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March 15, 2010

VIA ELECTRONIC MAIL ONLY

Hon. Jaclyn A. Brilling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Cases 07-C-1541 and 09-C-0370: T-Mobile's Response to XChange's Petition for Reconsideration and/or Rehearing

Dear Secretary Brilling:

Enclosed please find T-Mobile Northeast LLC's (d/b/a T-Mobile) ("T-Mobile") Response to XChange Telecom Corp.'s Petition for Reconsideration and/or Rehearing.

By this correspondence, a copy of T-Mobile's response is being served on the active parties to these proceedings.

Thank you for your attention in this matter.

Very truly yours,

/s/

John T. McManus

JM:tsh
Enclosure
cc: Service List (*via electronic mail only*)

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 07-C-1541: Complaint of XChange Telecom, Inc. Against Sprint Nextel Corporation for Refusal to Pay Terminating Compensation.

Case 09-C-0370: Petition of XChange Telecom Corp. for a Declaratory Ruling Establishing the Just and Reasonable Rate for Termination of Traffic Between Wireless Carriers and CLECs.

RESPONSE OF T-MOBILE TO XCHANGE PETITION FOR RECONSIDERATION AND/OR REHEARING

I. INTRODUCTION

On February 4, 2010, the New York State Public Service Commission (the "Commission") issued an *Order Granting Motion to Dismiss in Part and Denying in Part and Granting Complaint in Part and Denying in Part* (the "February 4th Order") in the above-referenced proceedings. In the February 4th Order, the Commission, among other things, established a rate that Sprint, a commercial mobile radio service ("CMRS" or "wireless") would pay XChange, a competitive local exchange carrier ("CLEC"), for intrastate wireless traffic originating on Sprint's network and terminating on XChange's. The Commission set the rate by conducting a comparison of XChange's facilities to those of Verizon and determined that XChange's facilities most closely resembled Verizon's end-office system and set the rate accordingly.

Recently, Sprint and the Wireless Coalition[1] filed petitions for rehearing and/or reconsideration or, in the alternative, a stay of the February 4th Order. CellCo Partnership (d/b/a/ Verizon Wireless) also filed a petition for rehearing of the February 4th Order.

On February 26, 2010, XChange filed a *Petition for Reconsideration and/or Rehearing* of the February 4th Order (the "XChange Petition"). XChange argues that its facilities more closely resemble Verizon's tandem facilities and that, as a result, XChange is entitled to compensation at Verizon's tandem rate.

Pursuant to 16 NYCRR § 3.7 (c), T-Mobile Northeast LLC (d/b/a T-Mobile) ("T-Mobile"), through its attorneys, respectfully submits this response to the XChange Petition.[2] As an initial matter, the Commission should not act upon the XChange Petition until certain threshold jurisdictional and due process issues – which, notably, have been raised in the petitions for rehearing filed by the both the wireless providers and XChange[3] – are addressed and resolved. Specifically, as the Wireless Coalition argues in its petition for rehearing/reconsideration or stay, the Commission: (1) erred in applying and relying on Public Service Law ("PSL") § 97 (3) as a basis for jurisdiction; (2) erred in applying the reciprocal compensation obligation of Section 251 (b) (5) of the federal Telecommunications Act ("the Act") to commercial mobile radio service ("CMRS") providers; (3) lacked authority under State and federal law to require negotiations

[1] The members of the Wireless Coalition petitioning for rehearing in these proceedings are T-Mobile, MetroPCS, CTIA – the Wireless Association, and AT&T.

[2] 16 NYCRR § 3.7 (c) states, "[a]ny party may respond to a petition for rehearing within 15 days of the date the petition was served on the responding party...." The members of the Wireless Coalition filed requests for active party status in Case 09-C-0370 shortly after XChange initiated the proceeding by filing a *Petition for Declaratory Ruling*. The Commission did not rule on the requests for active party status. Should the Commission determine that the members of the Wireless Coalition are not "parties" for the purposes of 16 NYCRR § 3.7 (c), the Wireless Coalition requests that the Commission nevertheless consider this response as a means of developing a more complete record upon which to base its decision. *See e.g.* Case 01-C-0864: *Choice One Communications*, Order on Petitions for Rehearing and Clarification (Mar. 7, 2002), at 8, fn 9.

