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November 22, 2006

VIA HAND DELIVERY

Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602-0615

Re: Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2006-00215

Dear Ms. O'Donnell:

Enclosed and hereby filed with the Commission in connection with the above-referenced matters please find an original and five copies of CMRS Providers' Joint Post-Hearing Reply Brief. Please place your file-stamp on the extra copy of this letter and return to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

Enclosures
cc: John Selent
James Dean Liebman
Bhogin M. Modi
William G. Francis
Thomas Sams
NTCH-West, Inc.

LOU 108410/124567/454665.1

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Petition of Brandenburg Telephone Company For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Case No. 2006-00288

Petition of Duo County Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 Case No. 2006-00217

Petition of Foothills Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 Case No. 2006-00292

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Petition of Gearheart Communications Inc. d/b/a Coalfields Telephone Company, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Case No. 2006-00294

Petition of Logan Telephone Cooperative Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2006-00218

Petition of Mountain Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
Case No. 2006-00296

Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Case No. 2006-00252

Petition of Peoples Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
Case No. 2006-00298

Petition of South Central Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Case No. 2006-00255

Petition of Thacker-Grigsby Telephone Company, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
Case No. 2006-00300

Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement with American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Case No. 2006-00220

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular f/k/a ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996	Case No. 2006-00215
Petition of Duo County Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant to the Communications Act of 1934, as Amended by the Telecommunications Act of 1996	Case No. 2006-00217
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Petition of Thacker-Grigsby Telephone Company, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996	Case No. 2006-00300

CMRS PROVIDERS' JOINT POST-HEARING REPLY BRIEF

Alltel Communications, Inc. ("Alltel"); New Cingular Wireless PCS, LLC, successor to BellSouth Mobility LLC, BellSouth Personal Communications LLC and Cincinnati SMSA Limited Partnership d/b/a Cingular Wireless ("Cingular"); Sprint Spectrum L.P., on behalf of itself and SprintCom, Inc., d/b/a Sprint PCS ("Sprint PCS"); T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC ("T-Mobile"); and Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated, and Kentucky RSA No. 1 Partnership ("Verizon Wireless") (collectively referred to as the "CMRS Providers"), hereby file their Joint Post-Hearing Reply Brief in the above dockets. The Commission should resolve the open issues as recommended by the CMRS Providers instead of as requested by the RLECs.[1]

I. BACKGROUND

A. Applicable Law

In their Post-Hearing Brief, the CMRS Providers identified the applicable law that must guide the Commission's resolution of the open issues in this case. CMRS Brief, pp. 1-2. That "applicable law" is primarily the 1996 Telecommunications Act ("Act"), the FCC's Part 51 Rules, and applicable Federal Communications Commission ("FCC") Rules and Orders. The RLECs' Post-Hearing Brief appears to be suggesting (for the first time) that state law (KRS

[1] The RLECs consist of Ballard Rural Telephone Cooperate, Corp. ("Ballard"), Duo County Telephone Cooperative Corporation, Inc. ("Duo County"), West Kentucky Rural Telephone Cooperative Corporation, Inc. ("West Kentucky"), Logan Telephone Cooperative, Inc. ("Logan"), North Central Telephone Cooperative Corporation ("North Central"), South Central Rural Telephone Cooperative Corporation, Inc. ("South Central"), Foothills Rural Telephone Cooperative Corporation, Inc. ("Foothills"), Brandenburg Telephone Company ("Brandenburg"), Gearheart Communications Inc. d/b/a Coalfields Telephone Company ("Gearheart"), Mountain Rural Telephone Cooperative Corporation, Inc. ("Mountain Rural"), Peoples Rural Telephone Cooperative Corporation, Inc. ("Peoples Rural"), and Thacker-Grigsby Telephone Company, Inc. ("Thacker-Grigsby").

278.030) should produce a different result than would federal law alone. *See* RLECs' Brief, pp. 2- 3.

KRS 278.030 does not give the Commission the authority to disregard requirements in Sections 251-252 because state law cannot undermine the standards set by Congress. *See, e.g.*, *Verizon North Inc. v. Strand*, 367 F.3d 577, 583-84 (6th Cir. 2004). The Commission should decline the RLECs' suggestion that state law somehow requires a different result than federal law, and instead apply federal law to:

> . . . ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title.

47 U.S.C. § 252(c)(1).

B. The RLECs' Four Conceptual Issues

The RLECs' Post-Hearing Brief identifies "four conceptual issues" that are, in reality, nothing more than the RLECs' requested rulings on four of the specific issues raised in this arbitration. All four should all be resolved as requested by the CMRS Providers.

1. Conceptual Issue 1

On page 3, the RLECs argue that they should not be required to "expand their networks in order to interconnect with the CMRS Providers." This is Issue 5, and the CMRS Providers' proposed resolution of this issue would not require the RLECs to "expand their networks." What *is* required by federal law, however, is that an originating carrier must deliver its calls to the network of the terminating carrier. In the case of indirect interconnection, this principle requires the originating carrier to pay the transiting charge. This does not "artificially impose costs on the RLECs," but simply requires each carrier to be financially responsible for the calls of its own customers. As the Florida Public Service Commission stated:

> Interestingly, the Small LECs argue that, if they are required to pay transit charges, then they are essentially subsidizing CLECs and CMRS carriers. If the Small LECs' position is adopted, it's the CLECs and CMRS carriers that would be subsidizing the Small LECs. The choice of how the originating call is delivered to the end user is not the choice of the terminating carrier, but rather the choice of the originating carrier, even if the originating carrier is a Small LEC.

Hearing Tr. 2 at 49-50 (quoted by Wood). The Commission should address this "conceptual issue" in a manner that is consistent with federal law and sound policy.

2. Conceptual Issue 2

On page 4 of their Brief, the RLECs argue that the CMRS Providers should be required to interconnect directly when traffic is above a *de minimis* level (which they claim is 75,000 minutes per month) so they will not be required to rely on a third party (i.e., BellSouth) to measure traffic for billing purposes. This is Issue 2, and under federal law, the Commission cannot prohibit the indirect interconnection allowed by Section 251(a) FCC Rule 20.11 simply because the RLECs would prefer not to rely on records provided by BellSouth. Under federal law, the CMRS Providers have the right to interconnect indirectly *regardless of the amount of traffic exchanged.*

3. Conceptual Issue 3

On page 5, the RLECs argue that the Commission should adopt a reciprocal compensation rate of $0.015 per minute. This is Issue 11. Significantly, in the RLECs' "conceptual" discussion of this issue, they fail to use the term "forward-looking," which is the most important concept for the Commission to apply when setting rates.

4. Conceptual Issue 4

On page 6, the RLECs argue that the Commission should not be required to pay reciprocal compensation on traffic that is routed via an interexchange carrier ("IXC"). This is

Issue 9, and as described below, the RLECs' position has been rejected by clear and overwhelming federal authority.

C. NTCH-West and ComScape

At page 7, footnote 5, the RLECs ask the Commission to approve their proposed template for their agreements with NTCH-West, Inc. ("NTCH") and ComScape Communications Inc. ("ComScape"), which did not actively participate in these cases. The RLECs contend that the absence of NTCH and ComScape from the arbitration hearing allows the Commission, by default, to require them to submit to the RLECs' interconnection template. No such result is warranted. In fact, regardless of NTCH's and ComScape's level of participation in the hearings themselves, any agreement approved by the Commission must meet the standards set forth in Section 252(a). As noted at the hearing and in the CMRS Providers' briefs, however, the RLEC's template is not consistent with the Act and thus should not be approved under these circumstances.[2]

II. UNRESOLVED ISSUES

The CMRS Providers address each of the unresolved issues below in order, except that Issues 1 and 9, and Issue 7 and 8, are addressed together, as they were in prefiled testimony. Issues 12, 19, 22, 23, 24, 25, 26, and 27 have been resolved.

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[2] In his testimony, Mr. Magruder stated that the RLECs would not object to the dismissal of NTCH and ComScape as long as the Commission ordered that NTCH and ComScape could not terminate traffic until they had an interconnection agreement with the RLECs. The Commission should disregard Mr. Magruder's suggestion because it conflicts with a recent FCC order. *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92, 20 F.C.C.R. 4855, Declaratory Ruling and Report and Order (2005). Under this order, a CMRS provider and an ILEC may exchange traffic in the absence of an interconnection agreement, and do so on a bill-and-keep basis until one party makes a formal negotiation request. *Id.* ¶ 14, fn. 57. As a result, an order that parties not exchange traffic in the absence of an agreement would impose a standard contrary to FCC requirements.

