the obligation to establish reciprocal compensation agreements required by Section 251(b)(5) necessarily involves payment for the use of a terminating carrier's *facilities*. Thus, the CMRS Providers' contention that Section 251(f)(2) does not apply because no "telephone exchange service facilities" are involved in reciprocal compensation is strained, impractical and inaccurate. Even the CMRS Providers admit that a "facility" is used to provide a telecommunications service. Similarly, AT&T's argument that the Rural ICOs can ask for modification of the application of the obligation but not a modification of the obligation lacks merit.

The Rural ICOs also rejected the estoppel argument advanced by the CMRS Providers because the Rural ICOs do not, as alleged by the CMRS Providers, seek the benefit of the Act without otherwise complying with it. The Rural ICOs plainly have the right to assert their right to reciprocal compensation for termination of other carriers' originating traffic while at the same time asserting their right to petition for a suspension or modification. The estoppel argument thus lacks merit.

With respect to other arguments, the Rural ICOs argued that nothing in the *T-Mobile Order* limits the ability of a State Commission to modify any Section 251(b) or (c) obligations as to an RTC. There is also no requirement in the FCC rules that transport and termination rates be lower than access rates although the Rural ICOs are not in fact seeking "access-like" rates for terminating CMRS traffic.

With respect to Verizon's concern as to how the Rural ICOs' requested relief could impact ILEC-to-ILEC ICAs, the Rural ICOs replied that they do not seek relief from ICAs with Verizon, including the applicable reciprocal compensation rates.

The Rural ICOs also rejected AT&T's Motion to dismiss for the reasons it has set forth in opposition to the arguments of the CMRS Providers. As for SECCA's comments, the Rural ICOs pointed out that there is nothing in Section 251(f) requiring that a request for modification be raised in the context of individual negotiations or arbitrations; and, in fact, this approach would be inefficient and uneconomic. The Rural ICOs also pointed out that one important reason they need relief is that they are in the position of David to the

CMRS' Goliath—entities that lack the economic leverage to counter the tactics the CMRS Providers have chosen.

Adequacy of proof. The Rural ICOs reiterated and amplified upon the proof they have furnished to show that the production of the TELRIC studies demanded by the CMRS Providers would subject them to an undue economic burden. The Rural ICOs said that many of the CMRS Providers' assertions are misdirected. For example, that the Act's pricing standards allow the recovery of all eligible costs misses the point that the undue economic burden is a consequence of having to produce and defend a TELRIC study, a cost not recoverable in the reciprocal compensation rate. Similarly, the argument that there is no burden on the Rural ICOs because they can pass the costs on to their subscribers begs the question of why the subscriber should pay and make wireless service an even more attractive competitive substitute for wireline service. The Rural ICOs further rejected the CMRS Providers' view that a specific showing of substantial capital outlay for TELRIC studies is necessary in order to prove an undue economic burden. As shown by the Public Staff's analysis, the relative magnitude of the cost of producing studies alone, when seen within the context of the number of access lines served by the Rural ICOs, adequately proves the existence of an undue economic burden.

The Rural ICOs' main argument centered on the inordinate complexity and expense of TELRIC studies as applied to companies of their size. They raised what they view as the likely prospect that, if they were required to produce such studies, the CMRS Providers and their allies would attack them in such a manner and in such detail as to attempt to "bludgeon small ICOs into submission." For example, the cost study provided by MebTel and the CMRS Providers' criticism of it as set forth in their Confidential Exhibit 4B illustrate the burden that the TELRIC study would impose on the Rural ICOs—and the likely rejection any study would receive from the CMRS Providers. The Rural ICOs contended that many of the adjustments the CMRS Providers proposed for that study were based on "misdirection, unreasonable assumptions, and incorrect information"—which, not coincidentally, reduced the cost of service to the CMRS Providers by 75%. The Rural ICOs also noted that in Tennessee, the CMRS Providers rejected six different cost study models proposed by six different consultants. It was the Rural ICOs' conclusion drawn from observing this experience that, no matter how much they spent on a TELRIC cost study, nothing would satisfy the CMRS providers in their desire to make them accept ever smaller reciprocal compensation payments.

