BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company And Modern Telecommunications Company,	)	
Petitioners,	)	
v.	)	
	)	Case No. TC-2002-57, et al. consolidated.
Southwestern Bell Telephone Company, Southwestern Bell Wireless (Cingular), Voicestream Wireless (Western Wireless), Aerial Communications, Inc., CMT Partners (Verizon Wireless), Sprint Spectrum LP, United States Cellular Corp., and Ameritech Mobile Communications, Inc.,	)	
Respondents.	)	

SBC MISSOURI'S REPLY BRIEF

SOUTHWESTERN BELL TELEPHONE, L.P.
D/B/A SBC MISSOURI

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November 24, 2004

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INTRODUCTION

After over three years of very contentious litigation in this case alone, its should be clear to the Missouri Public Service Commission ("Commission") that the situation in which the MITG Companies[1] find themselves is a mess of their own making.

From the beginning, remedies to obtain compensation from the wireless carriers were available to the MITG Companies under the federal Telecommunications Act ("the Act"), and later from the Commission itself. The MITG Companies, however, availed themselves of neither:

- Arbitration Under the Federal Law. MITG Companies admit that "Respondents T-Mobile and U.S. Cellular made interconnection requests of Petitioners,"[2] but complain the wireless carriers "did not pursue those requests to agreements . . . they did not pursue them to arbitration."[3] As a matter of federal law, that interconnection request gave the MITG Companies the right under Section 252(b)(1) to petition the Commission to arbitrate open issues with the wireless carriers.[4] The MITG Companies failed to pursue this remedy at any point, even though the traffic they complain about has been flowing for over seven years.

- PSC Approved Wireless Termination Tariffs. In February 2001, the Commission approved wireless termination service tariffs filed by nearly all of the small local exchange carriers ("LECs") in the state. But of the Petitioners in this case, only Alma, Choctaw and MoKan had such tariffs.[5] Chariton Valley and Northeast, to this day, still do not have such tariffs. And even those that have such tariffs on file with the Commission, have never fully exercised the remedies the Commission accorded them in those tariffs.[6]

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[1] Petitioners in this case originally consisted of Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company, Modern Telecommunications Company, Northeast Missouri Rural Telephone Company. However, Petitioners Choctaw and MoKan Telephone Companies have resolved their issues with the wireless carriers, dismissed their complaints with prejudice and are no longer parties to this proceeding. As Petitioners have referred to themselves throughout this litigation as the Missouri Independent Telephone Group ("MITG"), the remaining Petitioners will be referred to in this Reply Brief as the "MITG Companies" or "MITG."

[2] See, MITG's Proposed Report and Order, filed October 20, 2004 in Case No. TC-2002-57, p. 15, para. 16.

[3] Ibid.; T. 1486, 1540-1542

[4] Section 252(b)(1) of the Act provides: "Arbitration. -- During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiations under this section, a carrier or any other party to the negotiation may petition the state commission to arbitrate any open issues" (emphasis added).

[5] T. 1390. While Mid-Missouri later filed such a tariff, it was not in effect during the period of this Complaint. T. 1565.

[6] T. 1426-1427, 1564-1565.

Instead of pursuing arbitration under the Act -- where possible outcomes include a bill-and-keep arrangement as was ordered in Oklahoma[7] and Iowa[8] or a reciprocal compensation rate substantially lower than access charges -- the MITG Companies have elected to roll the dice and pursue the present litigation strategy. Obviously, their goal is to impose their admittedly "too high"[9] switched access rates that range from six to 15¢ per minute[10] on all wireless calls -- including those the FCC unequivocally ruled are not subject to access charges because they are deemed local.

As part of this strategy, the MITG Companies seek to reverse long-standing industry practices by imposing liability not only on the wireless carriers whose customers placed the calls at issue here, but also on carriers like SBC Missouri and Sprint Missouri, Inc. that merely provided intermediate transport function between the originating wireless carrier and the terminating small LEC.

This attempt should be clearly and forcefully rejected by the Commission as it not only conflicts with controlling federal law, prior decisions of the Commission and accepted industry standards -- it also is flatly inconsistent with the terms and applications of MITG's own tariffs. Applicable law compels rejection of the MITG Companies' Complaints.

If the MITG Companies wish to receive appropriate compensation for the remaining traffic in dispute, they should accept U.S. Cellular and T-Mobile's offer to negotiate under the Act and the FCC's rules. If the matter cannot be resolved through such private commercial

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[7] In the Matter of: the Application of Southwestern Bell Wireless L.L.C., et al. for Arbitration Under the Telecommunications Act of 1996, Cause No. PUD 200200149, Report and Recommendations of the Arbitrator, issued July 2, 2002, Ex. B, p. 1.

