IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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NOS. 10-2221 (L) & 10-2243

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NEW CINGULAR WIRELESS PCS, LLC, *ET AL.*,

PLANTIFFS-APPELLANTS,

V.

EDWARD S. FINLEY, JR., *ET AL.*,

DEFENDANTS-APPELLEES.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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# AMICUS BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN SUPPORT OF NEITHER PARTY

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By letter dated September 29, 2011, this Court invited the Federal Communications Commission ("FCC") to file an amicus brief "setting forth its views" on these cases "and how they ought to be resolved." In response to the Court's invitation, the FCC respectfully submits this amicus brief. As explained below, the FCC has not directly ruled on the precise issues raised by these cases. No prior FCC order has addressed whether the originating carrier or the terminating carrier is responsible for paying transit charges to an intermediate carrier under the facts presented here. Nor has the FCC clearly opined on whether the Communications Act authorizes state commissions to

suspend or modify the application of federal pricing requirements to small rural telephone companies.

## BACKGROUND

This case concerns a dispute involving two providers of wireless telecommunications service (AT&T Mobility and Verizon Wireless) and three rural local exchange carriers ("RLECs") in North Carolina (Ellerbe Telephone Company, Randolph Telephone Company, and Mebtel, Inc.). The RLECs' networks are not directly interconnected with the networks of the wireless service providers. Instead, the RLECs have opted for an indirect interconnection arrangement. Under this arrangement, any telephone call placed by an RLEC customer to a customer of AT&T Mobility or Verizon Wireless is carried from the originating RLEC network to the terminating wireless network via the network of an intermediary local exchange carrier (in this case, AT&T). The primary question raised by this appeal is: When such a call is made, which carrier – the RLEC or the wireless service provider – pays AT&T's transit charges for conveying the call from the RLEC network to the wireless network?

The parties presented this question to the North Carolina Utilities Commission ("NCUC") in an arbitration proceeding pursuant to section 252 of the Communications Act, 47 U.S.C. § 252. In 2008, the NCUC ruled that

the terminating wireless carriers bear responsibility for paying AT&T's transit charges for calls that originate on the RLECs' networks, traverse AT&T's intermediate network, and terminate on the wireless carriers' networks. *Final Arbitration Order* at 18-23 (JA 215-20). The NCUC further concluded that the wireless providers could seek reimbursement from the RLECs for these transit charges through reciprocal compensation arrangements.[1] *Final Arbitration Order* at 14 (JA 211).

The NCUC determined that the obligation to pay transit charges depends on the location of the physical point of interconnection ("POI") between the originating and terminating carriers. In assigning financial responsibility to the wireless providers, the NCUC designated a single POI "located on the RLECs' networks." *Final Arbitration Order* at 13 (JA 210). For purposes of this analysis, the NCUC deemed the transit network a "virtual part" of the wireless providers' own networks. *Id.*

[1] Section 251(b)(5) of the Communications Act imposes on all telecommunications carriers a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). "For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)," the statute establishes pricing requirements in section 252(d)(2). 47 U.S.C. § 252(d)(2)(A). And the FCC's rules currently prescribe a cost-based methodology – known as the "total element long-run incremental cost" (TELRIC) – to implement those pricing requirements. *See* 47 C.F.R. § 51.505(b).

Pursuant to section 251(f)(2) of the Communications Act, 47 U.S.C. § 251(f)(2),[2] the NCUC also modified the requirement that the RLECs set their reciprocal compensation rates in accordance with the statute's cost-based pricing standard and the FCC's implementing rules. Notwithstanding that requirement, the NCUC ruled that "the RLECs are not required to perform strict TELRIC studies to establish reciprocal compensation rates, and the rates proposed for reciprocal compensation do not have to comply with all of the requirements set forth in Section 252(d) of the Act and related FCC rules." *Final Arbitration Order* 27 (JA 224).

AT&T Mobility and Verizon Wireless sought review of the NCUC's rulings in federal district court. Those wireless carriers contended that the NCUC erred in requiring them to pay the transit charges associated with calls that originate on the RLECs' networks, traverse AT&T's network, and terminate on the wireless networks. They also argued that section 251(f)(2) of the Communications Act does not authorize the NCUC to suspend or modify the pricing requirements imposed on the RLECs by section 252(d)(2) and the FCC's rules.

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[2] Under section 251(f)(2), certain rural carriers "may petition a State commission for a suspension or modification of the application of a requirement or requirements of [section 251(b) or (c)] to telephone exchange service facilities specified in such petition." 47 U.S.C. § 251(f)(2).