[3] *See* XChange Petition at 7, fn 3-4 (XChange noting the lack of factual information requested by the Commission staff and violations of the State Administrative Procedures Act).

between CMRS providers and CLECs outside the context of Section 252 of the Act; and (4) violated the due process rights of CMRS providers under the basic tenets of United States Constitutional law, the New York State Administrative Procedure Act ("SAPA"), and as directed by the Federal Communications Commission (the "FCC") in *North County*.[4]

In the event that the Commission turns to the merits of the XChange Petition, due to the fact-intensive nature of its requested relief, T-Mobile respectfully requests that the Commission establish a schedule for the submission of evidence by all interested parties with respect to the nature of XChange's services and facilities. Given the widespread repercussions of the determination of these proceedings on wireless providers, the Commission should ensure that its decision is based upon a complete, accurate record. To that end, parties such as T-Mobile should have the opportunity to determine the scope of XChange's network and verify the nature of the one-way chat-line traffic scheme. Otherwise, XChange's, among others', type of unproductive regulatory arbitrage will continue to the detriment of the industry and frustrate the Commission's continuing initiatives to foster competition in telecommunications.

II. RESPONSE

XChange asserts that the Commission committed both factual and legal errors when it determined that XChange's facilities were not comparable to that of Verizon's tandem facilities and, therefore, not entitled to charge Verizon's tandem reciprocal rate.[5] In support of this argument, XChange describes its local exchange service in the "downstate New York area" in an effort to refute the Commission's finding that the

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[4] *See North County Communications Corp v Metro PCS California, LLC*, Order on Review (Nov. 19, 2009), 24 FCC Rcd. 14036 ("*North County*").

[5] *See* XChange Petition at 3.

functionality of XChange's network was not operationally equivalent to a tandem arrangement.[6] Specifically, XChange contends that "the geographical coverage of [its] switch is far greater than any Verizon central office switch, and in fact is much greater than the area served by any of Verizon's downstate tandems."[7] XChange concludes it is therefore entitled to assess the tandem reciprocal rate[8] for traffic below the 3:1 ratio and the convergent traffic rate end office rate to traffic above the 3:1 ratio.[9]

XChange's arguments lack merit and should be rejected. Once again, XChange attempts to have the Commission establish a rate without providing parties in this proceeding an opportunity to evaluate and scrutinize the facilities that it employs to provide local exchange service, the nature of the traffic, and whether any compensation is due.[10] Indeed, the only "evidence" in the record is XChange's self-serving description of its facilities. The Commission should not issue a decision on an incomplete and insufficient record containing disputed facts.

Upon developing a complete record in this proceeding, the evidence will show that an overwhelming portion of the traffic for which XChange seeks compensation is in fact not due any compensation. Specifically, as discussed in the accompanying Declaration of Chad Markel (attached hereto as Exhibit "A"), a significant portion of the subject traffic is likely to be interstate in nature since the XChange network is centrally located in the New York Major Trading Area (MTA) Number 1, which includes portions

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[6] *Id.* at 3-5.
[7] *Id.* at 5.
[8] T-Mobile reserves all administrative and legal rights with respect to the establishment of any rate in these proceedings, including, but not limited to, what the appropriate methodology is under the Act for determining a rate, if any, related to the type of traffic at issue in these matters.
[9] *See* XChange Petition at 10-11.
[10] *See* Wireless Coalition Petition at 18-19 (further challenging the Commission's finding that the traffic at issue is jurisdictionally intrastate).

of Pennsylvania, New Jersey, Connecticut, Vermont, and New York.[11] Such traffic is not subject to local rates.

In addition, T-Mobile believes that XChange is using its business to exploit the standard intercarrier compensation regime. Indeed, even the minimal record now before the Commission reveals that a principal owner of XChange is also a principal owner of a chat-line platform service that generates large one-way call volumes on T-Mobile's network – well above a 10:1 ratio mobile to land.[12]

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[11] *See* Declaration of Chad Markel at ¶¶ 6-7 (discussing www.blogtalkradio.com, which is a service being marketed nationally via the internet).

[12] *See id.* at ¶¶4-5. Further, although the XChange Petition contains a passing reference to the FCC ISP rate regime, XChange fails to acknowledge a growing precedent in regard to efforts to also prohibit CLEC traffic pumping. *See In re Qwest Communications Corporation v. Superior Telephone Cooperative et al., Iowa Utilities Board, Docket No. FCU-07-2, Final Order* (Sept. 21, 2009) *("IUB Traffic Pumping Decision")* (Petition for Preliminary Injunction pending before the District Court for N.D. Iowa). A copy of this Decision can be found at https://efs.iowa.gov/efiling/groups/external/documents/docket/023026.pdf; *See also In the Matter of Qwest Communications Corporation v Farmers and Merchants Mutual Telephone Company, No. EB-07-MD-001,* Second Order on Reconsideration, *FCC 09-103, 24 FCC Rcd 14801 at ¶ 25 (Nov. 24, 2009)*; *Total Telecomms. Servs., Inc., and Atlas Tele. Co. v AT&T Corp.,* Memorandum Opinion and Order, *16 FCC Rcd 5726, 5733 ¶ 16 (2001), aff'd in relevant part,* 317 F 3d 227 (D.C. Cir. 2003).