[8] In re Exchange of Transit Traffic, 2001 IOWA PUC LEXIS 548 at *42 (Iowa Utils. Bd.) November 26, 2001 (Proposed Decision), aff'd, 2002 IOWA PUC LEXIS 103 (March 11, 2002), Rehearing Denied 2002 W.L.1277812 (May 3, 2002).

[9] T. 1492-1493, 1544.

negotiations, Petitioners should bring the matter to the Commission for resolution in arbitration pursuant to the Act.

ARGUMENT

MITG's Initial Brief has failed to address most of the issues identified for resolution in this proceeding. In some instances, it has put its "reasoning" in its accompanying Proposed Report and Order.[11] But even there, MITG supports its claims only with rhetoric, misstatements of law and mischaracterization of the facts. As can be seen from these filings, the MITG has offered no valid law and virtually no pertinent citations to record evidence[12]

As SBC Missouri's Initial Brief explained in detail -- with numerous specific citations to record evidence and controlling law -- the claims the MITG Companies are making against it conflict with controlling federal law, prior decisions of the Commission, industry standards and MITG's own tariffs. Nothing in the MITG Companies' Initial Brief refutes these points. Applicable law compels rejection of the MITG Companies' Complaints.

I. MITG'S CLAIM FOR ACCESS CHARGES ON INTRAMTA TRAFFIC MUST BE REJECTED.

In its Initial Brief, MITG points to the Western District Missouri Court of Appeals decision in *Alma Telephone v. PSC*[13] and claims that "there is now no legal basis in Missouri to conclude Petitioners' access tariffs cannot be applied to intraMTA traffic terminated before a wireless termination service was effective or before a reciprocal compensation agreement

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[10] Chariton Valley's witness testified that its access rate is between 6¢ and 8¢ per minute (T. 1482). Northeast's witness testified that its access rate was 15¢ per minute (T. 1527).
[11] MITG's Initial Brief, p. 8.
[12] For example, MITG provided no cites to the record in its Initial Brief to support its claim for imposing liability on transit carriers. MITG's Proposed Report and Order contained only two cites to the record. SBC Missouri will address both of these claimed "supporting" citations later in this Brief.
[13] State of Missouri, ex rel. Alma Telephone Company, et al. v. Public Service Commission of the State of Missouri, et al., No. WD62961, slip op. (Mo. App. W.D. October 5, 2004).

becomes effective."[14] And in their Proposed Report and Order, MITG claims that the Commission is:

> . . . bound by the Court of Appeals determination of law, and can no longer conclude that it is unlawful for state tariffs to apply to intraMTA wireless-originated traffic terminated in absence of an agreement . . . The access tariffs of Petitioners apply to wireless traffic, whether interMTA or intraMTA, terminated prior to a wireless termination tariff or prior to an approved agreement.[15]

As set out below, this is a gross misstatement of the Court of Appeals decision.

A. The Western District's *Alma Telephone v. PSC* Decision Only Remanded Case No. TT-99-428 For Further Reconsideration. It Did Not Mandate the Application of Access Charges to IntraMTA Traffic.

Contrary to MITG's claim, the Western District's decision in *Alma Telephone v. PSC* was not a substantive rate application ruling and does not require the Commission to apply MITG's access charges to intraMTA wireless traffic. Rather, the Western District remanded the case for further consideration, i.e., for the Commission itself to decide the substantive issue: "We reverse the amended Report and Order and remand the amended tariffs for further consideration in light of the Commission's state regulatory authority."[16]

Thus, the Commission on remand retains discretion in reviewing the *Alma* tariffs and could still reject them on any one of a number of grounds. For example, the Commission could find under state law that it is inappropriate to apply intrastate access charges on local wireless traffic. The Commission could also find that it is unreasonable for a terminating carrier to impose intrastate access charges ranging up to 15¢ per minute to terminate a wireless call that just goes across town -- especially when those same carriers charge only approximately two

[14] MITG Initial Brief, p. 3.
[15] MITG Proposed Report and Order, p. 32, para. 12.
[16] *Alma Telephone*, slip op. at p. 11.

cents to terminate a call originating on the East or West coasts.[17] Or, the Commission could hold that in its judgment, imposing such rates on wireless traffic is contrary to the public interest.

But even if the Commission were to approve the MITG's proposed tariff amendments (adding the language the Court ruled would allow access charges to be assessed on wireless traffic), the tariffs in effect when the traffic at issue was passed did not contain this language. Any such decision by the Commission approving the proposed tariff amendments could only have prospective effect and cannot be applied retroactively in this case.[18]

B. The Commission Should Be Guided by the Overwhelming Weight of Authority at Both the Federal and State Levels That Unanimously Has Found Access Charges Inappropriate For IntraMTA Wireless Traffic.

Glaringly absent from MITG's Brief are citations to any authority authorizing the imposition of access charges to intraMTA wireless traffic. The reason should be obvious. There simply isn't any.