A. Issues 1 and 9 – Scope of Reciprocal Compensation[3]

Issues 1 and 9 relate to whether the RLECs owe reciprocal compensation for all intraMTA traffic, whether it is delivered directly or indirectly via an intermediate carrier. The RLECs argue that traffic they route to CMRS Providers via IXCs is excluded from reciprocal compensation. The RLECs confirm that this is the only dispute within Issues 1 and 9. RLECs' Brief, p. 9 n.7; *id.* at 24.[4]

Because numerous federal courts (on both the trial and appellate levels) have resolved this issue without difficulty, the RLECs' claims that the CMRS Providers' arguments "utterly defy common sense" or have "been explicitly rejected by the FCC"[5] are wrong. Every argument made by the RLECs has been considered and rejected in federal court decisions that the RLECs simply fail to acknowledge.

The FCC's MTA Rule was designed to implement Section 251(b)(5) for traffic exchanged with CMRS providers whose license and service areas did not necessarily match those of incumbent LECs.[6] The RLECs fail to accept this underlying policy rationale – they disagree with the MTA Rule because they find it inconsistent with the way they provide service as incumbent LECs. But 47 C.F.R. § 51.701(b)(2) is clear. *All* intraMTA traffic exchanged

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[3] Cingular Wireless does not participate in the discussion of these issues.

[4] The CMRS Providers note that the RLECs have not taken the more extreme position, advocated by Mr. Watkins, that traffic exchanged through *any* third-party provider (including a transit provider) is excluded from reciprocal compensation. Hearing Tr. 1 at 190. Instead, the RLECs agree that transited traffic is subject to reciprocal compensation, which narrows the scope of Issue 9 to only that traffic routed via IXC.

[5] RLECs' Brief, p. 24.

[6] *In the Matter of Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-98, 11 FCCR 15499, FCC 96-325, First Report and Order, ¶ 1036 (1996) ("*First Report & Order*").

between a CMRS Provider and an RLEC is subject to reciprocal compensation. There are no exceptions. The Commission should dismiss the RLECs' arguments, properly apply the FCC's Rules, and resolve Issues 1 and 9 in favor of the CMRS Providers.

B. Issue 2 – Should the Interconnection Agreement Apply to Indirect Traffic

Issue 2 involves whether the Interconnection Agreement should apply to traffic exchanged indirectly, *i.e.*, traffic switched through a third-party tandem and exchanged with the RLECs over common trunk groups carrying traffic of multiple carriers. The RLECs still maintain their claim that "indirect" interconnection, as used in the Act and FCC Rules, does not allow the CMRS Providers to send and receive traffic to/from the RLECs over the common trunks of a third-party tandem provider. RLECs' Brief, p. 10. This position, however, has now been modified to account for the RLECs' admission that requiring each CMRS Provider to establish direct (unswitched) trunk groups with each RLEC would be woefully inefficient and expensive:

> The RLECs candidly recognize that certain network efficiency considerations of the CMRS Providers could militate against the position espoused in the template agreement. RLECs' Brief, p. 10.

This admission requires the RLECs to adopt a "fall-back" position. Instead of demanding that the CMRS Providers establish direct interconnection trunks with each RLEC as a prerequisite to the exchange of traffic, the RLECs now claim that direct (unswitched) interconnection should be required when the traffic exchanged between an RLEC and any CMRS Provider reaches a "significant" level:

> All the RLECs ask is that once the traffic volume becomes significant, the CMRS Providers should be required to deliver traffic over dedicated circuits so that the traffic may be reliably measured and billed by the RLECs. *Id.* at 11.

According to the RLECs, traffic is "significant" when it "reaches 75,000 minutes of use per month (which is equivalent to the ordinary and reliable operating capacity of a DS-1 trunk)."[7]

The question of the RLECs' ability to "reliably" measure and bill traffic exchanged indirectly will be discussed in Issue 6. In the context of Issue 2, the Commission should be aware that the RLECs' new position is inconsistent with at least *23* different provisions of the RLECs' proposed interconnection agreement, is still contrary to all applicable federal law, and would do nothing to eliminate network inefficiencies.

1. The RLECs' Position is Inconsistent with at Least 23 Different Sections of the RLEC's Proposed Interconnection Agreement

The Petitions filed in these consolidated proceedings did not claim that the CMRS Providers should be allowed to interconnect indirectly with the RLECs until exchanged traffic between any CMRS Provider and any RLEC reaches 75,000 minutes of use per month. To the contrary, the RLECs' Petitions attached a proposed contract that *expressly prohibited indirect interconnection under any circumstances*.

Thus, as the Joint Issues Matrix filed herein and the testimony of CMRS witness Brown indicate, the RLECs' proposed contract contains at least *23* different sections that expressly

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[7] *Id.* at 11. Nothing in the record supports the RLECs' assertion – made for the first time in their Brief – that 75,000 minutes per month constitutes the operating capacity of a DS-1 circuit. Because this issue was not litigated the Commission cannot make a finding on this point. For background purposes, however, a DS-1 circuit is the equivalent of twenty-four (24) DS-0 (voice grade) circuits. Twenty-four voice grade circuits have the theoretical capacity for 34,560 minutes of use per day, and 1,036,800 minutes per month. Thus, in claiming that the operating capacity of a DS-1 circuit is 75,000 minutes per month, the RLECs are applying a 7.2% utilization factor. By comparison, two of the CMRS Providers (Alltel and Cingular) are currently involved in an arbitration in North Carolina in which RLECs are claiming that the capacity of a DS-1 Circuit is 300,000 minutes per month – a 29% utilization factor. *In the Matter of Petitions of Ellerbe Telephone Company, MebTel, Inc. and Randolph Telephone Company for Arbitration with Alltel Communications, Cingular, Sprint PCS and SunCom Communications;* Consolidated Docket Nos. P-21, Sub 71, P-35, Sub 107, P-61, Sub 95.

prohibit the CMRS Providers from sending or receiving traffic to/from the RLECs over the common trunk groups of a third-party tandem provider. Brown Direct, p. 3.

The idea that interconnection with the RLECs can only be made by direct (unswitched) trunk groups runs through the RLECs' proposed interconnection agreement like a thread. Remove the thread, and the contract unravels; i.e., becomes literally unintelligible. The RLECs' fall-back position – allowing indirect interconnection until a certain level of traffic is reached – would effectively remove the thread.

Implementing the RLECs' new position would require a complete overhaul – the revision of at least 23 separate sections – of the RLECs' proposed contract. Such extensive revisions by the RLECs would no doubt engender new disputes, which is why the Act specifically prohibits, in a Section 252 arbitration, the consideration of new issues not raised in the original Petition and Response. 47 U.S.C. § 252(b)(4)(A). In effect, the RLECs have raised a new issue: whether direct interconnection can be required when traffic exchanged indirectly reaches a certain level. The Act, however, does not permit the RLECs to raise a new issue in their Post-Hearing Brief.

Moreover, by making no changes to their proposed contract, the RLECs have failed to show the Commission how this resolution would be implemented, and what contract language would apply.

For these reasons, the RLECs' new position should be rejected.

2. The RLECs' New Position, Like Their Original Position, is Inconsistent with Federal Law

Apart from the procedural problems discussed above, the result advocated by the RLECs is prohibited by federal law. FCC regulations pre-dating the Act expressly require incumbent LECs to provide the type of interconnection requested by CMRS Providers:

> A local exchange carrier *must provide* the type of interconnection reasonably requested by a mobile service licensee or carrier. 47 C.F.R. § 20.11(a)(emphasis added).

Thus, under express federal regulation, the RLECs must provide indirect interconnection to the CMRS Providers – if the CMRS Providers request it. This regulation does not allow the RLECs to force the CMRS Providers to interconnect directly when traffic exchanged indirectly reaches a certain level.

