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CORPORATION COMMISSION
OF OKLAHOMA

BEFORE THE CORPORATION COMMISSION OF OKLAHOMA

IN THE MATTER OF:		
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APPLICATION OF ATLAS TELEPHONE COMPANY FOR ARBITRATION UNDER THE TELECOMMUNICATIONS ACT OF 1996	))))	CAUSE NO. PUD 200400507
IN THE MATTER OF:		
	)	
APPLICATION OF ATLAS TELEPHONE COMPANY FOR ARBITRATION UNDER THE TELECOMMUNICATIONS ACT OF 1996	))))	CAUSE NO. PUD 200400433

REPORT ON THE BILL AND KEEP ISSUE

On April 2, 2014, with agreement of the parties, Administrative Law Judge James L. Myles referred the issue to Administrative Law Judge Ben Jackson, who bases this report on briefs submitted by the parties.

In this matter, the following attorneys entered appearances: Ron Comingdeer and Kendall W. Parrish for Atlas Telephone Company, Beggs Telephone Company, Bixby Telephone company, Inc., Canadian Valley Telephone Company, Carnegie Telephone Company, Central Oklahoma Telephone Company, Cherokee Telephone Company, Chickasaw Telephone company, Cross Telephone Company, Dobson Telephone Company Hinton Telephone Company, and KanOkla Telephone Company; J. Fred Gist and Jennifer H. Castillo for Pottawatomie Telephone company, Cimarron Telephone Company, Salina-Spavianw Telephone Company, Inc., McCloud Telephone Company, Medicine Park Telephone Company, Oklatel Communications, Oklahoma Western Telephone, Company, Panhandle Telephone Cooperative, Inc., Pinnacle Communications, Pioneer Telephone Cooperative, Inc., Santa Rosa Telephone Cooperative, Inc., Shidler Telephone Company, Terral Telephone Company, and Valliant Telephone Company; John W. Gray and John Paul Walter, Jr., for AT&T Services, Inc.; Assistant Attorneys General William L. Humes, Nicole A. King and Jerry J. Sanger; and Assistants General Counsel Kimberly Prigmore and Dominic Williams for the Public Utility Division of the Oklahoma Corporation Commission.

Being fully advised of the premises, the ALJ finds

Findings

1. Order No. 617258 (October 2, 2012) asked if the Commission can set reciprocal compensation other than "bill-and-keep" for the period before July 1, 2012, and/or the period from July 1, 2012 forward.

2. In the above-captioned causes, the reciprocal compensation arose during arbitration of interconnection and compensation agreements ("ICAs"). Twenty-nine rural

incumbent local exchange carriers ("RLECs") petitioned the Commission to arbitrate certain controversies that prevented execution of ICAs with AT&T Mobility, a commercial mobile radio service provider ("CMRS") as defined by 47 C.F.R. §§ 20.3 and 51.5. The parties disagree over the pricing standards for reciprocal compensation in the transport and termination of non-access intra-MATA traffic. Pursuant to 42 U.S.C. §252(g) and OAC 165:55-17-7(j), Order No. 502614 (March 8, 2005) consolidated under the above-captioned numbers fifty-eight applications covering the twenty-nine RLECs: Causes Nos. PUD 200300433-2003462 & 200300507-2003535. Hereafter, this report refers to those fifty-eight applications as "the consolidated causes."

3. Order No. 617258 found that the Commission has subject matter jurisdiction under Okla. Const. Art. IX, §18 and 47 U.S.C. §252(b).

4. The Commission has jurisdiction over the persons. Notice was given as required by law and Commission rules.

5. OAC 165:55-17-1 through 165:55-17-27 implement 47 U.S.C. §252(b).

6. 47 U.S.C. § 252(b) comes from the Telecommunications Act of 1996 ("TCA"), Pub. Law No 104-104, 110 Stat. 56 (1996), which amends the Communications Act of 1934, which is the statutory framework for U.S. communications policy, covering telecommunications and broadcasting.

7. TCA introduced a competitive regime for local telecommunications services. Before its passage, a single company within each local calling area typically provided local telephone service pursuant to a state-sanctioned monopoly. . Under TCA, 47 U.S.C. §251(a) (1) requires a telecommunication carrier to interconnect with other telecommunications carriers. Under 47 U.S.C. §153(44), "telecommunications carrier" refers to any provider of telecommunications services other than an aggregator. Each party in the consolidated causes is telecommunications carrier. 47 U.S.C. §251(c)(2) opens local markets to competition by imposing a duty on each incumbent local exchange carrier ("ILEC") to interconnect with other telecommunications carriers.