The Western District's *Alma Telephone v. PSC* decision certainly didn't substantively resolve the issue. To the contrary, its ruling was very narrow. It focused only on the federal preemption issue: "The Commission erroneously determined that the amended switched access tariffs were preempted by federal law."[19] The Court simply disagreed that federal law was "controlling" where the wireless carriers had not taken the necessary steps to seek reciprocal compensation under the Act.[20]

[17] Northeast's terminating intrastate access charges are 15¢ per minute. T. 1527. Chariton Valley's terminating intrastate access charges are from six to eight cents per minute. T. 1482. Their intrastate access rate is 2.1¢ per minute. T. 1527-1528.
[18] Lightfoot v. City of Springfield, 236 S.W.2d 348, 353 (Mo. 1951) ("The Commission fixes rates prospectively and not retroactively"); State ex rel. Utility Consumers Council of Missouri, Inc. v. P.S.C., 585 S.W.2d 41, 58 (Mo. banc 1979) ("The Commission has the authority to determine the rate *to be changed*") (emphasis in original).
[19] *Alma Telephone*, slip op. at p. 10.
[20] Ibid.

While the Court has ruled that the Commission is not preempted under these circumstances by federal law, the Commission in its discretion may be guided by the overwhelming weight of authority in this area, both at the federal and state level. As discussed in SBC Missouri's Initial Brief,[21] the FCC as early as 1984 determined that wireless traffic is "local in nature"[22] and has historically prohibited the application of access charges to wireless carrier traffic (except in the case of roaming traffic): "we have consistently treated the mobile radio services provided by RCCs [Radio Common Carriers] and telephone companies as local in nature," and that wireless carriers "are not and should not be treated as interexchange carriers." The FCC unequivocally continued this prohibition in its *Local Competition Order*, issued shortly after the passage of the Act:

> . . . we reiterate that traffic between an incumbent LEC and the CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under Section 251(b)(5), rather than interstate or intrastate access charges.[23]

Every authority that has substantively considered this issue has reached the same conclusion that the Missouri Commission did in the underlying *Alma* case: that intrastate access charges are inappropriate for intraMTA wireless traffic. As discussed in SBC Missouri's Initial Brief, state Commissions in Iowa[24] and Oklahoma[25] issued decisions completely consistent with the Missouri Commission's *Alma* decision. A federal Court recently upheld the Oklahoma

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[21] SBC Missouri's Initial Brief, pp. 6-10.

[22] See, In re: MTS and WATS Market Structure, 97 FCC 2nd 834 para. 149, 1984 WESTLAW 251063 (February 15, 1984).

[23] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (released August 8, 1996), para. 1043 ("FCC Local Competition Order") (Section 251(b)(5) of the Act imposes on each local exchange carrier "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.")

[24] See, SBC Missouri's Initial Brief, p. 9 (quoting the Iowa Utilities Board: "The vast majority of the wireless traffic at issue is intraMTA and, as stated earlier in this proposed decision, the FCC has defined intraMTA wireless-originated traffic as local traffic. As local traffic, fees for access services are not applicable. . . .").

[25] See, SBC Missouri's Initial Brief, pp. 9-10, quoting the arbitrator's decision ("the arbitrator concurs with the position of the Staff . . . the FCC has clearly stated that calls made to and from a CMRS network within the MTA are subject to transport and termination charges rather than interstate and intrastate access charges").

Commission's Order, finding that the FCC defined intraMTA traffic to or from a wireless carrier as jurisdictionally local.[26]

Other federal courts have also spoken on this issue, and in each instance, rendered rulings fully consistent with the Missouri Commission's decision in *Alma*. In a federal court suit brought by the rural LECs in Iowa to collect switched access charges from Qwest on transited wireless calls, the federal court in Iowa specifically concurred with a prior decision of the Iowa Board that "Federal law defines the wireless traffic at issue as "local," so access charges do not apply."[27] And, within the last year, the Federal District Court in Montana, for the second time, considered this same issue and ruled that intraMTA wireless traffic is local and not subject to interstate or intrastate access charges. [28]

C. The Commission's Prior Decisions in the *United* and the *Chariton Valley/Mid-Missouri* Cases Have No Application Because the Question of the Appropriateness of Access Charges on IntraMTA Wireless Traffic was Neither Presented Nor Addressed in Those Cases.

