BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company, et al., Petitioners,	**)**	
v.	**)**	**Case No. TC-2002-57, et al (consolidated)**
Southwestern Bell Telephone Company, et al., Respondents.	**)**	

REPORT AND ORDER

Issue Date:

Effective Date:

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

Procedural History

1. The various Petitioners filed complaints and amended complaints against the various Respondents herein, which cases were docketed as TC-2002-57, TC-2002-113, TC-2002-114, TC-2002-167, TC-2002-181, TC-2002-182, and TC-2002-214. The Complaints seek compensation for wireless-originated traffic terminating to Petitioners.

The Petitioners include Alma Telephone Company (Alma), Chariton Valley Telephone Corporation (Chariton), Choctaw Telephone Company (Choctaw), Mid-Missouri Telephone Company (Mid-Missouri), MoKan Dial, Inc. (MoKan), Modern Telecommunications Company, and Northeast Missouri Rural Telephone Company (Northeast). All Petitioners are small rural incumbent local exchange carriers (ILECs) operating in Missouri.

The Respondents include SBC (SBC), f/k/a Southwestern Bell Telephone Company, Sprint Missouri Inc., Southwestern Bell Mobile Systems (Cingular), Sprint Spectrum, LP (Sprint PCS), CMT Partners d/b/a Cellular One, Ameritech Mobile Communications Inc., Voicestream Wireless (Voicestream), Western Wireless (Western), Aerial Communications Inc. (Aerial), Alltel Wireless or Alltel Mobile Communications Inc., AT&T Wireless, United States Cellular Corp. (US Cellular), Aerial Communications Inc (Aerial), Nextel of Texas, Sprint PCS (Sprint PCS), Cybertel Missouri Inc. (Cybertel), Northern Illinois Cellular, and Verizon Wireless. All of these Respondents, except SBC and Sprint Missouri Inc, are commercial radio service providers, or "wireless carriers". SBC and Sprint Missouri Inc. are large ILECs operating in Missouri.

2. The traffic in dispute, or "subject matter traffic", is traffic originated by a Commercial Mobile Radio Service Provider Respondent ("CMRS", or "wireless carrier"), transported by the CMRS provider to SBC, which in turn transported this traffic over the interexchange interconnection trunks between SBC and the Petitioner, whereupon the Petitioner ILEC terminated the call to its called landline customers.

3. On January 14, 2002 the Commission entered an Order Consolidating TC-2002-57, TC-2002-113, TC-2002-114, TC-2002-167, TC-2002-181, TC-2002-182, TC-2002-214, with TC-2002-57 being the lead case.

4. On February 14, 2002 the Commission entered an Order Regarding Jurisdiction denying Respondents' Motions to Dismiss based upon the Commission's alleged lack of subject matter jurisdiction.

5. On August 5 through 9, 2002 an evidentiary hearing was held.

6. By Order of June 2, 2003, the Commission Reopened the record to receive additional evidence as to the proportions of the subject matter traffic in dispute that were either interMTA or intraMTA in jurisdiction.

7. On September 8, 2004, a hearing was held as to proportions of subject matter traffic in dispute that was either interMTA or intraMTA in jurisdiction.

8. During the course of this litigation, certain settlements were reached dismissing with prejudice Petitioners' pleaded claims against Southwestern Bell Mobile Systems (Cingular), Sprint Spectrum, LP (Sprint PCS), CMT Partners d/b/a Cellular One, Ameritech Mobile Communications Inc., Western Wireless (Western), Alltel Wireless or Alltel Mobile Communications Inc., AT&T Wireless, Nextel of Texas, Sprint PCS (Sprint PCS), Cybertel Missouri Inc. (Cybertel), or Verizon Wireless

9. The remaining traffic in dispute, for which no settlements have been reached, was originated either by Respondent T-Mobile[1] or Respondent US Cellular. The following claims remain for resolution by this Report and Order:

a. The claim of Alma against SBC and US Cellular for wireless traffic originated by US Cellular, transported by SBC to Alma, and terminated by Alma between February 5, 1998 and December 31, 2001.