The Act contains the same standard in Section 251(a)(1), requiring all "telecommunications carriers" to "interconnect directly or indirectly." In interpreting this language, the FCC has stated that the choice of interconnection type is to be made by carriers "based upon their most efficient technical and economic choices."[8] Accordingly, both the 8th and 10th Circuit Courts of Appeal have ruled that CMRS Providers have the statutory right to utilize indirect interconnection.[9]

It is appropriate to leave network considerations to the workings of the market, rather than to arbitrary standards imposed by regulatory fiat. This is in part because as traffic increases between a CMRS Provider and an RLEC, switching from indirect to direct interconnection can make economic sense. Brown Direct, p. 7. When it does, parties establish direct connections voluntarily. However, under federal law, this decision is left to the discretion of the CMRS Provider. As the FCC has stated:

> The availability of transit service is increasingly critical to establishing indirect interconnection – a form of interconnection explicitly recognized and supported by the Act (*See* 47 U.S.C. § 251(a)(1)). It is evident that competitive LECs, CMRS carriers and rural LECs often rely upon transit service from the incumbent

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[8] *First Report & Order*, ¶ 997.

[9] *WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 892 (8th Cir. 2006); *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1265 (10th Cir. 2005) ("*Atlas Telephone*").

> LECs to facilitate indirect interconnection with each other. Without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks.[10]

Similarly, the FCC has specifically declined to require an originating carrier to establish direct end office trunks when traffic to a tandem reaches a predefined threshold, holding that the ILEC in question (Verizon) had failed to present any evidence of tandem exhaust.[11] The case involved direct interconnection, but demonstrates that when traffic is exchanged indirectly, i.e., through a third-party tandem, a requirement of direct trunking is *never* appropriate, because a terminating carrier's tandem is not directly receiving the originating carrier's traffic and therefore cannot be subject to exhaust from the originating carrier's traffic. Rather, in indirect interconnection, a transiting carrier's tandem is receiving the originating carrier's traffic.

The Directors of the Tennessee Regulatory Authority recently considered the issue of whether CMRS traffic can be combined with other traffic types over the same trunk group and "voted unanimously that either with direct or indirect interconnection, the combining of traffic types over the same trunk should be permitted, provided the calls are properly timed, rated, and

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[10] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 05-33, Further Notice of Proposed Rulemaking, ¶¶ 125-126 (rel. March 3, 2005). *See also* Hearing Tr. 1 at 96 (testimony of Don Wood) ("[T]he reason 251 is in the Act is everybody has got to be interconnected so customers can make calls, but you don't want every carrier going out really inefficiently building direct facilities to every other carrier.").

[11] *Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249, and 00-251, Memorandum Opinion and Order, 17 FCC Rcd 27039 (2002) ("*Virginia Arbitration Order*").

billed."[12] Likewise, the Florida Commission specifically declined to adopt a traffic threshold for direct connection.[13]

In opposition to this consistent and established body of law, the RLECs' only citation in support of their new position is a single reference to KRS 278.030(2), which provides that "[e]very utility . . . may establish reasonable rules governing the conduct of its business and the conditions under which it shall be required to render service." In other words, the RLECs claim that Section 278.030 prevents the Commission from ordering them to interconnect indirectly with the CMRS Providers. Obviously, what is a reasonable rule and condition of service lies in the eye of the beholder. As AT&T Broadband argued in a prior proceeding, the CMRS Providers submit that Section 278.030 requires the exact opposite outcome: "the requirements of KRS 278.030(2) for 'adequate, efficient, and reasonable service' and 'reasonable rules governing the conduct of its business' mandate the availability of indirect interconnection."[14]

3. The RLECs' New Position is as Inefficient as Their Original Proposal

The RLECs' fall-back position would require CMRS Providers to establish direct trunk groups when traffic exchanged indirectly exceeds 75,000 minutes of use in a month, which the RLECs admit is a *de minimis* amount. RLECs' Brief, p. 11. Seen in this light, the RLECs' new argument is not appreciably different than their original position. The RLECs would still demand direct interconnection for the exchange of all traffic except *de minimis* levels in

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[12] Order of Arbitration Award, Tennessee Regulatory Authority, Docket No. 03-00585, 2006 Tenn. PUC LEXIS 10 (Jan. 12, 2006). The arbitrators also determined that "[t]he ICO members can use the EMI 11-01-01 records to identify CMRS traffic."

[13] Florida Public Service Commission Order No. PSC-06-0776-FOF-TP in Docket Nos. 05-0119-TP and 05-0125-TP, pp. 28-32 (September 18, 2006).

[14] *Order*, AT&T Broadband, 2004 Ky. PUC LEXIS 214.

contravention of all applicable federal law. Thus, for all significant amounts of traffic, the RLECs would create the same network inefficiencies they have recognized and admitted in their Brief. The new proposal should therefore be rejected.

C. Issue 3 – Does the Interconnection Agreement apply only to traffic within Kentucky

The CMRS Providers have fully addressed this issue at pages 14-15 of their Post-Hearing Brief.

D. Issue 4 – Should the Interconnection Agreement exclude "Fixed Wireless Services"

Issue 4 is whether the Interconnection Agreement should exclude "fixed wireless services." The RLECs' initial Brief unwittingly demonstrates why their proposal is unnecessary and confusing. They argue that "fixed wireless is not a form of CMRS traffic." RLECs' Brief, p. 13. If this is true, the limitation is unnecessary, because the agreement is already limited to CMRS traffic. Such a term would also be confusing because the RLECs still have not provided a definition for "fixed wireless services." The CMRS Providers' position on Issue 4 should be accepted.

E. Issues 5 and 6 – Terms of Indirect Interconnection

Issues 5 and 6 involve two specific aspects of indirect interconnection. Issue 5 concerns whether the CMRS Providers or the RLECs should pay the transiting charge for RLEC-originated traffic exchanged through a third-party tandem. Issue 6 involves whether the RLECs can use industry standard records (e.g., EMI 11-01-01 records provided by transiting carriers) to measure and bill CMRS Providers for terminating mobile-originated Telecommunications Traffic.

1. Issue 5

The RLECs claim that they "should not be responsible for any transit or other fees incurred as a result of the CMRS Providers' decision to establish an interconnection point at some distant location for the exchange of traffic." RLECs' Brief, p. 14. The RLECs do not cite a single judicial or regulatory decision in support of this proposition. Their lone citation of authority is to 47 U.S.C. 251(c)(2)(B), which places upon "incumbent local exchange carriers":

> . . . the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –
>
> . . .
>
> (B) at any technically feasible point within the carrier's network.

Based solely on the phrase "within the carrier's network," the RLECs argue that they are exempt from paying the transit charge for RLEC-originated traffic, and further that the CMRS Providers should be required to pay the transiting charge for RLEC-originated traffic.

However, no court or regulatory commission has relied on Section 251(c)(2)(B), which imposes an *obligation* on ILECs, to relieve an ILEC of the basic requirement to pay the cost of transporting calls originated by its subscribers to the terminating carrier's network. Moreover, this basic requirement applies regardless of whether traffic is exchanged through direct or indirect interconnection. Thus, when traffic is exchanged indirectly, RLECs must pay the transiting charge when they originate calls to CMRS Providers, and CMRS Providers must pay the charge when they originate calls to RLECs.

a. The RLECs' Position Has Been Rejected by Every Court and Regulatory Commission that has Ruled on This Issue

The exact argument made by the RLECs in this case has been expressly rejected by the Tenth Circuit Court of Appeals in the *Atlas Telephone* case:

> The RTCs first contend that 47 U.S.C. § 251(c)(2) mandates that the exchange of local traffic occur at specific, technically feasible points within an RTC's

> network, and that this duty is separate and distinct, though no less binding on interconnecting carriers, from the reciprocal compensation arrangements mandated by § 251(b)(5). We simply find no support for this argument in the text of the statute or the FCC's treatment of the statutory provisions. Section 251(c)(2) imposes a duty on the ILECs to provide physical interconnection with requesting carriers at technically feasible points within the RTCs' networks. By its terms, this duty only extends to ILECs and is only triggered on request. The fallacy of the RTCs' argument is demonstrated in a number of ways. The RTCs contend that the general requirement imposed on all carriers to interconnect "directly or indirectly," 47 U.S.C. § 251(a) (emphasis added), is superceded by the more specific obligations under § 251(c)(2). Yet, as noted above, the obligation under § 251(c)(2) applies only to the far more limited class of ILECs, as opposed to the obligation imposed on all telecommunications carriers under § 251(a). The RTCs' interpretation would impose concomitant duties on both the ILEC and a requesting carrier. This contravenes the express terms of the statute, identifying only ILECs as entities bearing additional burdens under § 251(c). We cannot conclude that such a provision, embracing only a limited class of obligees, can provide the governing framework for the exchange of local traffic.[15]

In short, the Tenth Circuit held that Section 252(c)(2)(B) of the Act applies *only to incumbent carriers* and does not require CMRS Providers to establish direct interconnection on an incumbent's network. Accordingly, Section 252(c)(2)(B) does not require CMRS Providers to pay the transit cost for RLEC-originated traffic exchanged through indirect interconnection.