In an effort to bolster their claim that access rates are appropriate for intraMTA traffic delivered in the absence on an interconnection agreement under the Act, the MITG Companies point to the Commission's decisions in the *United Telephone* [29] and the *Chariton Valley/Mid-Missouri*[30] cases.[31]

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[26] Atlas Telephone Company v. Corporation Commission of Oklahoma, 309 F.Supp.2d 1299, 1302-03, fn. 6, 1309-1310 (W.D. Okl. 2004).
[27] Iowa Network Services, Inc. v. Qwest Corp., No. 4:02-cv-40156, 2002 U.S. Dist. LEXIS 19830, at *46 (S.D. Iowa, October 9, 2002), rev'd on other grounds and remanded; Iowa Network Services, Inc. v. Qwest Corporation, 363 F.3d 683, (8th Cir. 2004) ("we point out that our holding is narrow -- it is limited to the District Court's decision that it was bound by the IUB's determination on principles of *res judicata*. That is not to say that we think the IUB erred in interpreting federal law; we express no opinion there. Rather, we remand the case to the District Court for further proceedings, as the Court is best poised for evaluating the parties' remaining arguments." Id. at 694.)
[28] 3 Rivers Telephone Co-operative, Inc., et al. v. U.S. West Communications, Inc., CV99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871, at *65-67 (D.C. Mont. August 22, 2003) (This case is also discussed at length in SBC Missouri's Initial Brief, p. 8).
[29] Case No. TC-96-112, 6 MoPSC 3rd 244, issued April 11, 1997.
[30] Case Nos. TC-98-251 and TC-98-240, Report and Order, 8 MoPSC 3d 205, issued June 10, 1999.
[31] MITG Initial Brief, p. 4; MITG's Proposed Report and Order, p. 27.

The Commission should give no weight to those decisions. First, the facts in those cases were materially different than those presented here. The earlier cases arose under SBC Missouri's former wireless interconnection tariff which was superseded before the traffic at issue here flowed. Under that old tariff, SBC Missouri actually agreed to terminate wireless carrier traffic in third-party LEC exchanges. The prior cases did not involve transiting traffic as is the issue here.[32]

Second, the state of the law was materially different when the substantive liability and applicable rate issues in those prior cases were tried. As is evident from those decisions, the substantive liability and rate applicability issues were determined in the *United* case. The traffic involved in that case predated the Act (in *United*, the focus was on traffic that flowed between 1990 and December 1995).[33] In the *Chariton Valley/Mid-Missouri* cases, the substantive liability and applicable rate issues were not litigated. In order to avoid retrying what the Commission had just decided in the *United* case, SBC Missouri accepted the Commission's decision in *United* and limited its defense to arguments that Chariton Valley and Mid-Missouri had already been compensated by virtue of the terminating compensation arrangements under the old PTC Plan that were based on T/O ratios. Thus, the issue of the application of switched access charges to intraMTA traffic was neither litigated nor addressed by the Commission in any of these three cases.

Third, none of these cases were tested on appeal. While the lead case (the *United* decision), was on appeal, SBC Missouri was able to reach a negotiated settlement with Sprint and all of small companies in Missouri except two (Chariton Valley and Mid-Missouri).

[32] *United*, p. 4 (SBC Missouri has contracted with the cellular carriers to provide *end-to-end intraLATA termination* at a rate of approximately $.04/minute" emphasis added.)
[33] *United*, p. 4.

Although SBC Missouri had very valid grounds for appeal, any decision on appeal would have had no practical future application, as SBC Missouri had limited its role in carrying wireless-originated traffic to that of a transiting carrier as a result of the Commission's approval of SBC Missouri's revised wireless interconnection tariff. SBC Missouri similarly did not appeal the *Chariton Valley/Mid-Missouri* as it too would have required it to incur additional expense in continued litigation on an issue that would have no future impact.[34]

The Commission should not be misled by MITG's citation to these cases to advance a position that has not been accepted in any jurisdiction.

D. Reciprocal Compensation Under the Act Applies Even If Traffic Is Indirectly Routed Through An Intermediate Transit Carrier.

In various phases of this case, the MITG Companies, in order to argue for the application of access charges as opposed to reciprocal compensation, have claimed that reciprocal compensation under the Act does not apply when there are more than two carriers involved in handling the call. In their Initial Brief, however, they have not addressed this argument and therefore appear to have waived it. But since it does appear in MITG's Proposed Report and Order,[35] SBC Missouri, out of an abundance of caution, will address the argument here.

Federal law makes absolutely clear that access charges may not be applied to wireless-originated traffic that originates and terminates within the same Major Trading Area (MTA).[36]

[34] Hughes T. 1184-1186.
[35] MITG Proposed Report and Order, pp. 33-34.
[36] In its Interconnection Order, the Federal Communications Commission (FCC) rules that: "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and terminates rates under Section 251(b)(5) rather than interstate and intrastate access charges." Implementation of the Local Competitions Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, para. 1036 (released August 8, 1996) (the "*Local Competition Order*").

The FCC did not make any exception to this absolute prohibition when a wireless carrier seeks an indirect interconnection or when more than two carriers are involved in completing the wireless carrier's call.