b. The claim of Alma against SBC and T-Mobile USA for wireless traffic originated by T-Mobile USA, transported by SBC to Alma, and terminated by Alma between February 5, 1998 and December 31, 2001.

c. The claim of Choctaw against SBC and US Cellular for wireless traffic originated by US Cellular, transported by SBC to Choctaw, and terminated by Choctaw between February 5, 1998 and December 31, 2001.

d. The claim of MoKan Dial against Sprint Missouri Inc., SBC, and US Cellular for wireless traffic originated by US Cellular, transported by SBC to Sprint Missouri Inc. who transported it to MoKan Dial, and terminated by MoKan Dial between February 5, 1998 and December 31, 2001.

e. The claim of MoKan Dial against Sprint Missouri Inc., SBC, and T-Mobile USA for wireless traffic originated by T-Mobile, transported by SBC to Sprint Missouri Inc., who transported it to MoKan Dial, and terminated by MoKan Dial between February 5, 1998 and December 31, 2001.

[1] T-Mobile USA is a successor to and responsible for traffic reported by SBC to Petitioners under the prior entity names of Aerial, VoiceStream, and Western Wireless, for the time periods as listed on Schedule 5 to Exh. 301, direct testimony of William Biere. See also Transcript, Volume 11, page1364-1365, Volume 12 (Sept. 8, 2004 hearing), page 1407-1411

f. The claim of Northeast[2] against SBC and US Cellular for wireless traffic originated by US Cellular, transported by SBC to Northeast, and terminated by Northeast between February 5, 1998 and December 31, 2001.

g. The claim of Northeast against SBC and T-Mobile USA for wireless traffic originated by T-Mobile, transported by SBC to Northeast, and terminated by Northeast between February 5, 1998 and December 31, 2001.

h. The claim of Chariton Valley against SBC and US Cellular[3] for wireless traffic originated by US Cellular, transported by SBC to Chariton Valley, and terminated by Chariton Valley between February 5, 1998 and February 28, 2001.

i. The claim of Chariton Valley against SBC and T-Mobile USA Cellular for wireless traffic originated by T-Mobile, transported by SBC to Chariton Valley, and terminated by Chariton Valley between February 5, 1998 and February 28, 2001.

[2] Northeast and its prior wholly owned subsidiary, Modern Communications, were merged after the institution of this proceeding. Northeast survived the merger, and succeeded to all claims previously asserted by Modern. At the time of the first hearing, Modern and Northeast claims and traffic volumes were stated separately. This Report and Order will reference these claims solely as those of Northeast, and the claims and traffic volumes will be combined into those of Northeast alone. See October 22, 2002 Order in TM-2002-465, also Exh. 307, direct testimony of Gary Godfrey, page 3.

[3] This claim includes 274,942 minutes of use terminating to Petitioner Chariton Valley that was originated by Northern Illinois Cellular, an entity that was acquired by US Cellular. Northern Illinois Cellular is in default, and its traffic is now that of US Cellular. Transcript, Volume 2, pages 23, 25; See commitment of US Cellular, Transcript Volume 11, at page 1352-1354; See Exhibit 3, direct testimony of William Biere, p. 6; Exhibit 4, surrebuttal testimony of William Biere, p. 4.

Dispute/Issues

1. For purposes of applying reciprocal compensation, the FCC has determined that Major Trading Areas (MTAs) will be considered "local".[4] Most of Missouri has been assigned to one of two MTAs: one that covers roughly the eastern part of the state (the "St. Louis" MTA), and one that covers roughly the western part of the state (the "Kansas City" MTA). Exhibit 24. For purposes of this case, a portion of the service area of Northeast is included in another MTA, the "DeMoines" MTA, which includes a portion of northeast Missouri.

Wireless calls that originate and terminate within the same MTA are referred to as "intraMTA" calls. Wireless calls that originate and terminate within different MTAs are referred to as "interMTA" calls.