As was discussed in the CMRS Providers' Post-Hearing Brief, the state commissions in Tennessee, Florida and Georgia have all ruled that RLECs must pay the transiting cost for RLEC-originated traffic.[16] The Georgia Commission specifically cited the decision of the Tenth Circuit:

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[15] *Atlas Telephone*, at 1265.

[16] Order of Arbitration Award, Tennessee Regulatory Authority, 2006 Tenn. PUC LEXIS 10, p. 30; Florida Public Service Commission Order No. PSC-06-0776-FOF-TP in Docket Nos. 05-0119-TP and 05-0125-TP, issued September 18, 2006, p. 21; *Order on Clarification and Reconsideration*, Georgia Public Service Commission Docket No. 16772-U, released May 2, 2005, pp. 3-4.

> The Commission finds the reasoning of *Atlas* compelling. It is consistent with and confirms the principle that the originating party must bear the costs of transiting the call.[17]

Similarly, as also cited in the CMRS Providers' Brief, the FCC has also stated clearly that the originating carrier is required to pay the transiting charges to deliver traffic through indirect interconnection to another carrier for termination:

> Under current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless carrier is responsible for transporting the call and paying the cost of this transport. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport.[18]

No authority supports the RLECs' position. Not a single court or regulatory commission has ruled that RLECs are exempt from paying transiting charges for landline-originated traffic exchanged indirectly with CMRS Providers.

b. The Principle that the Originating Carrier Is Responsible for the Cost of Transporting Traffic to the Terminating Carrier's Network Applies to Both Direct and Indirect Interconnection

The RLECs claim that Issue 5 "is little more than a variation on the theme of Issue 8, which addresses the dispute over whether the RLECs' interconnection obligations extend beyond their networks." RLECs' Brief, p. 14. In discussing Issue 8, the RLECs then argue at some length that three important cases – *TSR Wireless, Level 3 and AT&T Broadband* – do "not require the RLECs to pay for facilities located outside their network." *Id.* at 19-21.

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[17] *Order on Clarification and Reconsideration*, Georgia Public Service Commission Docket No. 16772-U, released May 2, 2005, pp. 3-4.

[18] *United States Telcom Ass'n et al. v. Federal Communications Commission and United States of America*, Nos. 03-1414. 1443, 2004 WL 3190579, at 35 (D.C. Cir. 2004) (D.C. Cir., filed July 9, 2004).

The RLECs miss the point of these three cases – and other cases like them. According to the RLECs, the three cited cases all involve the issue whether an incumbent LEC must pay the cost of delivering its originated traffic to a distant point on its *own network* – i.e., that the question whether an originating carrier must pay the cost of transiting traffic is determined by whether the traffic terminated "on" or "off" of its network. However, the question of whether the point of termination was on or off of the originating carrier's network was simply not an issue in these cases. *Id.* at 20.

In the three cited cases, the issue was whether the originating carrier was required to pay the cost of transporting traffic to the network of the terminating carrier. In *TSR Wireless,* the FCC ruled that the originating carrier must bear such cost:

> Section 51.703(b), when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated . . . .[19]

That the terminating carrier's network interconnected directly with the originating carrier's network, as in *TSR Wireless*, was irrelevant to the decision. The key point was that the originating carrier was required to deliver its traffic, without charge, to the terminating wireless carrier's network within the MTA – whether the point of interconnection was with the originating carrier (direct interconnection) or with a third-party transit provider (indirect interconnection).

In *Level 3* and *ATT Broadband*, this Commission made similar rulings. The originating carrier is required to pay the cost of transporting its traffic to the terminating carrier's network.

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[19] *TSR Wireless* v. *U S West*, 15 FCC Rcd. 11166, 11184 ¶ 31 (2000), *aff'd Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001)("*TSR Wireless*").

Thus, when the RLECs originate traffic to the CMRS Providers, the RLECs are responsible for paying the cost of transporting that traffic to the CMRS Providers' networks, whether the CMRS Providers connect directly with the RLECs, or indirectly with BellSouth or another transiting carrier. The CMRS Providers are similarly responsible for wireless-originated traffic. When the CMRS Providers and RLECs are interconnected indirectly, the transport cost includes the transiting charge of the third-party tandem provider:

> We find that the petitioners' proposed language more closely conforms to our existing rules and precedent than do [the incumbent's] proposals. . . . [U]nder the petitioners' proposals, each party would bear the cost of delivering its originating traffic to the point of interconnection designated by the competitive LEC. The petitioners' proposals, therefore, are more consistent with the Commission's rules for section 251(b)(5) traffic, which prohibit any LEC from charging any other carrier for traffic originating on that LEC's network.[20]

The District of Columbia, Fourth and Fifth Circuits have all applied this same principle.[21]

The RLECs cannot avoid their obligation to pay transiting charges, and they certainly cannot require the CMRS Providers to pay transiting charges, for RLEC-originated traffic.[22]

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[20] *Id.* at 27063-64 ¶ 51, 27064-65 ¶ 53.

[21] *See Mountain Communications v. FCC*, 355 F.3d 644 (D.C. Cir. 2004); *MCImetro* v. *BellSouth*, 352 F.3d 872 (4th Cir. 2003); *Southwestern Bell* v. *Texas Public Utilities Comm'n*, 348 F.3d 482 (5th Cir. 2003).

[22] In a footnote, the RLECs also suggest that requiring them to pay transiting charges to BellSouth "could unintentionally cause the RLECs to incur greater transit costs than they [the CMRS Providers] incur for the same service." RLECs' Brief, p. 14, fn. 9. This suggestion is counter-intuitive. Since the CMRS Providers send more traffic to the RLECs, the CMRS Providers pay more transit charges. Moreover, the transit charge proposed by BellSouth to the RLECs ($0.0025 per minute) is *lower than* the transit charge currently paid by Cingular (and other CMRS Providers) to BellSouth ($0.003 per minute). Brown Rebuttal, p. 17.

2. Issue 6

As was pointed out in the CMRS Providers' Brief, the RLECs' opposition to the CMRS Providers' proposed language in Issue 6 is based solely upon the RLECs' opposition to indirect interconnection. Thus, the RLECs state:

> The arrangement [indirect interconnection] would result in too many intercarrier compensation disputes that could be avoided if the CMRS providers were to take the modicum of responsibility to exchange traffic on dedicated trunks once the volume of that traffic exceeds a de minimus [sic] level. Below a de minimus [sic] level of traffic, conversely, the significance of relying on BellSouth for this function is also de minimus [sic], and the RLECs do not (in that limited case) object to relying on industry-standard EMI 11-01-01 records provided by BellSouth to bill for that traffic. RLECs' Brief, p. 16.

This statement is revealing on several levels. First, the RLECs candidly admit, as they must, that the 11-01-01 tandem records provided by BellSouth are "industry standard." Indeed, based on the evidence in this case, the Commission should find that such records are accurate and are used throughout the country by RLECs to bill CMRS Providers. Brown Direct, p. 15. Wood Direct, pp. 20-21. Mr. Watkins' vague claims regarding the accuracy of these records was unsupported by any examples evidencing such concerns. Indeed, the RLECs did not even bother to cross-examine the CMRS witnesses on this issue.

Second, this statement reveals that the RLECs' fall-back position regarding indirect interconnection – that it should be allowed until total exchanged traffic reaches 75,000 minutes per month – is a "sleeves out of the vest" proposition. Traffic below that level, from the RLECs' viewpoint, is too small to make any real difference. As the RLECs put it: "Below a de minimus [sic] level of traffic, conversely, the significance of relying on BellSouth for this function is also de minimus [sic]." RLECs' Brief, p. 16. The RLECs are willing to allow indirect interconnection and the use of 11-01-01 records for billing, in other words, only when traffic levels are so small that the RLECs don't consider them "significant."

a. BellSouth Has No Incentive to Produce Unreliable Tandem Records

The RLECs give two reasons for opposing the use of 11-01-01 records for billing. First:

> To be clear, the CMRS Providers espouse the notion that BellSouth [emphasis in original] can tell the RLECs how much traffic the CMRS Providers are delivering. This is the classic case of the "fox guarding the henhouse," and it should be avoided at all costs. Just because it is a different "fox" (BellSouth) than the CMRS Providers is irrelevant. The danger remains the same. RLECs' Brief, pp. 15-16 and fn. 11.