47 CFR 51.701(c). The MITG companies misapply the FCC's definition of the term "transport" in 47 CFR Section 51.701(c)[37] in an attempt to avoid the obligation to apply reciprocal compensation rates instead of access charges. They claim that under the FCC's definition, "transport" can only take place between two carriers since it is to be measured from the "interconnection point between the two carriers" to the terminating LEC's end office. They state that because more than two carriers are involved with an indirect interconnection, there is no point of interconnection between the first and third carrier from which the "transport" can be measured.[38]

The MITG Companies' reading of the definition is simply incorrect. The FCC has recognized that many alternatives exist for the transport of traffic between two carriers' networks, including using the facilities of another carrier:

> Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. . . .[39]

In this case, transport is being provided by two carriers, the transiting LEC and the terminating LEC. Instead of the terminating LEC providing all of the transport, the transiting carrier is

[37] 47 CFR Section 51.701(c) states:

> Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to Section 252(b)(5) of the Act from the interconnection point between the two carriers to the terminating carriers and office switch that directly serves the called party, or equivalent facilities provided by a carrier other than the incumbent LEC.

[38] MITG Proposed Report and Order, pp. 33-34.

[39] Interconnection Order, para. 1039 (emphasis added).

providing part of it (usually transporting the call from the meet point between the wireless carrier and the transiting LEC to the transiting carrier's tandem switch, switching the call there, and transporting the call on to the meet point between the transiting LEC and the terminating LEC). In the present situation, the "interconnection point" from which the MITG companies can start measuring to bill their piece of transport is simply the place where indirect interconnection occurs, i.e., the interconnection between the transiting LEC and the terminating LEC. Both the transiting and terminating LECs receive compensation for the portion of transport each provides.

47 CFR 51.701(b). The MITG Companies also incorrectly claim that the FCC's definition of "telecommunications" in 47 CFR Section 51.701(b)[40] addresses only the context of a direct interconnection between two carriers. Focusing on the phrase "telecommunications exchanged between a LEC and a CMRS provider," MITG claims that reciprocal compensation only applies only when two carriers are involved in completing the call.[41] But, contrary to the MITG Companies' assertions, there is absolutely nothing in the definition requiring or limiting its application to direct interconnections. Rather,

by referencing "telecommunication traffic" in general, it is clear that the FCC intended it to apply to all telecommunications traffic between a LEC and a CMRS provider within the MTA.

MITG's New Wireless Termination Agreements. MITG's conduct again belies the claims it is advancing here. Even though MITG claims that the federal reciprocal compensation rules only apply "when two carriers -- the originating wireless carrier and the terminating

[40] 47 CFR Section 51.701(b) defines "local telecommunications traffic" as:

> (1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service areas established by the state commission; or
>
> (2) Telecommunications traffic between a LEC and CMRS provider that, at the beginning of the call, originates and terminates between the same major trading area, as defined in Section 24.202(a) of this chapter.

[41] MITG Proposed Report and Order, p. 33 and fn. 11 (bolded in original).

incumbent LEC ("ILEC") -- are involved in completing the call,"[42] their new traffic termination agreements with various wireless carriers specifically provide for reciprocal compensation when traffic is exchanged between them through the transit facilities of an intermediate carrier. For example, the traffic termination agreement between Petitioner Chariton Valley and Sprint PCS provided:

> ILEC [i.e., Chariton Valley] is a local exchange carrier operating in Missouri. Sprint PCS is a Commercial Mobile Radio Service carrier operating in Missouri. Sprint PCS terminates traffic originated by its end-user customers and terminating to ILEC through the facilities of another local exchange carrier in Missouri. ILEC may in the future elect to terminate traffic originated by its end-user customers and terminating to Sprint PCS through the facilities of another local exchange carrier in Missouri. Sprint PCS and ILEC recognize their responsibilities to compensate the other pursuant to Section 4 of this agreement for termination of the traffic originated by and under the responsibility of each Party, and which terminates to the other Party through the facilities of another local exchange carrier in Missouri.[43]

Section 4 of the agreement, which sets out the method of compensation between the parties for the traffic exchange under the agreement for local traffic, establishes the rate of $.035 per minute as the "rates for termination of Local Traffic via an indirect interconnection."[44]

II. MITG'S ATTEMPT TO IMPOSE LIABILITY ON TRANSIT CARRIERS FOR OTHER PARTIES' TRAFFIC MUST BE REJECTED.

Without citing any evidence from the record or any authority on transit traffic, MITG in its Initial Brief asserts that SBC Missouri, as the transit carrier, should be liable for paying terminating switched access charges on the wireless carriers' traffic that transited its network:

> Under Petitioners' access tariffs, it is the access customer that pays. This would be SBC. Neither T-Mobile nor U.S. Cellular have ordered access and made themselves subject to Petitioners' access tariff. This is why in the Complaint

