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# COMMERCIAL MOBILE RADIO CARRIERS ARE ENTITLED TO COMPENSATION FOR CALL TERMINATION

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All Commercial Mobile Radio Service ("CMRS") carriers who interconnect with the facilities of a Local Exchange Carrier ("LEC") should be compensated for terminating calling traffic that originates on a LEC's facilities.<sup>1</sup> Indeed, pursuant to the rules of the Federal Communications Commission ("FCC" or "Commission"), such compensation is mandatory.<sup>2</sup> However, to date, the LECs have only clearly recognized cellular carriers as having rights to compensation for terminating calling traffic, and even then to a limited extent.

Whether a mobile service provider is eligible for termination compensation depends upon how the Commission categorizes the carrier. In its *Second CMRS Order*<sup>3</sup> the Commission began to fold some of the mobile services into the regulatory category of CMRS. At that time, the CMRS classification affirmatively applied to cellular carriers, narrowband Personal Communications Service ("PCS") carriers, broadband PCS carriers, Part 22 paging and two-way mobile carriers, private carrier paging carriers, 800 MHz Special Mobile Radio ("SMR") carriers, 900 MHz SMR carriers, and 220-222 MHz service carriers.<sup>4</sup>

In the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") Congress required the Commission to provide for reasonable physical connection to common carrier networks by CMRS carriers.<sup>5</sup> In reaffirming its existing reasonable interconnection standard, in the *Second CMRS Order*, the Commis-

sion stated that the new provisions of Section 332 of the Communications Act of 1934 (the "Act"),<sup>6</sup> as amended, neither affected nor augmented the existing obligations of the LECs to provide reasonable interconnection under Section 201 of the Act.<sup>7</sup> Accordingly, the Commission reaffirmed the obligation of the LECs to provide reasonable interconnection to mobile service carriers and affirmatively decided that the existing Section 201 interconnection obligation encompassed the networks of the newly reclassified and future CMRS providers.<sup>8</sup>

In discussing interconnection for CMRS providers, the Commission stated that one requirement of reasonable interconnection was "mutual compensation."<sup>9</sup> Mutual compensation is compensation for the act of terminating calling traffic when the calling traffic originates on one carrier's network and terminates on the network of another. For example, if a subscriber places a call on the network of the LEC and the call is terminated on the network of a cellular carrier, the cellular carrier is entitled to compensation from the LEC for terminating that call. In this example, the Originating Carrier is a LEC and the Terminating Carrier is the cellular carrier. However, if the call originated on the network of the cellular carrier and was terminated on the network of the LEC, the LEC, as the Terminating Carrier, would be entitled to compensation for call termination from a cellular carrier, which in this example is the Originating Carrier.

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<sup>1</sup> CMRS carriers provide interconnected mobile service on a for profit basis that is available to the public. 47 C.F.R. § 20.3 (1994).

<sup>2</sup> See 47 C.F.R. § 20.11 (1994).

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<sup>3</sup> *In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411 (1994)(reconsideration pending)[hereinafter *Second CMRS Order*].

<sup>4</sup> *Id.* paras. 81-163.

<sup>5</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312, 392 (1993)[hereinafter *Budget Act*].

<sup>6</sup> 47 U.S.C. §§ 151-609 (1994).

<sup>7</sup> *Second CMRS Order*, *supra* note 3, para. 220.

<sup>8</sup> *Id.* paras. 230-34.

<sup>9</sup> *Id.*; see also 47 C.F.R. § 20.11.

This obligation of the Originating Carrier to compensate the Terminating Carrier for the cost of terminating traffic is codified in Section 20.11 of the Commission's Rules.<sup>10</sup> It is significant to note that, although the term used to describe compensation for the termination of calling traffic is mutual compensation, what qualifies any carrier for compensation is the act of terminating a call that was originated on another carrier's network. Therefore, the term "termination compensation" is a more illustrative description of what the Commission commonly refers to as "mutual compensation."

The term "mutual compensation" has been carried over from a regulatory environment in which CMRS carriers were not considered to be co-carriers with the LECs. In its original inception, mutual compensation was paid between independent telephone companies and the Bell Operating Companies ("BOCs"). Mutuality existed because of the contractual obligation between the LECs to pay compensation for termination. That is, LECs were required to compensate each other for calls originating on one network and terminating on the network of another LEC. Mutual compensation is necessary because the Terminating Carrier does not have a relationship with the party originating the call and, thus, there is no mechanism for compensating the Terminating Carrier for completing the call. Therefore, the term "mutual compensation" is a misnomer because the entitlement to mutual compensation is predicated upon the act of terminating traffic.