The RLECs argue that "BellSouth would have absolutely no incentive – in fact, it might have a negative incentive – to ensure the accuracy of the billing records being provided to the RLECs." *Id.* at 16 (emphasis in original).

The assertion (without any supporting evidence at all) that BellSouth has an incentive to produce inaccurate tandem records prejudicial to the RLECs is counter-intuitive. Inaccurate tandem records would prejudice the RLECs only if such records *undercounted* the minutes of use originated by CMRS Providers. Undercounting, however, *would also deny BellSouth transit charges from the CMRS Providers for the missing minutes.* Moreover, Bellsouth's proposed transit agreement would allow the RLECs to conduct audits, which is an appropriate check against any risk of undercounting. Wood Rebuttal, Ex. DJW-12, Section D(1). Undercounting CMRS minutes would simply not be in BellSouth's interest.

b. The RLECs' Ability to Measure Traffic Exchanged Directly Does not Relieve Them of the Obligation Under Section 251(a) to Exchange Traffic Through Indirect Interconnection

The RLECs' second reason for opposing the use of 11-01-01 records to measure traffic exchanged *indirectly* is that the RLECs have invested in equipment that allows them to measure and bill traffic exchanged *directly*:

> The RLECs request nothing more than that their prior "significant capital expenditures and investment . . . to identify, measure and record traffic that they terminate from other carriers . . . not be rendered useless . . . [and that they] not be

> forced to rely on [BellSouth], just because the CMRS Providers and BellSouth demand such a result. RLECs' Brief, p. 17 (quoting Watkins Direct, p. 14).

The requirement that the RLECs exchange traffic indirectly with the CMRS Providers has not been mandated by the CMRS Providers and BellSouth. It is instead required by federal law, as the CMRS Providers' discussion in Issue 2 makes clear. That the RLECs have obtained equipment that allows them to measure traffic exchanged directly does not relieve them of the basic obligation under Section 251(a) to exchange traffic through indirect interconnection. This is true even if the RLECs lack the capability in their own system to accurately measure traffic exchanged indirectly. Watkins Direct, p. 14. If the law were otherwise, then the requirement to exchange traffic indirectly could be rendered meaningless by the capability, or lack thereof, of a particular carrier's billing system.

As Mr. Wood testified: "To the extent there's traffic terminating to your tandem, you would use [the billing functionality], but, I mean, there's no 'If we build it, they must come' type principle here." Hearing Tr. 2 at 64.

The point of Issue 6 is not the RLECs' capability to measure traffic exchanged directly. Issue 6, rather, makes clear that 11-01-01 records are an accurate and reliable option available to the RLECs for billing for traffic exchanged *indirectly* – a standard recognized throughout the country. Issue 6 demonstrates that if the RLECs exchange traffic indirectly, as is required by law, they will still be able to accurately bill for such traffic.

F. Issues 7 and 8 – Terms of Direct Interconnection

1. Issue 7

The RLECs' discussion of Issue 7 substantially consists of a restatement of their new position on Issue 2: CMRS Providers should be denied the option of interconnecting indirectly and be forced to interconnect directly with the RLECs, except where traffic exchanged is *de minimis* (below 75,000 MOU per month). The RLECs believe this comports with their Section 251(a) obligation to interconnect directly *or* indirectly because they believe, in error, that a dedicated interconnection may be either direct or indirect. The Commission should properly define "direct" and "indirect" interconnection as set forth in the CMRS Providers' Post-Hearing Brief (pp. 24-25) and ensure the RLECs' Section 251(a) obligations are enforced. The Commission should reject the RLECs' request that direct interconnection be required above a *de minimis* level of traffic exchanged indirectly. That issue as been fully briefed *supra*, at Section II(B).

The RLECs' end their discussion of Issue 7 with the suggestion that the Commission decide a brand new issue that was not raised previously at any point in this arbitration proceeding:

> In addition, the Commission should order that any time the CMRS Providers establish facilities (for example, a cell site or some equivalent point of presence ("POP")) within the boundaries of the RLECs' incumbent networks, *the RLECs shall be permitted to interconnect and exchange traffic with the CMRS Provider at that POP*. RLECs' Brief, p. 18 (emphasis added).

Because it was not raised by the RLECs in negotiations, in their arbitration Petitions, or in any other pleading filed in this docket before their Post-Hearing Brief, the matter was not timely raised and must be rejected. 47 U.S.C. § 252(b)(4)(A). Had the issue been pled and litigated, the record would show that the presence of a wireless antenna in a particular area (on the side of a highway, for example) is not indicative of the amount of traffic exchanged with the RLEC

serving the area. It is placed there to expand the CMRS Provider's coverage area. Thus, in many cases, direct interconnection is not warranted. Furthermore, such sites are not switches on the CMRS Providers' networks, and the RLECs have not proposed to allow the CMRS Providers to charge the RLECs for their portion of such facilities back to the CMRS switch. As a result, this is just another attempt to force the CMRS Providers to pay for a disproportionate amount of the interconnection facility between the RLEC switch and the CMRS switch. The Commission should see this new issue for what it is: an eleventh-hour ploy to restrict indirect interconnection and force the CMRS Providers to pay for a disproportionate share of interconnection facilities.

2. Issue 8

In their discussion of Issue 8, the RLECs again assert that "[t]he Act is clear that the RLECs are not required to provide interconnection with the CMRS Providers outside their own networks." RLECs' Brief, p. 18 (emphasis in original). Citing Section 251(c)(2), the RLECs claim the clause "within the carrier's network" requires the CMRS Providers to be responsible for the cost of all interconnection facilities between the two parties' networks that fall outside of the RLEC service territory, including that portion carrying RLEC-originated calls. This is a fundamental misinterpretation of the Act that is discussed in detail above in Section II(B), and has been decided by the FCC and several federal courts. Section 251(c)(2) merely creates the obligation *on the part of the ILEC* to allow interconnection at a technically feasible point *on the ILEC's network*. Simply put, an ILEC cannot refuse to interconnect. The rule means nothing more. It does not place an affirmative obligation *upon a requesting carrier* to interconnect directly with the ILEC's network. Nor does it address the parties' respective responsibilities for the shared cost of the interconnection facility *between* the interconnecting networks. On that point, the FCC has clearly established that with respect to dedicated facilities that interconnect two parties' networks, the parties are to share the costs of such facilities based upon their

proportionate use of the facilities, regardless of how the facilities are provisioned, and without regard to the carriers' respective service areas.[23]

Contrary to the RLECs' arguments and consistent with the CMRS Providers' Post-Hearing Brief, the *TSR Wireless* case *does* hold that LECs must pay for facilities located outside their network. *TSR Wireless* held that 47 C.F.R. § 51.703(b) "when read in conjunction with Section 51.701(b)(2), requires LECs to deliver, without charge, traffic to CMRS providers anywhere within the MTA in which the call originated ...."[24] An MTA is generally larger than a LEC's local service territory. Thus, a LEC can be required to pay for the cost of facilities located outside its network but within the same MTA.

In its *Level 3* decision, this Commission relied upon *TSR Wireless*, concluding that "in TRS Wireless, supra, the FCC stated that LECs must bear the cost of transporting originating traffic to anywhere within an MTA (major trading area), an area generally larger than a LATA."[25] There was no limitation in *Level 3* with respect to the borders of BellSouth's territory. Similarly, in the *AT&T Broadband* decision, this Commission reiterated the "well-established

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[23] 47 C.F.R. § 51.507(c) ("The costs of shared facilities shall be recovered in a manner that efficiently apportions costs among users."). *See also First Report & Order*, ¶ 1062 ("The amount an interconnecting carrier pays for dedicated transport is to be proportional to its relative use of the dedicated facility"), and ¶ 1063 ("We recognize that the facility itself can be provided in a number of ways – by use of two service providers, by the other carrier, or jointly in a meet-point arrangement. We conclude first that, no matter what the specific arrangements, these costs should be recovered in a cost causative manner and that usage-based charges should be limited to situations where costs are usage sensitive.").