[42] MITG Proposed Report and Order, p. 33, para. 13.
[43] Ex. 304, Chariton Valley/Sprint PCS Traffic Termination Agreement ("TTA") p. 1 (emphasis added). The same provisions are in Chariton Valley's TTA with Cingular, which was approved in Case No. TK-2004-0518. T. 1433; and in Northeast Missouri Rural's TTAs with Cingular and Sprint, which were approved in Case No. TC-2004-0513 and TK-2004-0544. T. 1519-1520.
[44] Id. Sections 4.1, 4.1.1 and Appendix 1.

cases of *United, Chariton Valley, and Mid-Missouri*, the Commission ordered SBC to pay access.[45]

As demonstrated previously, MITG is wrong. In the *United* and *Chariton Valley/Mid-Missouri* cases, the Commission's decision was expressly predicated on SBC's wireless termination tariff which SBC specifically assumed responsibility for terminating calls on behalf of wireless providers. Moreover, the Commission should forcefully reject this claim because it is contrary to industry standards as expressed by the FCC and other state Commissions; MITG's own state and federal tariffs and how they have been applying them; and MITG's new wireless termination agreements with various wireless carriers.

A. Imposing Liability on Transit Carriers Violates Accepted Industry Standards As Expressed by the FCC and Other State Commissions, and the Missouri Commission's Own Staff.

As discussed in detail in SBC Missouri's Initial Brief, accepted industry standards call for the originating carrier to be responsible for compensating all downstream carriers involved in completing the call.[46] These standards are consistently reflected in decisions by the FCC, both in generic industry dockets,[47] and in arbitrations with individual carriers.[48] Other state

[45] MITG's Initial Brief, pp. 3-4.
[46] SBC Missouri Initial Brief, pp. 11-16.
[47] In the Matter of Developing a Unified Carrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, released April 27, 2001, para. 9 ("Existing access charge rules and the majority of existing reciprocal compensation agreements require the calling party's carrier, whether LEC, IXC, or CMRS, to compensate the called party's carrier for terminating the call.")
[48] See, e.g., In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia Inc., and for Expedited Arbitration, et al., CC Docket No. 00-218, et al., Memorandum, Opinion and Order, released July 17, 2002 ("FCC Verizon-Virginia Arbitration Order").

commissions, like Iowa,[49] Oklahoma, [50] and Wisconsin[51] have also ruled that it is inappropriate to impose terminating charges on a transit carrier for other carrier's traffic, as did the Commission's own Staff.[52]

B. MITG's Own Tariffs Do Not Authorize Billing the Transit Carrier.

MITG in its Brief claims that SBC Missouri and Sprint Missouri are responsible for paying access charges on transit traffic, but provides not one reference to any tariff to support this claim. In its Proposed Report and Order, MITG offers only one reference, the two-sentence definition of an "interexchange customer."[53]

It should be very telling that MITG omitted any of the substantive provisions from applicable switched access tariffs that explain how the tariff is to be applied and who is to be billed. When those sections are examined, it is clear that the tariffs call for the terminating carrier to apply industry-developed meet-point-billing principles under which both the transiting carrier and the terminating carrier bill the originating carrier for the services they jointly provide in handling the call. As SBC Missouri explained in detail in its Initial Brief, these coordinating tariff provisions were developed years ago at the national level at the Ordering and Billing Forum ("OBF"), and appear in both MITG member company and SBC Missouri's state and

[49] In re Exchange of Transit Traffic, 2001 IOWA PUC LEXIS 548 (Iowa Utils. Bd.) November 26, 2001 (Proposed Decision), aff'd, 2002 IOWA PUC LEXIS 103 (March 11, 2002), Rehearing Denied 2002 W.L.1277812 (May 3, 2002).
[50] In the Matter of: the Application of Southwestern Bell Wireless L.L.C., et al. for Arbitration Under the Telecommunications Act of 1996, Cause No. PUD 200200149, Report and Recommendations of the Arbitrator, issued July 2, 2002, Ex. B, p. 1 ("The arbitrator agrees with the position of the CMRS providers that the FCC requires that reciprocal compensation be paid by the originating carrier for all traffic exchanged between the parties that is originated and terminated within an MTA as determined at the beginning of call," (emphasis added).
[51] In re Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), Case No. 05-MA-120, Arbitration Award (P.B. Serv. Comm of Wisc, October 12, 2000), issue 75, p. 129.
[52] See, e.g. Second Initial Brief of Staff, pp. 21-22 ("The originating carrier (here, the CMRS provider) is responsible for payment of the traffic in dispute. Staff supports the industry standard where the "calling-party's-network-pays" whether a LEC, IXC or CMRS provider.")
[53] MITG's Proposed Report and Order, p. 11, para. 8.

federal tariffs.[54] As is readily apparent from the operative language of those tariffs, nothing in them supports the billing of the transit carrier.