8. *Interconnection* refers only to the linking of two networks for the mutual exchange of traffic. 47 C.F.R. §51.5. Networks interconnect either directly or indirectly. Carriers may interconnect directly at a physical point or indirectly by sending calls through an interexchange carrier that provides inter-LATA communication (long-distance service). 47 U.S.C. §251(a) (1); *Atlas Telephone v. Ok. Corp. Comm.*, 400 F.3d 1256, 1265 – 1268 (10th Cir. 2005).

9. Through either a direct or indirect interconnection, TCA allows customers of one LEC to call the customers of another network, with the calling party's LEC (the *originating carrier*) transporting the call to the connection point, where the called party's carrier (the *terminating carrier*) takes over and transports the call to its end point.

10. Under 47 U.S.C. §252(a) (1) and 47 C.F.R. §20.11(e), an ILEC may ask another carrier for an interconnection agreement. 47 U.S.C. §251(b) (5) provides that interconnecting carriers must establish reciprocal compensation arrangements for the transport and termination of telecommunications.

11. Under a reciprocal compensation arrangement, the originating carrier must compensate the terminating carrier for delivering its customer's call to the end point. 47 U.S.C. §252(d) (2) (A) (i). Under the "bill-and-keep" methodology, the compensation is set at zero. 47 C.F.R. §51.713(a). The term *bill-and-keep* describes the billing process. The originating carrier bills its subscriber for the call and keeps that revenue, and at the same time, it does not pay the terminating carrier for terminating the call. Bill-and-keep shifts the billing relationship to the end-user rather than between the carriers. A carrier looks first to its subscribers to cover the costs of the network, then to explicit universal service support where necessary. 76 Fed. Reg. 73830, 73832 ¶18 (November 29, 2011).

12. On November 29, 2011, the U.S. Federal Communications Commission ("FCC") adopted a bill-and-keep framework for all telecommunications traffic exchanged with LECs as part of an effort to reduce arbitrage practices such as traffic pumping and phantom traffic, encourage the deployment of internet protocol-based networks, and reduce artificial competitive distortion between wireline and wireless carriers. 76 Fed. Reg.73830, 73837 ¶¶54 & 55 (November 29, 2011).

13. 47 CFR §20.11(b) now provides that local exchange carriers and commercial mobile radio service providers shall exchange non–access telecommunications traffic, under a bill-and-keep arrangement, unless they mutually agree otherwise. Similarly, 47 CFR § 51.705(a) now provides that bill-and keep shall be the default methodology for transport and termination of non–access telecommunications traffic. Under the "default rule" concept, if the parties cannot agree on a pricing method, then bill-and-keep will apply.

14. The FCC bill-and-keep rules became effective December 29, 2011. 76 Fed. Reg. 73830 (November 29, 2011). In a subsequent order, the FCC on its own motion extended the startup date for the program to July 1, 2012, but the extension did not change the effective date of the rules. *Order on Reconsideration* 26 FCC Rcd. 17663 (December 23, 2011). The FCC later issued five other orders on motions to reconsider, but those orders do not change when the bill-and-keep program begins. See *Second Order on Reconsideration,* 27 FCC Recd. 4648 (April 25, 2012); *Third Order on Reconsideration*, 27 FCC Rcd. 5622 (May 14, 2012); *Fourth Order on Reconsideration*, 27 FCC Rcd. 8814 (July 18, 2012); *Fifth Order on Reconsideration, 27* FCC Rcd. 14549 (November 16, 2012); and *Sixth Order on Reconsideration,* 28 FCC Rcd. 2572 (rel. February 27, 2013).

15. The 2011 bill-and-keep regulations started a phased reform of the intercarrier compensation system which had been in place since 1982, and which defined how, and how much, telecommunications carriers paid for use of each other's networks. As of December 29, 2011, all access charges (for non-local calls) and reciprocal compensation (for local calls) are capped, except for originating intrastate access charges for rate-of-return ILECs, and CLECs

who benchmark to those ILEC rates. Over a period of seven years for price-cap carriers (large incumbents) and nine years for rate-of return carriers (small, usually rural carriers), the terminating access and reciprocal compensation rates will gradually be eliminated and replaced by the bill-and-keep process. 76 Fed. Reg. 73830, 73837-73839 (November 29, 2011).

16. In the consolidated causes, the parties have lacked permanent ICAs since the RLECs terminated the prior ICAs effective December 14, 2003. Since December 14, 2003, the parties have exchanged telecommunications traffic under the interim arrangements described below.