[24] *TSR Wireless*, at 11184.

[25] *In the Matter of: The Petition Of Level 3 Communications, LLC For Arbitration With Bellsouth Telecommunications, Inc. Pursuant To Section 252(b) Of The Communications Act Of 1934*, As Amended By The Telecommunications Act Of 1996, 2001 Ky. PUC LEXIS 873, Case No. 2000-404 (issued March 14, 2001).

principle that the carrier must pay the originating costs of its own traffic," again without limitation to a LEC service territory.

The RLECs' Post-Hearing Brief does not address other substantive matters included in Issues 7 and 8, including the option of one-way or two-way facilities for direct interconnection and the ability of either party to provision the direct interconnection facilities. The Commission should refer to the CMRS Providers' Post-Hearing Brief and adopt the CMRS Providers' recommendations.

G. Issues 10 and 11 – The Appropriate Reciprocal Compensation Rate for Each RLEC

Issues 10 and 11 relate to the appropriate reciprocal compensation rate to be established by the Commission for each RLEC consistent with the standards in the Act and the FCC's Rules.

As discussed in the CMRS Providers' initial Brief, the Commission must set reciprocal compensation rates based on the incumbent LECs' forward-looking costs. CMRS Brief, p. 29. The RLECs do not dispute this legal standard, but instead argue that their proposed rate of $0.015 constitutes a "reasonable approximation" of the RLECs' forward-looking costs. Because the RLECs failed to produce forward-looking cost studies, they seek refuge in Section 252(b)(4)(B), which allows the Commission (in certain circumstances) to proceed "on the best information available to it." RLECs' Brief, p. 25.

The RLECs' approach is flawed. Section 252(b)(4)(B) allows the Commission to proceed on the "best information available to it" only where necessary to remedy a party's *unreasonable failure or refusal* to "respond on a timely basis to any reasonable request from the State commission." The RLECs' advocacy, then, is premised on a conclusion that they failed or refused to provide necessary information from the Commission. Then, the RLECs seek to use their failure to dramatically lower the bar they would otherwise have to meet to support their

proposed rates. As Mr. Meredith admitted on the stand, had the RLECs' sponsored cost studies, the parties would have litigated a series of issues, including:

- the forward-looking costs of current state-of-the-art switching equipment;
- the portion of those costs caused by usage and thus properly recovered through per-minute rates;
- the efficient, forward-looking costs of building a transport network;
- whether proposed reciprocal compensation rates would improperly subsidize other services; and
- how switching and transport facilities would be shared with the providers of other services.

Hearing Tr. 1 at 93-95. The RLECs want to use their failure to produce cost studies as a way to avoid doing the hard analysis required to determine forward-looking costs, and to instead have a rate approved because it feels like "fair, just, and reasonable compensation." RLECs' Brief, p. 29. This is not how the 1996 Act works. If the law were otherwise, then all incumbents could avoid having to justify their transport and termination rates *simply by refusing to produce a cost study.* The RLECs, in short, are attempting to turn their failure to produce TELRIC studies into a virtue.

To make matters worse, *nothing* the RLECs rely on is intended to be indicative of *forward-looking* (non-embedded) costs. Access rates are based on embedded costs. Negotiated rates (including the rate contained in the parties' 2004 Settlement Agreement) are based on negotiations, not costs. And, the application of DEM weighting to proxy rates is intended to inflate an FCC estimate above a proxy number that the FCC deemed "an outlier." *See* Farrar Rebuttal, p. 13. The result is that the RLECs give nothing but lip service to the term "forward-looking" in advocating their proposed $0.015 rate.

As discussed in the CMRS Providers' Post-Hearing Brief, Mr. Wood's proposal should be accepted because it begins with forward-looking costs as established by the Commission for BellSouth, uses the DEM weighting methodology approved by Mr. Meredith, and accepts Mr.

Meredith's proposed (albeit high) transport rates. CMRS Brief, pp. 31-34. Because the Commission must set rates based on forward-looking costs, Mr. Wood's proposal should be accepted. No other proposal in this case is based upon forward-looking costs.

H. Issue 13 – IntraMTA Traffic Factors

Issue 13 involves the appropriate intraMTA factors to be used in the interconnection agreements. The RLECs oppose the use of factors altogether. As with so many other issues in these consolidated proceedings, however, the RLECs' position is premised totally on the assumption that the Commission will prohibit the continued exchange of traffic through indirect interconnection; i.e., through a third-party tandem provider (BellSouth, or in some cases, Windstream). According to the RLECs:

> Provided that the Commission agrees that traffic should be exchanged on a dedicated basis once traffic volumes exceed a de minimus [sic] level, there will be no practical need for intraMTA factors at all. RLECs' Brief at 30-31.

The RLECs claim that if the CMRS Providers are required to establish dedicated trunks to each RLEC, the RLECs "can measure total mobile-to-land terminating traffic." *Id.* at 31. This would mean that "the parties will use the RLECs' traffic measurements to determine the actual traffic distribution." *Id.*

Because the RLECs have now adopted the position that indirect interconnection should be allowed for *de minimis* levels of traffic, the RLECs must also take a modified position on measurement when traffic is exchanged indirectly. The RLECs therefore argue that "the Commission should order the CMRS Providers to operate as though all of the [indirectly] exchanged traffic is CMRS-originated." *Id.* In other words, when traffic is exchanged indirectly, only the CMRS Providers should pay compensation, and the CMRS Providers should not be allowed to bill the RLECs for traffic exchanged indirectly. Such a position is so patently outrageous (and self-serving) it should simply be rejected out of hand by the Commission.

When the RLECs claim that they can produce all the records that are necessary for billing, they appear to mean two things: 1) in the case of indirect interconnection, they will never owe compensation to the CMRS Providers, and thus there is no need for the CMRS Providers to produce bills; and 2) in the case of direct interconnection, the RLECs will produce both the bills to be paid by the CMRS Providers and the bills to be paid by the RLECs. In other words, the RLECs are apparently arguing that in the case of direct interconnection, they should be allowed to *bill themselves.*

Neither of these positions is consistent with the Act or industry practice.

1. Traffic Factors are Standard Throughout the Industry and Are Based Upon Measurements of CMRS-Originated Traffic

It is standard industry practice for CMRS/RLEC interconnection agreements to contain intraMTA "traffic factors" allowing CMRS Providers to base their intercarrier bills to RLECs upon the RLECs' bills for CMRS to RLEC intraMTA traffic. Brown Direct, p.17; Conn Direct, pp. 19-20. The RLECs do not dispute this in their Brief, nor did they cross-examine the CMRS witnesses on this point at the hearing.

Traffic factors are required because CMRS Providers lack the capability to produce accurate intercarrier billing records. This inability to measure has nothing to do with a "business decision not to invest in reliable traffic measurement capabilities," as alleged by the RLECs. RLECs' Brief at 31. Instead, the measurement problem results when RLEC-originated traffic is handed off to IXCs. Such hand-off occurs, in part, because of the RLECs' refusal to recognize dialing parity for CMRS local numbers (see Issue 16). When an RLEC hands of a CMRS-bound call to an IXC, the billing records available to a CMRS Provider, whether generated from a third-party tandem or from the CMRS Provider's switch, will show the originating carrier to be the

IXC, not the RLEC. Thus, CMRS Providers base their bills to RLECs off of the RLECs' bills to the CMRS Providers.

As the hearing demonstrated, the RLECs' interconnection agreements with their own wireless affiliates recognize this principle by allowing the parties to "negotiate an assumed monthly minutes of use" if "terminating access minutes cannot be measured, either on a temporary or permanent basis." Respondents' Hearing Exhibits 2-4. The interconnection agreement between Duo County and Bluegrass Cellular contains an agreed traffic factor of 80% wireless-originated / 20% landline-originated. Respondents' Hearing Exhibit 5.

To repeat: the use of traffic factors is standard practice in the industry.