The Rural ICOs noted that even "cost" companies like Citizens and MebTel do not maintain the kind of detailed data that larger ILECs do, nor do they have access to the actual cost of acquiring network assets, maintaining those network assets, and providing management of those operations. TELRIC studies, it should be remembered, require the development of a cost estimate for building a hypothetical new network to service each and every customer—the so-called "scorched node" approach. The proposed CMRS Providers' guidelines do nothing to relieve or moderate the undue burden on the Rural ICOs.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission finds that good cause exists to grant the Rural ICOs' Petition pursuant to Section 251(f)(2) of the Act for modification of the reciprocal compensation requirements of Section 251(b)(5)—specifically, that the Rural ICOs should not be required to perform TELRIC studies to establish reciprocal compensation rates (including the interim rate)—because (1) the Rural ICOs are local exchange carriers "with fewer than 2% of the Nation's subscriber lines installed in the aggregate nationwide," (2) such TELRIC studies would be unduly economically burdensome to them, and (3) the granting of such relief would be consistent with the public interest, convenience and necessity. Such relief should continue until such time as the FCC shall have rendered its final ruling in CC Docket No. 01-92 concerning intercarrier compensation. This relief does not affect the Rural ICOs existing ICAs. In the meantime, the Rural ICOs should conduct alternate cost studies utilizing the guidelines recommended by the Public Staff in its December 14, 2005, Comments. The interim reciprocal compensation rate for termination by Rural ICOs and CMRS Providers should be $0.015 per minute subject to true-up once a permanent rate is established. However, the parties may voluntarily agree to different rates if they are so disposed.

The Commission believes that the Rural ICOs have established that they are entitled to the modification of the reciprocal compensation obligation which they seek for the reasons as generally set forth by the Rural ICOs and the Public Staff. Specifically, they have demonstrated that the per-access line costs of TELRIC studies for such the companies would work an undue economic burden on them and that a modification such that the Rural ICOs would not have to produce TELRIC-based reciprocal compensation studies would be in the public interest, convenience, and necessity. Notably, Section 251(f)(2) commands no specific methodology to prove that a requirement is unduly burdensome. Therefore, the Commission has used its best judgment based on the evidence and the totality of the circumstances to arrive at its decision. It is obvious from the evidence that the Rural ICOs are very small ILECs with limited subscriber bases and limited resources for dealing with the demands that much larger and more sophisticated ILECs must meet. Indeed, this type of disparity is the very reason that Congress rejected a "one size fits all" approach when it made available to rural carriers a process for exemptions, suspensions, and modifications from certain Section 251 duties pursuant to Section 251(f)(1) and (2).

The Commission also believes that the CMRS Providers' legal arguments against such modification, while occasionally ingenious, are not persuasive. The Rural ICOs aptly pointed out that it is not possible to establish reciprocal compensation arrangements without establishing a rate to be paid for the transfer and termination of telecommunications traffic, and the obligation to establish reciprocal compensation agreements necessarily involves payment for the use of a terminating carrier's facilities. The estoppel argument of the CMRS Providers has even less merit. The Rural ICOs plainly have the legal ability to assert their right to reciprocal compensation for termination of other carriers' traffic while at the same time asserting their right to petition for suspension or modification. The power to *modify* a reciprocal compensation obligation

necessarily implies a power to *suspend* a TELRIC rate calculation requirement for good cause shown, given that the relevant statute authorizes *both suspension and modification.*

The Commission notes that the relief originally sought by the Rural ICOs with respect to alternate cost studies and interim rates differs from that proposed by the Public Staff; but, since the Rural ICOs have acceded to the Public Staff recommendations in this regard, the Commission need not address those differences, except to state that it believes that the Public Staff recommendations are well-founded and follow reasonably and logically from the grant of modification. The Commission further notes that the relief it is granting herein is restricted to the named Rural ICO petitioners. It cannot be extended to the TDS Companies in the absence of record evidence.

Finally, with respect to the interim rate, the Commission notes that interim rates subject to true-up are recognized by the *T-Mobile Order* and are consistent with FCC rules. It should also be noted that the interim rate set out here was also previously a *negotiated* rate derived from the now-expired settlement agreement between the Rural ICOs and the CMRS Providers.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 8th day of March, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

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