III. CONCLUSION

In sum, depending on the Commission's determination of the pending petitions for rehearing by the various wireless carriers, the relief sought in the XChange Petition should be denied and, if necessary, a complete record should be developed in these proceedings based upon evidence submitted by all interested parties.

Dated: March 15, 2010
Albany, New York

/s/

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EXHIBIT A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Case 07-C-1541: Complaint of XChange Telecom, Inc. Against Sprint Nextel Corporation for Refusal to Pay Terminating Compensation.

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Declaration of Chad Markel

1. My name is Chad Markel and I am employed as a Contract Manager in the Carrier Management group of T-Mobile USA, Inc. ("T-Mobile"). My duties include negotiating interconnection agreements on behalf of T-Mobile.

2. I have participated in telephone discussions and exchanged correspondence, including numerous emails, with XChange Telecom Inc. ("XChange") and its representatives regarding a Reciprocal Transport and Termination Agreement ("Agreement") between T-Mobile and XChange from 2006 until June of 2009.

3. T-Mobile had in place an Agreement with XChange for several years; however, the Agreement was unilaterally terminated by T-Mobile effective September 2008. In January of 2009, XChange contacted T-Mobile to discuss renewing an Agreement.

4. Throughout the term of the Agreement and since the termination of the agreement, the traffic ratio between T-Mobile and XChange has been significantly imbalanced such that 95% of the total traffic terminates to XChange and only 5% of the total traffic terminates to T-Mobile

5. I had subsequent conversations and exchanged emails with Mr. Keith Roland and previously with Zalmen Ashkenazi, representatives of XChange, who confirmed that 95% of the traffic between T-Mobile and XChange was terminating at XChange's switch location in Brooklyn, New York.

6. Major Trading Area (MTA) 1 contains parts of five states: New York, New Jersey, Pennsylvania, Connecticut and Vermont. Given current system limitations, T-Mobile is unsure what percentage of intra-MTA traffic it delivers to XChange is interstate in nature. However, since MTA 1 encompasses multiple states, T-Mobile believes that the interstate portion of intra-MTA traffic is more than de minimis. With additional discovery, T-Mobile believes that it will be able to further assess the interstate percentage of intra-MTA traffic it actual delivers to XChange.

7. I further researched the services XChange offered by searching and reviewing internet documents. I was able to determine that XChange provisions NXXs to enable access to a service entitled www.blogtalkradio.com, which markets over 200,000 talk radio shows. I also noted that www.blogtalkradio.com and XChange share the same principal owner, Mr. Alan Levy. Access and participation in this talk radio service can be facilitated by calling and maintaining the connection via XChange NXXs. This talk radio service traffic exhibits similar characteristics to that of chat-line services accessed via T-Mobile's network – in that millions of minutes of all one-way traffic are generated on our network.

8. I have traded emails with Mr. Keith Roland on several occasion regarding the historical imbalance in traffic as well as the nature of the traffic between T-Mobile and XChange, including a discussion specific to the termination of calls related to

www.blogtalkradio.com; to which I was advised by Mr. Keith Roland generally that there was no traffic pumping since XChange was not seeking compensation under the access charge regime of the federal Telecom Act ("the Act").

9. T-Mobile believes based on the information provided during conversations with XChange representatives and the historical traffic imbalances, that XChange is conducting regulatory arbitrage in the form of traffic pumping under the local rate regime of the Act; and if given the opportunity to conduct discovery, proffer testimony, cross-examine witnesses via a hearing, it will prove that the overwhelming majority of the traffic is not entitled to any compensation.

10. I certify under penalty of perjury that the foregoing statements are true to the best of my knowledge.

Chad Markel

Executed: March 15, 2010

Subscribed and sworn to before me, a Notary Public in and for said County and State, Chad Markel, known to me to be the person described in and who executed the foregoing Declaration, on this 12th day of March, 2010.

Notary Public