2. All parties agree that Petitioners are entitled to compensation for the use of their facilities in transporting and terminating the traffic in dispute, whether the terminating wireless call is interMTA or intraMTA in jurisdiction. The parties disagree as to what compensation applies, and what carrier is responsible to pay that compensation.

3. For "interMTA" traffic there is no dispute that Petitioners' tariffed switched exchange access compensation applies. SBC claims it is not responsible to pay access compensation for interMTA traffic, but instead the CMRS provider is. Petitioners claim that SBC is their access customer responsible to pay pursuant to Petitioners' access tariffs, and that the CMRS providers are not access customers of Petitioners subject to their access tariff.

[4] ***Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,*** **First Report and Order, CC Docket No. 96-98, August 8, 1996,** paragraph 1036. See also 47 CFR 51.701(b)(2).

4. For "intraMTA" traffic terminated by Petitioner after the effective date of a wireless termination service tariff, there is no dispute that the CMRS provider originating the call is responsible to pay the wireless termination service tariff compensation rate to that Petitioner.

5. For "intraMTA" traffic terminated by Petitioner before the effective date of a wireless termination service tariff, disputes exist as to what compensation can apply and whose responsibility it is to pay a Petitioner that compensation. Petitioners claim their tariffed access compensation applies until and unless displaced either by reciprocal compensation contained in an approved interconnection agreement, or by a wireless termination service tariff.[5]

SBC, T-Mobile and US Cellular claim access compensation cannot be applied to intraMTA traffic. Although SBC, T-Mobile and US Cellular agree Petitioners are entitled to compensation for this traffic, nowhere do they identify what compensation can be applied in the absence of an approved agreement or wireless termination service tariff.

FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to

[5] In February of 2001, Petitioners Alma, Choctaw, and MoKan had wireless termination service tariffs approved by the Commission. During the period here in dispute, neither Chariton Valley, Mid-Missouri, nor Northeast (including merged subsidiary Modern) had a wireless termination service tariff in effect.

consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

1. Pursuant to state and federal regulation, the privately owned facilities of telecommunications carriers devoted to public use are interconnected. This provides an extensive network for the origination, transport, and termination of communications and information services of many different types. Carriers owning such facilities are compensated for their use. Intercarrier or intercompany compensation requires a tariff or contract. Tariffs are standard offerings to all carriers making use of facilities. Contracts are applicable to the specific carriers party thereto. Exhibit 1, page 6, direct testimony of David Jones.

2. From the inception of wireless or commercial mobile radio service provider traffic in the 1980's and 1990's, calls made by wireless customers to landline customers have been terminated on the "landline" network provided in Missouri by incumbent local exchange carriers.

3. From the inception of wireless traffic until the approval of interconnection agreements after the 1996 Telecommunications Act, the termination of this traffic in Missouri was accomplished pursuant to the Wireless Interconnection Service Tariff of SBC, PSC Mo. No. 40. See Exhibit 1, page 7, direct testimony of David Jones. Under this tariff SBC provided the service of terminating wireless-originated traffic throughout the state of Missouri. SBC received compensation from the wireless carriers for terminating this traffic. For traffic SBC terminated to the exchanges of other ILECs, SBC did not provide those ILECs terminating compensation. In three complaint cases brought against SBC, This Commission awarded Complainants Sprint Missouri Inc.,

Mid-Missouri, and Chariton Valley compensation to be paid by SBC at Complainants' Missouri tariffed switched access rates.[6] Therefore, for wireless-originated traffic terminating to non-SBC ILECs, SBC was responsible to compensate those ILECs at their Missouri access rates. See Exhibit 1, direct testimony David Jones, pp. 7-9.

4. Effective in February 1996, the United States Congress adopted the Telecommunications Act of 1996. This Act introduced a new type of compensation—reciprocal compensation—for local traffic. See 47 USC 251 (b) (5). The Act also introduced a statutory procedure by which CMRS providers could obtain reciprocal compensation. They had to request interconnection with the ILEC with whom reciprocal compensation was desired, negotiate or arbitrate agreements with the ILEC, and have the agreement approved by state utility commissions in order to become effective. See 47 USC 252.