CMRS providers are entitled to termination compensation, as well as being subject to reciprocal compensation requirements. However, to date, although the LECs have begun in a few instances to provide cellular carriers with some measure of termination compensation, the LECs have not begun to compensate other CMRS carriers for traffic originating on a LEC's network and terminating on the network of CMRS carriers. Therefore, although every CMRS carrier that terminates traffic is entitled to compensation under Section 20.11 of the Commission's rules, other than possibly some cellular carriers, CMRS carriers are not being compensated by the LECs for call termination. This clear violation of federal law

must be immediately rectified.

There is no question that CMRS carriers should be entitled to compensation for terminating calling traffic. Costs are associated with call termination whether the termination is on a LEC's network, a cellular carrier's network, or the network of other CMRS carriers, such as paging carriers. Because such termination costs are in fact incurred by every carrier that terminates traffic, every carrier that terminates traffic is entitled to compensation for terminating that traffic. This is a basic concept to the operation of mutual compensation and is significant to understanding the rights of all CMRS carriers to compensation for traffic termination.

Specifically, LECs may argue that some CMRS carriers, such as paging carriers, will always be Terminating Carriers and never Originating Carriers and, therefore, are not entitled to mutual compensation. Such an argument would be predicated upon the incorrect notion that termination compensation should only be paid to a Terminating Carrier who is also an Originating Carrier. This argument is patently defective because entitlement to mutual compensation is predicated upon the act of terminating traffic, not whether the carrier terminating traffic is also able to originate traffic.

Further, there is no logical correlation between originating traffic and the cost associated with terminating traffic. In other words, the Terminating Carrier incurs costs associated with the termination of calling traffic whether that carrier's network originates traffic or not. Therefore, mutual compensation is not contingent upon whether a network originates traffic. Mutual compensation is a requirement of reasonable interconnection under Section 201 of the Act and Section 20.11 of the Commission's Rules and is predicated solely upon terminating traffic by a LEC or CMRS carrier.

Having established the right of cellular carriers to mutual compensation prior to the redesignation of some of the mobile services as CMRS, the Commission previously allowed LECs and cellular carriers to negotiate the terms and conditions of interconnection, including the issue of mutual compensation.<sup>11</sup> A specific component of the LEC and cellular intercon-

<sup>10</sup> Section 20.11 of the Commission's Rules states:

(b) Local exchange carriers and commercial mobile radio service providers shall comply with the principles of mutual compensation.

(1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

(2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

47 C.F.R. § 20.11 (1994).

<sup>11</sup> *In re* The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, *Declara-*

nection was compensation to the cellular carriers for calls originating on a LEC's facilities and terminating on the cellular carrier's facilities.<sup>12</sup> The Commission required the LECs and the cellular carriers to negotiate interconnection in good faith.<sup>13</sup>

In the *Second CMRS Order*, the Commission found that there was no distinction between the LECs' obligation to offer interconnection to Part 22 licensees and all other CMRS providers.<sup>14</sup> Therefore, in extending its LEC/cellular interconnection policy to CMRS, the Commission specifically placed an affirmative obligation on LECs to provide reasonable interconnection to all CMRS carriers in order to meet the requirements of interconnection.<sup>15</sup> Pursuant to this requirement, LECs must compensate CMRS providers for the reasonable costs incurred by the CMRS carrier in terminating traffic that originated on the LECs' facilities.<sup>16</sup> In addition, pursuant to the good faith negotiation requirement of the LEC/cellular interconnection policy, the LECs and the entire CMRS industry, arguably, have a duty to negotiate mutual compensation in good faith. To date, to the author's knowledge, no such negotiations have produced compensation for paging carriers.

If the LECs will not negotiate with all CMRS carriers for mutual compensation, or the LECs further attempt to put-off such negotiations, CMRS carriers may wish to file an access tariff in which a CMRS carrier would set its interstate mutual compensation rate for the LECs. Unfortunately, in the *Second CMRS Order*, the Commission stated that it would not accept access tariffs from CMRS providers. Specifically, the Commission stated:

[W]e will forbear from requiring or permitting tariffs for interstate service offered directly by CMRS providers to their customers. We also will temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service.<sup>17</sup>

Therefore, although the Commission has mandated

that mutual compensation must be provided to all CMRS carriers, one mechanism by which CMRS carriers could recover interstate mutual compensation has been foreclosed.