2. The RLECs Seek the Ability to Bill Themselves for Traffic Exchanged Directly, and to Avoid Any Compensation Obligation for Traffic Exchanged Indirectly

a. Direct Interconnection

The RLECs have never clearly stated what their position would mean for traffic exchanged through direct interconnection trunks. The RLECs' Brief comes closest when it claims that "the parties will use the RLECs' traffic measurements to determine the actual traffic distribution." RLECs' Brief, p. 31. The clear implication is that the RLECs would not only produce bills to be paid by the CMRS Providers (for mobile to land traffic), but the RLECs would also produce bills to be paid by themselves (for land to mobile traffic). In other words, the RLECs would *bill themselves* – either directly or else by sending their own records to the CMRS Providers who would then, apparently, send them back to the RLECs in the form of bills.

As discussed above, the RLECs have counter-intuitively claimed that using BellSouth 11-01-01 tandem records to bill the CMRS Providers (in the case of indirect interconnection) would be like "the fox guarding the henhouse." RLECs' Brief, p. 15-16. As also discussed above, it is

not in BellSouth's interest to produce inaccurate tandem records. The same cannot be said of the RLECs, who would have a clear interest in manipulating the records used to bill themselves.

The RLECs clearly have an interest in accurately recording all CMRS-originated traffic. Thus the standard industry practice applies traffic factors to the RLECs' bills to produce bills back to the RLECs. To the extent an RLEC would be tempted to manipulate its bill to a CMRS Provider, such manipulation (likely in the form of overstated minutes of use) would be reflected in the bill back to the RLEC (in the form of proportionately overstated minutes). Thus, standard industry procedure mitigates the incentive to manipulate.

The RLECs are now proposing to stand the industry practice on its head. Instead of allowing the CMRS Providers to apply traffic factors to the RLECs' measurement of CMRS-originated minutes, the RLECs are proposing that they will measure RLEC-originated minutes themselves and then force the CMRS Providers to use those measurements for billing. Clearly, such a method would provide no disincentive at all against manipulation. An RLEC would suffer no untoward consequences whatsoever for undercounting RLEC-originated minutes. Indeed, the RLECs have already stated that they do not intend to measure land-to-mobile intraMTA traffic delivered to a CMRS Provider via an IXC (Issue 9), which would cause RLEC-originated traffic to be seriously undercounted.

b. Indirect Interconnection

In the case of indirect interconnection, the RLECs ask the Commission to adopt a proposal that would remove the RLECs' obligation to pay compensation for RLEC-originated, intraMTA traffic. This argument is premised upon the RLECs' claim that they owe no compensation for RLEC-originated, intraMTA traffic handed off to IXCs (Issue 9). The RLECs are wrong on this issue. Thus, when traffic is exchanged indirectly, the RLECs' reciprocal

compensation obligations should be based upon the application of intraMTA traffic factors to the RLECs' bills to the CMRS providers, the same as in the case of direct interconnection.

3. The RLECs have Presented No Evidence to Rebut the CMRS Providers' Proposed Traffic Factors

The CMRS Providers' direct testimony listed proposed traffic factors for each RLEC that filed a Petition for Arbitration against a CMRS Provider. Because not every RLEC filed a Petition against every CMRS Provider, not every CMRS Provider proposed factors for every RLEC. Brown Direct, p. 18; Clampitt Direct, pp. 10-11; Farrar Direct, p. 22; Conn Direct, p. 20.

The RLECs did not present alternative traffic studies in their rebuttal testimony, nor did their testimony challenge the accuracy of the CMRS Providers' studies. At the hearing, the RLECs did not cross-examine any CMRS witness on the validity of any of the traffic studies. Those traffic studies stand unchallenged in the record.[26]

The Commission should therefore adopt the proposed factors for use in the interconnection agreements between the RLECs and CMRS Providers.

I. Issue 15 – Compensation for InterMTA Traffic

Issue 15 involves how the parties should compensate each other for the exchange of interMTA traffic. As the RLECs' brief demonstrates, this issue has resolved itself to a fairly simple discussion.

[26] Having offered no evidence on these points, in footnote 23 of their Brief the RLECs seek to challenge the CMRS Providers' proposed traffic factors through punctuation – an exclamation point and quotations around the word "data." If the RLECs had legitimate criticisms regarding the testimony of the CMRS Providers' witnesses, they should have identified their concerns in testimony or at the hearing.

1. The Commission Should Adopt a Three Percent InterMTA Factor

The RLECs' Brief is primarily concerned with defending the claim that they can have no liability for interMTA traffic. RLECs' Brief, p. 32-34. Without conceding the point (which is not contained in any FCC Rule), the CMRS Providers have made clear – in their Joint Response, their testimony and their post hearing brief – that they are willing to accept a small interMTA traffic factor applying *only* to CMRS-originated traffic. The factor must be small, because little interMTA traffic is exchanged between the RLECs and the CMRS Providers. Brown Direct, p. 20; Clampitt Direct, pp. 11-12; Conn Direct, pp. 20-21. The RLECs have offered no evidence to the contrary.

The RLECs propose a five percent interMTA factor. *See* Appendix A to Redline Interconnection Agreement, filed October 27. The CMRS Providers propose a three percent factor. Nothing in the record supports five percent. The CMRS Providers have submitted testimony (not controverted) that interconnection agreements between CMRS Providers and RLECs generally contain an interMTA factor between zero and three percent, and supported this testimony with a discussion of why such an assumption is consistent with network engineering. Brown Direct, p. 19; Clampitt Direct, pp. 11-13; Conn Direct, pp. 20-21. The CMRS Providers have also submitted testimony concerning the recent resolution of a Tennessee arbitration on this same issue. In that case the parties (including one RLEC, North Central, also a party to these consolidated proceedings), at the request of the Tennessee Regulatory Authority, ultimately agreed upon a three percent interMTA factor. Brown Direct, p. 22; Brown Rebuttal, pp. 32-33.

Accordingly, the record supports adoption of a three percent interMTA factor applied only to CMRS-originated traffic.

2. Compensation for InterMTA Traffic Should be Evenly Split Between the Interstate and Intrastate Jurisdictions

The RLECs' Brief proposes "that all interMTA traffic should be subject to the RLECs' tariffed intra- or interstate access charges, as is appropriate based on the actual jurisdiction of the traffic." RLECs' Brief, p. 34. The CMRS Providers agree. CMRS Brief, pp. 42-46. However, the technology currently does not exist to determine if a call is interMTA or intraMTA for intercarrier billing purposes, much less if an interMTA call is interstate or intrastate.

The RLECs therefore claim:

> Absent the ability or willingness of the CMRS Providers to provide actual, accurate data [concerning the jurisdiction of interMTA traffic], the Commission should approve the RLECs' proposed language making interMTA traffic subject to the RLECs' tariffed intrastate access charges. RLEC's Brief at 34.

Such a result would be at odds with the undisputed fact that most of Kentucky is covered by a single MTA. Thus, in that large area of the state, most interMTA traffic must also be interstate in jurisdiction. To require the rate for interMTA traffic to be composed exclusively of the RLECs' intrastate access charges would thus be inconsistent with that uncontroverted fact.

The CMRS Providers would therefore be within their rights to ask that interMTA compensation be based on a very high percentage of the RLECs' interstate access rates. However, as a compromise, and also as an acknowledgement that not all of Kentucky is covered by the same MTA, the CMRS Providers have proposed that the three percent interMTA factor be divided evenly between the intrastate and interstate jurisdictions. That was the compromise agreed to in Tennessee. That is the result that the Commission should adopt in this case.