This Act gave the FCC six months to develop rules and regulations pertaining to reciprocal compensation. See 47 USC 251 (d). Six months later, by Order of August 8, 1996, the FCC in its "Interconnection Order" issued rules pertaining to reciprocal compensation. This Order and rules provided that, for purposes of developing agreements under which to apply reciprocal compensation for wireless to landline traffic, the Major Trading Areas (MTAs), would be considered the "local" area for reciprocal compensation. 47 CFR 51.701(b)(2).

5. At SBC's request, on December 23, 1997 in TT-97-524 the Commission entered a Report and Order approving a change in SBC's Wireless Interconnection

[6] April 11, 1997 Report and Order, TC-96-112, Complaint of United Telephone Company against Southwestern Bell Telephone Company for Failure to Pay United its Terminating Access for Cellular-Originated Calls which are Terminated in United's Territory; and June 10, 1999 Report and Order, TC-98-251 and TC-98-340, Complaints of Chariton Valley Telephone and Mid-Missouri Telephone against Southwestern Bell Telephone Company for Terminating Cellular Compensation.

Service Tariff, PSC Mo No. 40. This change was designed to provide for an end to SBC's responsibility to pay terminating compensation for calls transported by SBC to terminate in other ILEC service areas. In approving this change the Commission recognized that, in order to provide a seamless transition from access compensation to reciprocal compensation for intraMTA traffic terminating to small ILECs, reciprocal compensation agreements with small ILECs such as Petitioners would be necessary.

In order to accomplish this seamless transition, the Commission required SBC's tariff to provide that wireless traffic could not be terminated to the small ILEC unless there was an agreement between the wireless carrier and the small ILEC. The Commission required the following tariff language:

> "Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic."

The change to SBC's wireless interconnection tariff was effective February 5, 1998. Exhibit 1, direct testimony David Jones, pp. 7-8.

6. After the 1996 Act, FCC Interconnection Order, and FCC reciprocal compensation rules were promulgated, Respondent wireless carriers utilized those rules in obtaining reciprocal compensation agreements with SBC. Commensurately they ended their purchase of SBC services from SBC's Wireless Interconnection Service Tariff, PSC Mo. No. 40. The agreements they reached with SBC were approved by This Commission. See Exhibits 25, 26, 27, 30, 31, 33, 34, 36, 37, and 38. Respondent Wireless Carriers did complete such agreements with other ILECs in addition to SBC.

Exhibits 28, 29, 32, and 35. Respondent Wireless Carriers did not obtain such agreements with Petitioners.

7. The subject matter traffic is delivered by T-Mobile and US Cellular to SBC, which in turn delivers the traffic to Petitioners over the intraLATA interexchange or toll facilities between SBC and Petitioners. Although Petitioners' exchanges were located within the same LATA as was located the interconnection points between the wireless carriers and SBC, the exchanges of Petitioners were not necessarily located within the same MTA as was located the interconnection points between the wireless carriers and SBC.

Mid-Missouri, Chariton Valley, and Northeast all had exchanges located in different MTAs than the location of the interconnection points between SBC and the wireless carriers. See Exhibit 1, direct testimony of David Jones, pp. 32-33; Exhibit 2, surrebuttal testimony of David Jones, pp. 24-27; Exhibit 4, surrebuttal testimony of William Biere, pp. 6-8; Exhibit 6, surrebuttal testimony of Gary Godfrey, pp. 7-9.

8. The origination, transport, and termination of the traffic or calls in dispute requires the collaboration of three carriers: the origination of the call by the wireless carrier, the transport by SBC, and the transport and termination of the call by a Petitioner ILEC. SBC is not an ILEC in Petitioner's exchange service areas. 47 USC 251(h)(1). SBC's role in transporting the traffic in question is performed as an interexchange carrier. Under Petitioner's access tariffs, SBC's role in delivering traffic to Petitioners' exchanges is the role of an Interexchange Customer, or interexchange carrier. See Schedule 2, Access Tariff sheet 44.1, to the surrebuttal testimony of David Jones. Only

Petitioners are ILECs for purposes of termination of the traffic in question in Petitioners' own exchanges.