On September 30, 2010, the district court rejected the wireless providers' arguments and granted the motions of NCUC and the RLECs for summary judgment. *New Cingular Wireless PCS, LLC v. Finley*, No. 5:09-CV-123-BR (E.D.N.C. Sept. 30, 2010) (JA 412).

On appeal, AT&T Mobility and Verizon Wireless contend that the district court erred in affirming the NCUC's determination that they must pay the transit charges associated with phone calls that originate on the RLECs' networks, traverse AT&T's facilities, and terminate on the wireless carriers' networks. The appellants also assert that the NCUC lacks authority to relieve the RLECs of the reciprocal compensation pricing requirements established by section 252(d)(2) and the FCC's implementing rules.

**DISCUSSION**

1. As the district court noted (Slip Op. at 14-15 (JA 425-26)), the FCC previously has observed that the point at which a carrier bears financial responsibility for intercarrier compensation (in this case, the payment of transit charges) may not necessarily be the physical POI between networks. In a 2001 order, for example, the FCC concluded that Verizon did not violate the Communications Act or the FCC's rules by "distinguish[ing] between the physical POI and the point at which Verizon and an interconnecting competitive LEC are responsible for the cost of interconnection facilities"

because the "issue of allocation of financial responsibility for interconnection facilities" was "an open issue" in the agency's intercarrier compensation rulemaking docket. *Application of Verizon Pennsylvania, Inc.*, 16 FCC Rcd 17419, 17474 ¶ 100 (2001), *aff'd*, *Z-Tel Commc'ns, Inc. v. FCC*, 333 F.3d 262 (D.C. Cir. 2003). Similarly, in 2003, the FCC found that, for purposes of "determin[ing] financial responsibility for inter-network calls," Verizon could permissibly designate an "interconnection point" that "is different" from "the physical point of interconnection." *Application by Verizon Maryland Inc.*, 18 FCC Rcd 5212, 5273 ¶ 103 (2003). These orders suggest that under current law, the point of financial responsibility for intercarrier compensation can be – but need not be – the same as the point of physical interconnection.

2. No FCC order, however, has ever addressed the question whether the originating or terminating carrier must pay transit charges under the factual scenario presented by this case. The district court correctly noted (Slip Op. at 17 (JA 428)) that the FCC in a related context has determined that a third-party transit provider "may charge a terminating carrier for the portion of facilities used to deliver transiting traffic to the terminating carrier," and that the terminating carrier "may seek reimbursement of these costs from originating carriers through reciprocal compensation." *Texcom, Inc. v. Bell Atlantic Corp.*, 17 FCC Rcd 6275, 6277 ¶ 4 (2002). But the

dispute in *Texcom* was between the transit provider and a terminating carrier. Furthermore, the terminating carrier in that case was a paging carrier – *i.e.*, a carrier that only receives (and never originates) telecommunications traffic.[3] By contrast, this case involves a dispute between originating carriers and terminating carriers; and the terminating carriers in this case are not paging carriers, but providers of wireless voice and data services.

It is not clear from the FCC's decisions whether these distinctions would lead the FCC to reach a result different from *Texcom* and related cases if presented with the facts of this case. The FCC has yet to specifically address whether the terminating or originating carrier is responsible for paying transit charges when (as in this case) the terminating carrier's dispute is with the originating carrier (rather than the transit provider), and the terminating carrier is a provider of wireless voice and data services (as opposed to a paging carrier). Accordingly, FCC counsel are unable to state

[3] The same is true of the FCC orders cited in the RLECs' brief (at 39-42). To the extent that those orders concerned the payment of transit charges, they involved disputes between terminating carriers and transit providers in cases where the terminating carrier was a paging carrier. *See TSR Wireless, LLC v. U S West Commc'ns, Inc.*, 15 FCC Rcd 11166 (2000), *petitions for review denied, Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001); *Mountain Commc'ns, Inc. v. Qwest Commc'ns Int'l, Inc.*, 17 FCC Rcd 15135 (2002), *vacated in part, Mountain Commc'ns, Inc. v. FCC*, 355 F.3d 644 (D.C. Cir. 2004); *Metrocall, Inc. v. Concord Tel. Co.*, 17 FCC Rcd 2252, 2257 ¶ 11 (2002).

how the Commission would analyze the carriers' financial responsibility for transit charges under the facts of this case. *Cf. Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2257 n.1 (2011) (noting that FCC's amicus brief "reflect[ed] the Commission's considered interpretation of its own rules and orders").