17. In their interim arrangements, the parties' use of the term *bill-and-keep* comports with the FCC definition found at 47 C.F.R 51.713(a), which defines *bill-and-keep* to mean arrangements in which carriers do not charge each other for specific transport and/or termination functions or services.

18. Each RLEC entered into a private agreement with AT&T Mobility to use bill-and-keep from July 1, 2012 forward. The terms and conditions of each private agreement are the same. A sample agreement appears in Exhibit B to the *Initial Brief of AT&T Mobility*, and the sample agreement is entitled *Amendment to the Interim Arrangement between New Cingular Wireless PCS, LLC, and its Commercial Mobile Radio Service operating affiliates, d/b/a AT&T Mobility, and Atlas Telephone Company.* The 2012 agreements amend private contracts found in Exhibit A to *Initial Brief of AT7T Mobility.* Each of the private contracts is entitled *Interim Compensation Arrangement.* Each of these private contracts has the same provisions and is effective June 1, 2005. The section of each private contract entitled *Exhibit A – Billing, Payment and Rates* sets out the net billing factors and formula. Basically, the parties agreed to one-cent per minute, with a net balance of traffic set at eighty percent AT&T Mobility to twenty percent RLEC.

19. The parties did not ask the Commission to set interim rates, even though that relief was available at all times after filing of the arbitration applications. The interim arrangements between the parties consist solely of the post-terminations provisions in the prior ICAs and the private contracts described above.

20. The parties need to amend the proposed ICAs to reflect use of bill-and-keep from July 1, 2012 forward. Under 47 U.S.C. §252(b)(1), the RLECs applied to the Commission to arbitrate open issues in the proposed ICAs. The proposed ICAs have the same provisions. A sample of a proposed ICA appears in Exhibit "C" to the *Petition for Arbitration of Open Issues Between Atlas Telephone Company and AT&T Wireless Services, Inc.*. The sample agreement in Exhibit "C" is entitled *Compensation and Interconnection Agreement* and provides for reciprocal compensation of one-and-one-half cents ($.015) per minute.

21. Since the parties have resolved their dispute over reciprocal compensation from July 1, 2012 forward, the dispute over pricing standards now only concerns whether the bill-and-keep methodology is mandatory for traffic before July 1, 2012. The arbitration concerns

what should be the reciprocal compensation during the period of interim arrangements, which is the period between December 14, 2003 and July 1, 2012.

22. The starting point of December 14, 2003 comes from the termination date of prior ICA approved and executed under Order Nos. 466613 (August 9, 2002) and Order No. 468598 (October 22, 2002). Order No. 466613 adopted the arbitrator's findings on open issues. Order No. 468598 approved the terms and conditions of the interconnection agreements prepared from arbitrator's findings. Based on Order No. 468598, the parties executed permanent ICAs ("the arbitrated agreements"), effective December 14 2002. Each of the arbitrated agreements has the same provisions and sets reciprocal compensation at bill-and-keep. The RLECs elected to terminate the arbitrated agreements effective December 14, 2003, and asked for negotiation of permanent successor ICAs. After termination of the arbitrated agreements, the parties operated under post-termination provisions of the arbitrated agreements. The post-termination provisions provided for bill-and-keep until permanent successor ICAs become effective, at which time the parties will "true up" the compensation rates based the new rate in the permanent successor ICAs. The parties operated under those post-termination provisions of the arbitrated agreements until the parties entered into private contracts effective June 1, 2005. The RLECs filed applications for arbitration of successor permanent agreements roughly contemporaneously. The series of applications starts with the applications of Atlas Telephone Company filed with the Commission on October 5, 2004. Meanwhile, out-of-court negotiations lead to the above described interim compensation arrangements by private contract effective June 1, 2005. Each of 2005 interim compensation arrangements has "true up" provision, allowing each carrier to receive the level of compensation it would have received had the rates in its interim compensation arrangements equaled the rates later established in its permanent successor ICA.

23. With respect to the 2005 private contracts including the 2012 amendments, the parties entered into those private contracts without thee direction, supervision or approval of the Commission. Also, the parties have not submitted those private contracts to the Commission for approval as interconnection agreements.

24. Since the application commencement dates in 2004, the consolidated causes have remained at the Commission During that time period, the issue of reciprocal compensation before July 1,2012 has transformed from a current problem to an historic problem. The carriers paid for services and billed their subscribers for their share of charges paid to another carriers. Today, the bottom line question is whether the parties must refund any portion of those payments made under the interim compensation arrangements. It is submitted that there is no compelling need to settle in order to conduct day-to-day operations, and so, the parties have aggressive positions in the arbitration. .