9. This Commission has approved reciprocal compensation agreements between Respondent SBC and Respondents wireless carriers. Reciprocal compensation under those agreements only applies to traffic exchanged between SBC and those wireless carriers. Those agreements, like SBC's PSC Mo No. 40 Wireless Interconnection Service Tariff, provided SBC would deliver the wireless traffic to third party carriers such as Petitioners.

Like SBC's PSC Mo No 40 Wireless Interconnection Service Tariff, the agreements between SBC and the wireless carriers contained provisions requiring the wireless carriers to obtain agreements with other ILECs such as Petitioners prior to sending SBC traffic destined for those other ILECs. This Commission approved these agreements with the expectation that such agreements would be in place prior to the delivery of such traffic.

Petitioners were not parties to these agreements, and are not bound by their terms.[7]

10. The agreements between SBC and Respondents T-Mobile and US Cellular contained provisions that, if they delivered such traffic to SBC without an agreement with Petitioners, T-Mobile and US Cellular would be responsible to indemnify SBC for "any charges rendered" by Petitioners. See section 3.1.3 of Exhibit 33 (SBC/Aerial); section 3.1.3 of Exhibit 34 (SBC/US Cellular); section 3.1.3 of Exhibit 36 (SBC/Western

[7] 47 USC 252 (e)(2).

Wireless); and section 3.1.3 of Exhibit 37 (SBC/Voicestream). Sections 3.1.3 of these agreements provided:

> "In the event that Carrier does send traffic through SWBT's network to a Third Party Provider with whom Carrier does not have a traffic interchange agreement, then Carrier agrees to indemnify SWBT for any termination charges rendered by a Third Party Provider for such traffic."

11. After February 5, 1998, Respondent wireless carriers continued to send to SBC traffic destined to terminate to Petitioners, and SBC kept delivering such traffic. This was done without approved agreements between the Respondent wireless carriers and Petitioners. Thus the seamless transition from state tariff compensation to reciprocal compensation envisioned by the Commission's December 23, 1997 Order did not occur. Instead the traffic in dispute terminated to Petitioners in the absence of approved agreements providing for reciprocal compensation.

12. From Petitioners' perspective, a wireless-originated call is a toll call. It originates outside of their local networks and is transported to their local networks by an interexchange carrier. If that interexchange carrier is one other than SBC, Petitioners receive access compensation from that interexchange carrier. If that interexchange carrier is SBC, Petitioners have not received compensation. Exhibit 1, direct testimony David Jones, pp. 7-9. This Commission has so found in the February 8, 2001 Report and Order Approving small company Wireless Termination Service Tariffs, TT-2001-139, at page 14:

> "From the point of view of the small LECs, a wireless-originated call is a toll call. It originates outside of their local networks and is transported to their local networks by an intervening carrier. If the intervening carrier is an IXC, the small

LECs are paid for terminating access. However, if the intervening carrier is a large LEC, then the small LECs do not receive compensation."

13. The subject matter traffic is placed by SBC on "common" trunks between SBC and the Petitioners, where it is intermingled with traffic originated by other carriers. Because of the limitations of common trunks, Petitioners cannot distinguish the disputed traffic for which no compensation was paid from other traffic for which compensation was paid, and could not prevent the disputed traffic from terminating without compensation.

14. SBC provided summary reports of the totals of traffic terminating to Petitioner and originated by a particular wireless carrier. From these reports, the Petitioner companies cannot identify the jurisdiction of the wireless traffic which determines compensation rates, and cannot determine if SBC carried the traffic pursuant to its state wireless interconnection tariff or pursuant to an approved agreement with a particular wireless carrier. Petitioners base the minutes of use of terminating subject matter traffic contained in their complaints upon these summary reports provided by SBC.

