Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554


Dear Ms. Dortch:

On November 24, 2014, along with Keith Buell of Sprint and Curtis Groves of Verizon, I met with David Gossett and Richard Welch of the Office of General Counsel, Deena Shetler and Victoria Goldberg of the Wireline Competition Bureau, and Peter Trachtenberg of the Wireless Telecommunications Bureau. Janette Luehring and Joe Chiarelli from Sprint participated in the meeting by phone. We addressed two matters relating to compensation for “intraMTA calls” (calls between a local exchange carrier (“LEC”) and a commercial mobile radio service (“CMRS”) provider that originate and terminate in the same major trading area (“MTA”)): (1) the recent primary jurisdiction referral from the Northern District of Iowa and (2) a petition for declaratory ruling recently filed by a number of defendants in cases brought by Sprint or Verizon.

1. Primary Jurisdiction Referral. With respect to the primary jurisdiction referral, we explained that the Commission has decided that intraMTA calls are subject to reciprocal compensation rather than access charges in all circumstances, including when an interexchange carrier (“IXC”) connects the CMRS provider and the LEC. See, e.g., Connect America Fund Order (“CAF Order”) at ¶ 1007 (“all traffic exchanged between a LEC and a CMRS provider that originates and terminates in the same MTA ... is subject to reciprocal compensation”). The Commission has said that this rule applies “without regard to whether a call is routed through interexchange carriers.” Id. n. 2132. Indeed, the Commission in 2011 cited approvingly the Eighth Circuit’s 2007 decision in Alma Communications Co. v. Missouri PSC, 490 F.3d 619, 625 (8th Cir. 2007), where the court held that a prior decision “explodes the idea that a cell-phone call made and received within a major trading area is transformed into a long-distance call simply by being routed through a long-distance carrier.” And both the CAF Order and the Eighth Circuit’s decision were based on the Commission’s 1996 decision in In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (“Local Competition Order”), 11 FCC Rcd 15499 (1996).
Because the Commission has already answered the question referred by the court, there is no need for a proceeding to determine the answer. We recognize that the Commission has stated that, "generally, primary jurisdiction referrals in cases involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to section 208 of the Communications Act, as amended." Primary Jurisdiction Referrals involving Common Carriers, 15 FCC Rcd 22449 (2000). But that guidance also stated that "[t]here may be circumstances, however, in which this approach may not be appropriate." Id. One such case was In re U.S. Telepacific Corp., 19 FCC Rcd 24552 (2004), in which Telepacific filed a complaint to bring a primary jurisdiction referral before the Commission and the Commission dismissed the complaint because it concluded that a recent Commission decision "should provide the District Court with the guidance it sought regarding the lawfulness of the access charges at issue here." Id. at ¶ 3.

In this case, the guidance provided by the CAF Order and the Local Competition Order was already available to the district court. But because the dispute involves a technical matter—whether the access charge regime or reciprocal compensation rules apply to intraMTA calls carried by an IXC from the CMRS provider to the LEC (or vice versa)—it makes sense to provide a brief explanation from the expert agency to alleviate the district court’s confusion. But no rule requires the Commission to waste its time or the time of parties when there is no need for a proceeding. Accordingly, the Office of General Counsel ("OGC") should send a brief letter to the court explaining that the Commission has concluded that reciprocal compensation and not access applies to all intraMTA calls, including ones involving an IXC.

Filing a letter is analogous to the procedure the Commission follows when it files amicus briefs. OGC makes such filings when (and only when) the Commission has spoken to the question at issue, and it does so without initiating a proceeding (although it generally consults with the parties). If the district court had not made a primary jurisdiction referral, OGC could make an amicus filing saying exactly what we urge the Commission to tell the court, and it could do so without any further proceeding. There is no good reason to follow a different course here. Moreover, as we noted in the meeting, Sprint has sought certification to file an interlocutory appeal from N.D. Iowa’s referral decision and it would be appropriate for the Commission to file an amicus brief (without initiating a proceeding) if certification is granted, and the amicus brief would effectively answer the question referred by the district court.

2. Petition for Declaratory Ruling. With respect to the related Petition for Declaratory Ruling of the LEC Petitioners, at our meeting we explained that the petitioners are wrong in their central claim that, even though the Commission has determined that reciprocal compensation is due for intraMTA calls, the “default rule” nevertheless is the opposite. Thus, in their view LECs may impose access charges under a tariff unless an interconnection agreement ("ICA") specifically states that reciprocal compensation is due. That is backwards. Because the Commission has determined that reciprocal compensation governs intraMTA calls, the default rule is that reciprocal compensation applies unless the parties specifically negotiate an agreement otherwise.

Moreover, issues involving the relevance of ICAs and tariffs are presented in the pending litigation, and the Commission should respect the decisions of Sprint and Verizon to seek relief in court rather than at the Commission. Section 207 gives that choice to parties aggrieved by
violations of the Communications Act and the Commission should respect that choice by dismissing the petition for declaratory ruling.

As the Commission has explained, it "has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to 'terminate a controversy or remove uncertainty.'" In re Joint Petition for Declaratory Ruling, 22 FCC Red 300, ¶ 3 (2007). In addition, although 47 C.F.R. § 1.2(b) provides that a Bureau "should" normally seek public comment on a petition for declaratory ruling, "[i]n stipulating that petitions for declaratory ruling 'should' rather than 'must' seek comment, the Commission has afforded bureaus and offices discretion to act without public notice in unusual circumstances." John F. Garziglia, Esq., 28 FCC Red 4145, 4146 (2013). Because the courts can resolve the controversy, it is not necessary for the Commission to review the petition.

In an analogous situation, Haxtun Telephone, a party to a district court proceeding, filed claims before the Commission that "differ[ed] substantially from Haxtun's claims before the federal district court that referred the case to the Commission," In re Haxtun Telephone Co., 15 FCC Red 14895, ¶ 1 (2000), just as the petition for declaratory ruling raises issues that differ substantially from the question referred by the court. The Enforcement Bureau dismissed Haxtun's claims, explaining that "[o]nly in this way can we preserve the integrity of the primary jurisdiction doctrine and the choice-of-forum system established by Congress in section 207 of the Act." Id. The Commission denied Haxtun's application for review. 15 FCC Red 25260 (2000). Moreover, in this case resolution of the petition for declaratory ruling—which adds multiple questions to the straightforward question referred by the Northern District of Iowa—is likely to delay resolution of the court cases, and that may be part of the reason it was filed. That tactic should not be rewarded.

However, the Commission should not simply decline put the petition out for comment, as sometimes happens. See, e.g., MB Dkt. 12-1 (petition for declaratory ruling filed on April 19, 2012, has not been put out for comment or resolved). Rather, the Commission should state that it is dismissing the petition out of respect for the plaintiffs' choice of forum provided by Section 207. In addition, once the Commission explains that it has concluded that reciprocal compensation governs all intraMTA calls, it will be clear to the district courts that the LECs' argument for a contrary default rule lacks merit.

Sincerely,
/s/ Christopher J. Wright
Christopher J. Wright
Counsel to Sprint Communications Co., L.P.

cc: David Gossett
Deena Shetler
Richard Welch
Victoria Goldberg
Peter Trachtenberg

attachments (handouts at meeting)