C. MITG Members Have Historically Billed the Originating Carrier, Not the Transit Carrier.

In an effort to portray SBC Missouri as their access customer, the MITG Companies try to make it appear that SBC Missouri has "ordered access and made themselves subject to Petitioners' access tariff," and is responsible for paying access charges on traffic that flows over the facility, even if it was another carrier's traffic.[55]

This claim, however, was refuted by undisputed evidence, including admissions from one of the MITG Companies own witnesses. The evidence showed that the common trunk groups between the LECs (i.e., the facilities over which the traffic at issue flows) were not established through placing access service orders (like IXCs order service). Rather, MITG witness Jones admitted that the establishment of facilities between LECs were considered "joint provisioning of the common trunk group" and such facilities are established through "mutual discussions" between the LECs.[56]

Moreover, the actual conduct of MITG members in the ordinary course of business over the years belies their claim that access charges on interexchange traffic should be billed to the transit carrier. During cross-examination, all of the MITG Company witnesses conceded that when an IXC brings a call to a LEC tandem for termination to another LEC subtending that tandem, they follow the standard industry practice under which the tandem LEC and the

[54] See, SBC Missouri's Initial Brief, pp. 17-19, providing specific citations to MITG and SBC Missouri's state and federal access tariffs.
[55] MITG Initial Brief, pp. 3-4.
[56] Hughes, transcript pp. 1189-1197 (quoting MITG witness Jones' recorded testimony from p. 260 of the transcript in Case No. TO-99-593).

terminating LEC bill the IXC on an meet-point-billing basis. As the terminating LEC, they do not bill the tandem LEC that merely transits the call to the terminating LEC.[57]

And as pointed out above, the "legal authority" upon which MITG appears to rely does not support their position. The cases they cite, the *United* and the *Chariton Valley/Mid-Missouri* cases, did not involve transited traffic. Rather, the wireless traffic at issue in those cases was handled under SBC Missouri's superseded wireless termination tariff under which it held itself out to actually terminate the wireless carrier's call in another carrier's exchange. In those cases, the termination services offered by the terminating LECs were found to be a wholesale component of the end-to-end service SBC Missouri had offered to the wireless carriers. Following these decisions, SBC Missouri materially revised its wireless termination tariff so that it no longer offered actual termination of a call in another carrier's exchange. Rather, it limited its offer only to the intermediate carriage of a call between two other carriers. As the Court in *Alma Telephone v. PSC* recognized, this revision ended SBC Missouri's obligation to pay termination charges on other carriers' traffic: "Effective in February 1998, the Commission approved tariff revisions that eliminated SWBT's obligation to pay for wireless traffic delivered to the rural companies."[58]

D. MITG's New Agreements With Wireless Carriers Call for Access Charges to be Billed to the Originating Wireless Carrier.

The MITG Companies claim that their access tariffs impose liability on the transit carriers is further belied by their own billings to the wireless carriers and their new wireless termination agreements with the wireless carriers.

[57] Jones, T. 242-245; Biere, T. 406-407; Godfrey, T. 469-470; Stowell, T. 524-525; Glasco, T. 591-594.
[58] *Alma Telephone*, slip op. at p. 4, citing *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revised Its Wireless Carrier Interconnection Service Tariff, P.S.C. Mo.-No. 40*, Case No. TT-97-524, 7 MoPSC 3rd. 38 (December 23, 1997).

Although they claim their access tariffs require them to bill the transit carriers, MITG's witnesses admitted during cross-examination that they are actually billing the wireless carriers these access charges out of their access tariffs.[59]

And their new wireless termination agreements followed this same practice. These agreements, which have all been approved by the Commission, specifically call for their switched access tariff rates (which are to be applied to interMTA traffic) to be billed to the wireless carrier with whom they contracted: "The originating Party shall pay the billing Party for all charges properly listed on the bill."[60] None of those agreements call for such charges to be imposed on the transit carrier that merely provides the intermediate carriage between them.

E. Transiting Is Not An IXC Function.

In various phases of this case, the MITG Companies, in order to impose liability on transiting companies like SBC Missouri and Sprint, have attempted to portray the transit companies as IXCs. In their Initial Brief, however, they have not addressed this argument and therefore appear to have waived it. But since it does appear in MITG's Proposed Report and Order,[61] SBC Missouri out of abundance of caution will address the argument here.

Neither the evidence nor the law supports MITG's view that transiting is an IXC function. First, transiting carriers like SBC Missouri and Sprint-Missouri are not IXCs. While they each have IXC affiliates, and offer local toll services on a retail basis to their own customers, SBC Missouri and Sprint-Missouri are and have always been LECs.[62]

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[59] T. 1440.