15. As the wireless-originated traffic continued to terminate to Petitioners at no cost to the Respondents T-Mobile and US Cellular, there was no financial incentive for T-Mobile or US Cellular to obtain agreements with Petitioners. This Commission has so found in the February 8, 2001 Report and Order Approving small company Wireless Termination Service Tariffs, TT-2001-139, page 16:

"Because the wireless-originated traffic continues to be terminated to subscribers of the small LECs at no extra cost to the CMRS carriers, there is no incentive for those carriers to enter into agreements with the small LECs. Since

implementation of SWBT's revised tariff in February of 1998, not a single such termination compensation agreements has been made between a CMRS carrier and a small LEC."

16. Respondents T-Mobile and US Cellular made interconnection requests of Petitioners. However, they did not pursue those requests to agreements. They did not pursue them to arbitration. T-Mobile and US Cellular Respondents criticize Petitioners' bargaining positions. Petitioners claim their positions were justified. This Commission has previously refused to find either side's positions were unjustified. See February 8, 2001 Report and Order in TT-2001-139, at page 18:

> "Each side in this matter contends that the other side has not been willing to enter into good-faith negotiations leading to interconnection agreements. Having considered the evidence and testimony offered on this point, the Commission concludes that neither side has been willing to make the compromises necessary for reaching an agreement."

The Commission so finds here. The topics Petitioners wanted to negotiate were legitimate negotiation subjects. Exhibit 1, direct testimony David Jones, pp. 13-14. Regardless, it is undisputed that there were no agreements between US Cellular and Petitioners, or between T-Mobile and Petitioners, during the period the subject matter traffic in dispute terminated.

17. Between February 5, 1998 and December 31, 2001[8], subject matter traffic was originated by the T-Mobile and US Cellular, transported by Respondent SBC, and terminated by the respective Petitioner.

[8] For traffic terminating to Petitioner Chariton Valley, the end date of the subject matter traffic is February 28, 2002.

18. Effective in February, 2001 Petitioners Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial Inc. (along with numerous other small ILECs) had wireless termination tariffs become effective upon the subject matter traffic that was intraMTA in jurisdiction. See the February 8, 2001 Report and Order in TT-2001-139. Exhibit 7, direct testimony of Donald Stowell,pp 3-4; Exhibit 9, direct testimony of Oral Glasco, pp 3-4.

19. During the period here at issue Petitioners Northeast, Chariton Valley, and Mid-Missouri did not have wireless termination service tariffs in effect.

20. At all times during the period in dispute, all Petitioners had Missouri switched access compensation tariffs in effect. Under the access tariffs, SBC is the interexchange carrier purchasing access services from Petitioners. It is SBC's responsibility to pay Petitioners' access, unless the access tariff is superseded by an approved agreement. Exhibit 1, Jones direct testimony, pp. 24-25. Petitioners attempted to bill Respondents for the traffic in dispute pursuant to their existing tariffs—either access or wireless termination tariff, when applicable. Exh 1, direct testimony David Jones, pp. 9-11, 19-20. Payment was refused.

21. The volumes of subject matter traffic in dispute, as originated by the following Respective CMRS Respondents, transported by SBC, and terminated by the following respective Petitioners, with these traffic volumes further segregated into the period when Alma, Choctaw, and MoKan's access tariffs were in effect and the period when Alma, Chocatw, and MoKan's wireless termination service tariffs were thereafter in effect, can be found in Schedules 1 to the Surrebuttal Testimonies of David Jones

(Exhibit 2), William Biere (Exhibit 4), Gary Godfrey (Exhibit 6), Donald Stowell (Exhibit 8), and Oral Glasco (Exhibit 10).