J. Issue 16 – Dialing Parity

Issue 16 is whether the RLECs are required to provide dialing parity for land-to-mobile traffic, i.e., calls placed by the RLECs' own customers to the customers of the CMRS Providers within the same local calling area. The RLECs continue to maintain on pages 35-36 of their

Brief that "[a]bsent some limited geographic scope comparable to the exchange area concept expressed in the rules, it follows, the CMRS Providers do not provide telephone exchange service" (emphasis in original), and that therefore "the RLECs are not required to provide the CMRS Providers with dialing parity." The RLECs thus stubbornly continue to ignore the FCC's conclusion to the contrary in paragraph 1013 of the *First Report & Order* (read by RLEC witness Watkins during cross-examination, Hearing Tr. 1 at 165-67) wireless service falls within the definition of "telephone exchange service" because it is "comparable service" to telephone exchange service. In other words, the FCC found that in order to be considered as providing telephone exchange service and thus come under the dialing parity rule, CMRS carriers don't need to actually provide service within a local telephone exchange, as long as CMRS carriers provide service that the FCC deems comparable, i.e., "local, two-way switched voice service as a principal part of their business." *Id.*

The RLECs also remark (p. 36) that "dialing parity has no relation whatsoever to 'rates charged' by a carrier," claiming that RLECs should be able to charge their customers whatever they want for calling a wireless number. As the CMRS Providers' witness, Mr. David Conn, observed in his prefiled testimony, "If an RLEC's customers can dial competitors' local numbers on a seven digit basis, but are then assessed additional per-minute charges for doing so, the purpose of requiring dialing parity will be frustrated." Conn Direct, p. 18. Further, the additional digits dialed by RLEC end-users when dialing parity is not observed and the resulting extra charges incurred by those same RLEC customers are inextricably linked: when a customer must dial a "1," he must pay an IXC an extra per-minute charge, and the IXC must pay the ILEC its per-minute intrastate access rate. It is illogical and contrary to common sense for the RLECs

to assert that the Commission should only concern itself with the extra digits dialed and not the extra charges incurred as a consequence of dialing the extra digits.

The RLECs' position regarding the extra charges incurred by their customers when forced to dial extra digits to reach CMRS customers in the same local calling area is also contrary to this Commission's ruling in the 2002 *Brandenburg Telecom* case cited in the CMRS Providers' Post-Hearing Brief. In that case, the Commission itself linked together the concepts of the extra digits dialed *and* the extra toll charges flowing from the extra digits when it found that "[p]arity does not exist when the CLEC's customers must dial 10 digits *and incur toll charges* to reach a 'local' number an ILEC's customers may reach by dialing 7 digits without a toll charge."[27] Accordingly, the Commission should follow its own precedent, based on well-established federal law, and conclude that RLECs cannot require their customers to dial extra digits *or* to pay additional charges to call the CMRS Providers' customers in the same local calling area.[28]

K. Issue 17 – SS7 Signaling Parameters

Issue 17 is the appropriate contract terms to govern the exchange of SS7 signaling information. There are two main reasons why this issue should be resolved in favor of the CMRS Providers. First, the SS7 terms in the Interconnection Agreement should be clear and

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[27] Case No. 2002-00143, Order (issued May 23, 2002), at 4 (emphasis added).

[28] The RLECs' brief does not reprise the inventive argument espoused by RLEC witness Watkins in his prefiled testimony that 47 U.S.C. § 332(c)(3)(A) preempts this Commission from prohibiting RLECs from assessing toll charges on their own customers who call CMRS customers within the same local calling area, because that provision purportedly covers the rates ILECs charge ILEC customers for land-to-mobile calls to the CMRS Providers' end-users. To the extent that the RLECs have not abandoned this argument, the CMRS Providers urge the Commission to find that Section 332(c)(3)(A) only preempts state regulation of *CMRS rates*, not ILEC rates. *See* Conn Rebuttal, pp. 14-15.

succinct. The RLECs' proposal is neither. Second, the RLECs seek to require the CMRS Providers to populate the "JIP" signaling field (RLEC Brief, p. 37) even though that field is not mandatory under currently-recognized industry standards, as admitted by RLEC witness Watkins:

> Q. You reference, in your Rebuttal Testimony, I think you refer to a "Jurisdictional Indicator Parameter," on Page 29, Line 22, of your testimony.
>
> A. In Direct?
>
> Q. Rebuttal; I'm sorry.
>
> A. Yes.
>
> Q. Is the proper term for that "Jurisdiction Information Parameter"?
>
> A. It may be. I'm sorry.
>
> Q. Okay. Is that considered - do you know what ATIS is?
>
> A. Yes.
>
> Q. Does ATIS mandate that that's a mandatory field, signaling field?
>
> A. I do not believe it is a mandatory field.

Hearing Tr. 1 at 195.

The Commission should resolve this issue in favor of the CMRS Providers.

L. Issue 18 – Incorporation of Tariffs

The CMRS Providers fully briefed this issue at page 55 of their Post-Hearing Brief.

M. Issue 20 – Post Termination Arrangements

The CMRS Providers fully briefed this issue at pages 55-56 of their Post-Hearing Brief.

N. Issue 21 – Definitions

The RLECs assert falsely that the CMRS Providers "initially fail[ed] to identify the RLEC-proposed definition of 'Interconnection' (proposed section 1.12) as an issue in dispute."

RLEC Brief, p. 40. They explain in footnote 27 of their Brief that "[a]s a result of the CMRS Providers' failure to identify this dispute on the issues matrix (both in the initial matrix and in their review of the context of the updated matrix), the RLECs unintentionally neglected to identify this issue when they filed the updated matrix on Friday, October 26, 2006." On this basis, the RLECs ask that the dispute over this issue be resolved in their favor.

The issue of the proper definition of "Interconnection" was raised in the CMRS Providers' Consolidated Response to Arbitration Petitions filed on July 7, 2006 and is therefore a timely raised issue that must be decided in this arbitration.[29] The inadvertent omission of the issue from the issues matrix was corrected as soon as it came to the CMRS Providers' attention and was raised in the Direct Testimony of CMRS witness Randy Farrar (p. 23) on September 29, 2006. The RLECs had full opportunity to address the issue from the time it was initially raised in July in the CMRS Response (which was timely served on counsel for the RLECs), and were expressly reminded it was as issue in prefiled testimony well in advance of the hearing, allowing ample opportunity to respond in pre-filed rebuttal testimony and to address it in post-hearing Briefs. They also had full opportunity to cross-examine the CMRS witnesses at hearing on the issue. The Commission should dismiss this transparent attempt to use an inadvertent omission to dismiss an issue that was timely raised.

For the reasons set forth in the CMRS Providers' Post-Hearing Brief, the Commission should adopt the proposed modifications and/or deletions proposed by the CMRS Providers.

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[29] Joint Response to Petitions, Exhibit E (redline of Selent template). *See BellSouth Telecomms. v. Cinergy Communications*, 297 F. Supp. 2d 946, 951 (E.D. Ky 2003) (upholding PSC authority to determine that arbitration issue had been properly raised as required by § 252 and was before the Commission).

O. Issue 28 – Management Agreements

The RLECs assert that the CMRS Providers' suggested provisions regarding management contracts will deprive them of revenue because network expansion "could significantly increase the percentage of inter-MTA traffic being exchanged" while forcing the RLECs to "continue billing as though there were less inter-MTA traffic than actually exists." RLECs' Brief, p. 45. As the CMRS Providers stated in their Post-Hearing Brief, the purpose of the management contract provision is to continue a common, uncontroversial industry practice of enlarging CMRS networks while ensuring that the RLECs with whom the CMRS Providers exchange traffic are appropriately compensated. The proposed provision allows expansion without requiring a new interconnection agreement and a proceeding like this one every time a CMRS Provider seeks to expand its network through a third party management arrangement.

Interconnection agreements typically contemplate many types of changes, including regulatory ("change in law") and network changes that may affect traffic factors or interconnection arrangements set forth in the agreement. This interconnection agreement is no different. Section 5.4.1 provides that the Parties will "work together to develop an auditable report which shows...the ratio of inter-MTA Traffic...for representative periods of time." The RLECs' own proposed template language allows the parties to adjust the inter-MTA factor as needed:

> If an auditable report can be developed to identify and measure inter-MTA Traffic and the Parties mutually agree to new traffic percentages based on the prior 12-month period, the percentages ... will be amended and applied to prospective periods. (5.4.1)

Thus the RLECs' own template language provides the flexibility to adjust interMTA factors as needed, and there is no reason to deny the CMRS Providers the ability to expand their networks through management contracts.

CONCLUSION

Every position adopted by the RLECs is inconsistent with the federal law the controls this proceeding. The CMRS Providers therefore ask the Commission to adopt all of the CMRS Providers' positions and proposed contract language.

Respectfully submitted this 22nd day of November, 2006.

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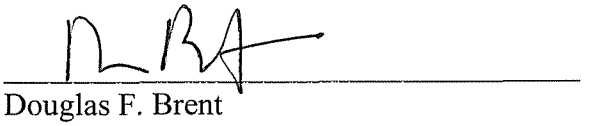
I hereby certify that a true and correct copy of the CMRS Providers' Joint Post-hearing Brief was served upon the following by electronic and postal delivery this 22nd day of November, 2006. A copy was mailed to the following:



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