3. Likewise, we are unable to provide the Court with a definitive FCC position on whether section 251(f)(2) authorizes state commissions to suspend or modify the pricing requirements of section 252(d)(2) for certain RLECs. Contrary to the district court's conclusion (Slip Op. at 27 (JA 438)), we do not believe that the FCC's 1996 *Local Competition Order* clearly resolves that question. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

The district court held that the NCUC had authority under section 251(f)(2) to relieve the RLECs of their obligation to perform TELRIC cost studies pursuant to section 252(d)(2) and the FCC's implementing rules. Slip Op. at 26-28 (JA 437-39). In support of that ruling, the district court cited the FCC's *Local Competition Order*. At the end of a section of that order discussing the FCC's cost-based pricing methodology, the FCC addressed some concerns expressed by small incumbent LECs. In particular, the FCC

noted that "certain . . . small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2)." *Local Competition Order*, 11 FCC Rcd at 16026 ¶ 1059. The district court construed that statement to reflect an "explicit[ ] recogni[tion]" by the FCC "that the general rule requiring rates to be established based on TELRIC studies is subject to an exception for small and rural LECs." Slip Op. at 27 (JA 438).

Unlike the district court, we do not read paragraph 1059 of the *Local Competition Order* as clearly interpreting section 251(f)(2) to permit a state commission to suspend or modify the TELRIC pricing requirements established by section 252(d)(2) and the FCC's rules. Paragraph 1059 made no mention of either section 252(d)(2) or the TELRIC pricing requirements. Furthermore, when describing section 251(f)(2) in that paragraph, the FCC did *not* specifically refer to its pricing rules; rather, it merely observed that some "small incumbent LECs may seek relief from their state commissions from our rules." *Local Competition Order*, 11 FCC Rcd at 16026 ¶ 1059. In that context, the FCC's reference to section 251(f)(2) reasonably could be understood as a general description of the statutory remedies available to small incumbent LECs, not a specific finding that state commissions may suspend or modify the Act's pricing requirements. Indeed, in another paragraph of the *Local Competition Order*, the FCC expressly "decline[d] . . .

to adopt national rules or guidelines" regarding the specific implementation of section 251(f), stating that it "may offer guidance on these matters at a later date, if we believe it is necessary and appropriate." *Id.* at 16118 ¶ 1263.

In sum, it is not clear whether the FCC determined in paragraph 1059 of the *Local Competition Order* that state commissions are authorized by section 251(f)(2) to suspend or modify the pricing requirements of section 252(d)(2). Nor are we aware of any other order in which the FCC clearly addressed this issue.

* * * *

Although the FCC's appellate counsel are unable to provide the Court with a definitive answer to the questions raised by this case, we note that there is a procedural mechanism through which the parties can request an answer from the FCC. Under the doctrine of primary jurisdiction, the Court could hold this case in abeyance (or dismiss it without prejudice) and direct the parties to file a pleading at the FCC asking the agency to address these questions in a declaratory ruling. *See Reiter v. Cooper*, 507 U.S. 258, 268 (1993); *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64 (1956); *see also Piney Run Pres. Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 262 n.7 (4th Cir. 2001). When the FCC receives such a pleading from a party or parties implementing a primary jurisdiction referral from a

court, the FCC commences an administrative proceeding, seeks public comment to build a record to facilitate its decision, and then issues a declaratory ruling to resolve the relevant questions. This procedure enables the FCC to offer its views on questions that it has not previously resolved – an option that is not available to the FCC's counsel when the FCC has not previously spoken on an issue.[4]

[4] The FCC's Chairman recently announced that he is circulating to his fellow Commissioners a proposed set of comprehensive reforms to overhaul and modernize the agency's rules governing, among other things, the intercarrier compensation system. These proposed rule changes have been scheduled for a vote by the FCC on October 27, 2011. *See* News Release, *FCC Announces Tentative Agenda for October Open Meeting* (released Oct. 6, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1006/DOC-310258A1.pdf. In the event that the rulemaking order released by the FCC addresses any of the specific questions presented by this case before this Court issues its decision, we will supplement this amicus brief with pertinent information.

## CONCLUSION

For the foregoing reasons, FCC counsel are unable at this time to present a position of the FCC on the questions presented by this case.

Respectfully submitted,

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October 20, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Amicus Brief for the Federal Communications Commission in Support of Neither Party" in the captioned case contains 2,339 words.

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October 20, 2011

10-2221

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**New Cingular Wireless PCS, LLC, Plaintiff-Appellant**

**v.**

**Edward S. Finley, Jr., Defendant-Appellee.**

## CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on October 20, 2011, I electronically filed the foregoing Amicus Brief for the Federal Communications Commission in Support of Neither Party with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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