25. 47 U.S.C. §252(d) requires the Commission to adopt just and reasonable rates based on cost. According to OAC 165:55-17-25, the Commission looks at all of the equipment and activities involved in providing call termination, it treats those items as parts of a single service, and it prices them like a network element. The Commission requires an applicant to present an economic model that would establish the economic cost of the service as opposed to its actual costs. The Commission adopted the FCC protocol of basing the rates on forward-

looking economic cost, and OAC 165:55-17-25 requires each applicant to present a Long-run Incremental Cost ("LRIC") study. Generally, the LRIC study is a Total Element Long Range Incremental Cost ("TELRIC") study or price model, consistent with 47 C.F.R. §51.705.

26. Small telephone companies dislike TELRIC study requirements for a variety. Some major points of contention are that a TELRIC study is lengthy and expensive and that the TELRIC methodology does not consider all costs and may undervalue assets.

27. Order Nos. 466613 and 468598 represent a situation, where strict adherence to the TELRIC approach failed to produce a workable rate structure. The RLECs were unable to come up with competent evidence for their economic costs. The Commission ruled that the RLECs had to accept bill-and-keep, until they could show the Commission a proper study based on forward looking costs. The federal courts upheld the Commission's decision in *Atlas Telephone Co. v. Corp. Com. of Ok., 309 F. Supp. 2d 1299 (W.D. Ok. 2004);* 400 F.3d 1256, 1264 (10th Cir. 2005). Although legally correct, the decision in Order Nos. 466613 and 468598 produced ICAs which were one-sided in terms of the benefits to the parties. Bill-and-keep worked well for AT&T Wireline Services, Inc., the predecessor to AT&T Mobility. Bill-and-keep eliminated fees owed to RLECs and eliminated costs for administration associated with those fees. In its briefs in the consolidated causes, AT&T Mobility insists that bill-and-keep is the best pricing method and that the Commission must adopt bill-and-keep. However, bill-and-keep under the 2002 ICAs cut off a major income stream for the RLECs. Because of financial hardship, the RLECs were back at the Commission in 2004 applying for a new arbitration of reciprocal compensation..

28. While the TELRIC approach worked for the CMRS in the prior ICA arbitration, the TELRIC approach may be burdensome for its successor in the consolidated causes. As noted in the briefs of AT&T Mobility, the time involved in preparing TELRIC studies could extend the consolidated causes for many years at considerable cost to the parties.

29. The RLECs attached a cost study to the each application in the consolidated causes. This study failed to persuade the parties to settle, and the parties later agreed to ask the Commission for a ruling on the bill-and-keep issue.

30. Based on the foregoing problems, the Commission should consider whether to adopt another approach to setting reciprocal compensation. One alternative is to grant a hardship exception under 47 U.S.C. §252(f)(2). The Commission could entertain such a request by motion, notice and hearing. If the Commission found an alternative, less burdensome, pricing method which was consistent with the public interest, convenience, and necessity, then the Commission could set aside use of TELRIC. The Commission could then select the alternative pricing method as long as that method results in mutual rates that are just, reasonable and non-discriminatory. *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 248 – 252 (4th Cir. 2012).

31. If the Commission granted an exception under 47 §252(f)(2), the Commission would need an evidentiary hearing to flesh out the details for using the chosen pricing method. A possible approach for a pricing methodology would be to set a benchmark such as the interstate terminating access rate, which is cost-based, and then set market-based rates based on negotiated rates involving other carriers.

32. In the meantime, the FCC's bill-and-keep rules are currently under judicial review in the United States Court of Appeals for the Tenth Circuit: *In Re: FCC 11-161*, Case No. 11-9900, which consolidates thirty appeals and involves two major points: Does the FCC have the right to usurp the individual states rate-making authority? And second, does the FCC have the legal authority to create its new Connect America Fund with universal service fund ("USF") money and send USF dollars to broadband providers despite the fact the broadband is not one of the USF mandated services? The Denver Circuit Court heard oral arguments on November 19, 2013. The November hearing date means that a decision may not issue until well into 2014. And with an appeal to the U.S. Supreme Court almost inevitable, final legal resolution may not occur until 2016 - 2017.