[60] See, e.g., Exhibit 304, Chariton Valley Traffic Termination Agreement ("TTA") with Sprint PCS, Section 5.3. Sections 4.1.2 and 4.1.3 and Appendix 1 provide for the application of Chariton Valley's switch access rates to "non-local" traffic, which is defined as interMTA traffic. Id., Sections 2.7, 2.8 and 2.9. The same provisions are in Chariton Valley's TTA with Cingular, which was approved in Case No. TK-2004-0518. T. 1433; and in Northeast Missouri Rural's TTAs with Cingular and Sprint, which were approved in Case No. TC-2004-0513 and TK-2004-0544. T. 1519-1520.

[61] MITG Proposed Report and Order, pp. 11, 16 and 34.

[62] See, Ex. 13, Hughes Rebuttal, p. 12.

Second, transiting LECs and IXCs offer significantly different functions that are not competitive with each other. While the MITG Companies attempt to portray a wireless carrier's transit of a call through a LEC's network as the same as an IXC's using another IXC's network, the two situations are very different. IXCs that use another IXC's network have entered into private resale agreements. Under these types of agreements, the reselling IXC (which may not have any physical facilities of its own) often purchases large blocks of transmission capacity on the facility-based IXC's network. Under these agreements, the facility-based IXC not only agrees to carry resellers' traffic across its own network, but also to terminate it on an end-to-end basis. In offering this type of end-to-end service, the facilities of the terminating LEC(s) are a component of the facility-based IXC service. And the facility-based IXC must compensate all of LEC involved in the termination of its calls for using the LECs' facilities. As explained in Sections II(B) and (C), above, compensation to the terminating LECs is under LEC access tariffs, which call for meet point billing.[63]

These resale arrangements are very common in the industry and represent a separate wholesale line of business for facility-based IXCs. Facility-based IXCs have voluntarily chosen to engage in this line of business and is the means by which they are able to generate additional revenue from the excess capacity on their networks that they are not using to serve their own retail customers.[64]

Transiting LECs, however, are in a very different position. First, they are not offering other carriers an end-to-end service that includes the actual termination of the connecting carrier's traffic to a customer on a third carrier's network. Instead, the transiting LEC offers actual termination of the connecting carrier's calls only to customers within the transiting LEC's

[63] See, Ex. 13, Hughes Rebuttal, pp. 12-13.
[64] Id., p. 13.

own exchanges. If the call is destined for a customer on another LEC's network, the transiting LEC only holds itself out to transport or "transit" the call across its own network so the connecting carrier can reach the network of the terminating LEC. Under the transiting LEC's access tariffs and interconnection agreements, it only bills for the pieces of its network used by the connecting carrier. It is up to the connecting carrier, not the transit carrier, to separately compensate the terminating LEC for using its network.[65] And as the admissions from each of the MITG Companies' witnesses demonstrate, that is also what the terminating LECs' access tariffs call for.[66]

The Iowa Utilities Board considered the exact same issue that the MITG Companies have advanced here and specifically rejected it:

> The [rural LEC] interpretation depends on Qwest being defined as an IXC as meant by the FCC in paragraph 1043. However, it appears the FCC was referring to traditional "long distance" traffic delivered to the LEC by a classic IXC, such as AT&T, which has a billing relationship with the customer who initiates the call. The FCC's analysis is not applicable to a carrier in the position that Qwest occupies in this case, where it has no end-user customer in the transaction who can be billed for the costs Qwest incurs to complete these calls.
>
> Additionally, paragraph 1043 refers to CMRS providers and not intermediate carriers such as Qwest when it states that "CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to access charges. . . ." The traffic at issue in this docket is not Qwest's toll traffic and the function that Qwest performs in its transit function is to provide an indirect connection for local traffic.[67]

CONCLUSION

No party is contending that the MITG Companies should not be compensated for terminating wireless-originated traffic. However, their attempt to extract access charges on intraMTA wireless traffic from the originating wireless carrier and the transit carrier violates

[65] See, Ex. 13, Hughes Rebuttal, pp. 13-14.
[66] See note 57, supra.
[67] In re Exchange of Transit Traffic, 2002 IOWA PUC LEXIS 548 at *16-17.

controlling FCC rules and long-standing industry standards. And there is absolutely no authority, either in the law or Petitioners' own tariffs, for imposing liability on transit carriers like SBC Missouri and Sprint Missouri.

As this case has progressed, Petitioners have been able to reach acceptable agreements with Cingular, Sprint PCS and other wireless carriers to resolve the claims brought here. If the MITG Companies wish to receive appropriate compensation for the remaining traffic in dispute, they should accept U.S. Cellular and T-Mobile's offer to negotiate under the Act and the FCC's rules. If the matter cannot be resolved through such private commercial negotiations, Petitioners should bring the matter to the Commission for resolution in arbitration pursuant to the Act.

Respectfully submitted,

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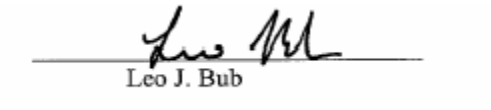
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on November 24, 2004.



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