It is important to emphasize that the Commission's forbearance regarding CMRS tariffs is permissive in nature.<sup>18</sup> In the *Second CMRS Order*, the Commission recognized that there were public interest factors that would make forbearance with respect to interstate access tariffs inappropriate.<sup>19</sup> The Commission stated it would look at this issue in more detail in proceedings addressing interconnection issues and equal access<sup>20</sup> and on January 11, 1996, issued a *Notice of Proposed Rulemaking* in order to "consider[] the policy issues in establishing compensation arrangements for LEC-CMRS interconnection."<sup>21</sup>

Although the Commission stated that CMRS access tariffs cannot be filed, such tariffs may possibly be allowed for the limited purpose of mutual compensation. This may be particularly true if the tariffs were filed as a result of the refusal of the LECs to negotiate mutual compensation in good faith. Although such tariffs could lead to a suspension, it will be important to have the rates effective as soon as possible. To that end, if a tariff was filed and the Commission was inclined to suspend the mutual compensation tariffs, CMRS carriers such as paging carriers should seek a short suspension and the imposition of an accounting order during the Commission's investigation of the tariff. The accounting order will allow the Commission to permit the rates to become effective and provide the LECs, CMRS carriers and the Commission with information regarding mutual compensation being paid to CMRS carriers. In addition, if the mutual compensation tariffs were rejected by the Commission, this rejection would represent the grounds by which the Commission's access tariff forbearance policy could be challenged by the paging carriers. Therefore, if the LECs refuse to negotiate in good faith regarding

*tory Ruling*, 2 FCC Rcd. 2910 (1987).

<sup>12</sup> See *In re The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriage Services (Cellular Interconnection Proceeding)*, *Memorandum Opinion and Order on Reconsideration*, 4 FCC Rcd. 2369, paras. 10-29 (1989)[hereinafter *Cellular Interconnection Decision*].

<sup>13</sup> *Id.*

<sup>14</sup> *Second CMRS Order*, *supra* note 3, para. 230.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* paras. 227-34.

<sup>17</sup> *Id.* para. 179.

<sup>18</sup> See Budget Act, *supra* note 5, § 6002(c)(1)(A).

<sup>19</sup> *Second CMRS Order*, *supra* note 3, para. 179.

<sup>20</sup> *Id.*

<sup>21</sup> *In re Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Equal Access and Interconnection Obligation Pertaining to Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking*, CC 94-185, CC 94-54 (Jan. 11, 1996), para. 3. The Commission stated that it was "concerned that existing general interconnection policies may not do enough to encourage the development of CMRS, especially in competition with LEC-provided wireline service." *Id.* para. 2. The Commission "further concluded that, at least for an interim period, interconnection rates for local switching facilities and connections to end users should be priced on a 'bill and keep' basis (*i.e.*, both the CMRS provider charge a rate of zero for the termination of traffic)." *Id.* para. 3.

mutual compensation, the filing of access tariffs may be the quickest way to receive interstate mutual compensation. Whether the tariffs are accepted by the FCC or not, they may be an appropriate vehicle to bring the issue of payment before the Commission for resolution.

If the LECs will not negotiate mutual compensation, paging carriers may also file formal complaints against the LECs for refusal to provide reasonable interconnection. The grounds for that complaint will be that, under the Commission's CMRS interconnection policy, it is an unreasonable practice under Section 201 of the Act for the LECs not to negotiate the compensation with all CMRS carriers for termination of calls originated on the LECs' networks. In addition, the formal complaint would be based upon the breach of duty to negotiate in good faith with CMRS providers regarding interconnection.<sup>22</sup> Note,

that in the *Cellular Interconnection Decision*, the Commission identified the Section 208 complaint procedure as a means to redress the failure of the LECs to negotiate interconnection in good faith.<sup>23</sup>

The Commission mandates LECs to provide mutual compensation to CMRS carriers. Although the Commission has established a duty to negotiate interconnection in good faith, over one year after the FCC mandated mutual compensation for all CMRS carriers, this good faith policy has not encouraged the LECs to pay or even yielded the benefit of termination compensation for a majority of CMRS carriers. Therefore, without reopening the debate as to whether mutual compensation is due to CMRS carriers, it is incumbent on the CMRS industry to seek all avenues that are prudent and necessary to achieve termination compensation for CMRS carriers.

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<sup>22</sup> *Id.* para. 29.

<sup>23</sup> *Cellular Interconnection Decision*, *supra* note 12, para.

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