33. By ending intercarrier fees which are a major source of income for RLECs and by capping federal universal service funding to wireline carriers, mandatory bill-and-keep creates an unfunded mandate for the States, because the cuts increase what state universal service funds have to pay to RLECs.

34. Based on principles of statutory construction, mandatory bill-and-keep must apply prospectively. A regulation is retroactive if it takes away or impairs any vested right acquired under existing laws, creates a new obligation, imposes a new duty, or attaches a new disability in respect to a transaction or consideration already past. Here, retroactive application of the 2011 bill-and-keep regulations would affect payments between the parties made before July 1, 2012. It would cancel out any unpaid obligations accruing under the 2005 interim compensation arrangements, and the parties would have to refund payments made between June 1, 2005 and before July 1, 2012. However, federal law disfavors retroactive application of administrative rules. An administrative agency may apply a rule retroactively only if Congress expressly authorized retroactive rulemaking and the agency clearly intended the rule to have retroactive effect. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208; 109 Sect. 468, 471; 102 Led. 2d 493 (1988). Here, neither the statutes nor the FCC regulations contain a clear statement rebutting the presumption against retroactivity. Furthermore, the FCC's rulemaking documents do not mention retroactive application of any rule. As a result, the Commission must resort to FCC regulations in use before July 1, 2012.

35. Before November 29, 2011, 47 C.F.R. §20.11 contained paragraph (b) which read:

> (b) Local exchange carriers and commercial mobile radio service providers shall comply with 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.

The plain text of the pre-November 29, 2011 version of 47 C.F.R. §20,11 only requires reciprocal compensation to be mutual and reasonable.

36. 47 U.S.C. §§251(b)(5) and 252(d) require mutual and reciprocal recovery of costs, without exception. OAC 165:55-17-15(a)&(b) mirror the requirements of 47 U.S.C. Section 252(d)(2)(A)&(B). The plain text of 47 U.S.C. §252(d)(2) requires a cost-based fee arrangement for the transport and termination of calls. The concept of a cost-based arrangement may include bill-and-keep under three scenarios: the parties agree to bill-and-keep; the costs to the carriers are *de minimis*; or the proponent of higher compensation lacks competent evidence to justify compensation above zero. 47 U.S.C. §252(d)(2)(B)(i) allows the parties to waive compensation and agree to bill-and-keep arrangements. Next, during rulemaking on "bill-and-keep" in 1996, the FCC found that carriers incur costs in terminating traffic that are not *de minimis*. *Implementation of Local Competition Provision in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Implementation of Sections 3(n) and 332 of the Communications Act*, 61 Fed. Reg. 45476, 45586 ¶733. In the same paragraph, the FCC also concluded that the states may impose bill-and-keep arrangements if traffic is roughly balanced in both directions and neither carrier rebuts the presumption of symmetrical rates. The FCC reasoned that if the fees cancel out, the cost of administration is the real issue. 47 C.F.R. §51.711(a) requires each carrier to charge the same rate, unless a cost study proves that asymmetric rates are necessary. If the traffic is roughly equal in the both directions, then the fees collected should roughly equal the fees paid. Under those circumstances, charging call termination fees confers little benefit on anyone, and the administration and transaction costs associated with call termination fees are unnecessary . Bill-and-keep arrangements would minimize those unnecessary costs. Here, that logic is inapplicable. The *Interim Compensation Arrangements* privately negotiated by the parties show that the traffic is not roughly balanced. Under such facts, the Commission cannot require bill-and-keep based on a presumption of equal traffic in both directions.

37. AT&T Mobility contends that private contract terms and conduct of the parties in respect to the interim compensation agreements show an intent to true-up by bill-and-keep. However, the parties have not submitted for Commission approval as an interconnection agreement either the *Interim Compensation* Arrangement or the subsequent amendment to it. As a result, the Commission does not have to consider whether those documents should bind the parties under 47 U.S.C. §§251 & 252. Furthermore and for whatever it is worth, the *Interim Compensation Agreement* appears to expressly preserve the right of each party to support or oppose bill-and-keep.

Recommendation

Based on the foregoing findings, the undersigned ALJ recommends that the Commission should issue an order finding:

(1) The parties should amend the proposed compensation and interconnection agreements to reflect bill-and-keep starting July 1, 2012; and

(2) The Commission is not restricted to bill-and-keep for the period before July 1, 2012; and

(3) The Commission should conduct an evidentiary hearing to determine the appropriate pricing methodology for the arbitration based on the foregoing findings. .

Respectfully submitted,

Ben Jackson

Ben Jackson
Administrative Law Judge

Date: 4/30/2014