22. With respect to the subject matter traffic, the pertinent parties stipulated, and the Commission hereby finds, the following proportions of the subject matter traffic crossed Major Trading Area boundaries ("interMTA traffic"):

a. the claim of Alma based upon traffic originated by US Cellular: zero percent (0.0%);

b. the claim of Alma based upon traffic originate by T-Mobile: zero percent (0.0%);

c. the claim of Choctaw based upon traffic originated by US Cellular: zero percent (0,0%);

d. the claim of MoKan based upon traffic originated by US Cellular: zero percent (0.0%);

e. the claim of MoKan based upon traffic originated by T-Mobile: zero percent (0.0%);

f. the claim of Northeast based upon traffic originated by US Cellular: twenty-two and ½ percent (22.5%);

g. the claim of Chariton Valley based upon traffic originated by US Cellular: twenty-six percent (26.0%).

23. The only two contested interMTA factors were that factor applying to the traffic originated by T-Mobile and terminated to Northeast, and that factor applying to the traffic originated by T-Mobile and terminated to Chariton Valley.

24. The FCC in its August 8, 1996 Interconnection Order suggested three methods for CMRS providers and ILECs to utilize in determining the interMTA and intraMTA proportions of traffic. The FCC contemplated the method chosen would be contained in an agreement. No such agreements exist between T-Mobile and Chariton Valley, or between T-Mobile and Northeast, so no such approved factors existed at the time the traffic in dispute terminated.

25. The only evidence submitted as to these disputed proportions was submitted by Chariton Valley and Northeast. Northeast and Chariton Valley presented traffic studies which produced T-Mobile traffic interMTA factors of 100% for traffic terminating to Northeast, and 73% for traffic terminating to Chariton Valley.

26. Northeast and Chariton Valley used an approved FCC method, except, because they were not provided information as to the location of the cell tower originating the wireless call, they substituted the assumption that each call originated on a cell tower in the same MTA where the wireless customer resided for the actual location of the originating cell tower. Exhibit 301, direct testimony of William Biere, pp.15-16; Exhibit 302, surrebuttal testimony of William Biere, pp. 4-7, and Revised Schedule 3HC thereto; Exhibit 307, direct testimony of Gary Godfrey, pp. 5-11, and Schedule 4 HC.

27. The Respondents opposing these factors, SBC and T-Mobile, failed to produce witnesses or direct evidence at the September 8 hearing.

28. SBC and T-Mobile criticize the traffic studies of Northeast and Chariton Valley for lacking information as to what cell cite or cell tower originated each of the calls studied. However, the evidence discloses that this information was not recorded or retained by T-Mobile. Exhibit 301, direct testimony of William Biere, pp 12-13; Exhibit

307, direct testimony of Gary Godfrey, pp. 6-7. This information was not retained even though it constituted the only evidence from which the originating cell tower could be determined. T-Mobile and SBC knew or should have known there was no approved agreement sanctioning any specific traffic proportions for traffic terminating to Northeast and to Chariton Valley. T-Mobile and SBC knew or should have known there was a likely compensation dispute, and that in resolving this dispute the originating cell tower location would have been critical to resolving that dispute.

29. Neither SBC nor T-Mobile submitted any direct evidence that any call in either the study of Northeast or that of Chariton Valley was erroneously categorized as either an interMTA or intraMTA call. Northeast and Chariton Valley have discharged their burden by providing interMTA and intraMTA traffic factor studies based upon the best and only information available to them.

30. The Commission finds that, as neither T-Mobile nor SBC could provide the actual originating cell tower information requested by Northeast and Chariton Valley, the assumption of Northeast's and Chariton Valley's studies that the calls originated in the caller's home MTA was reasonable. T-Mobile and SBC will not be heard to complain the studies are defective for failure to evaluate information only T-Mobile and SBC could have provided but did not.

31. The Commission finds that one hundred percent (100%) of the subject matter traffic originated by T-Mobile and terminated to Northeast was interMTA in jurisdiction.

32. The Commission finds that seventy-three percent (73%) of the subject matter traffic originated by T-Mobile and terminating to Chariton Valley was interMTA in jurisdiction.

33. As a result of the determinations set forth in the foregoing findings 21-32, the following are the amounts of disputed traffic that are interMTA and intraMTA in call jurisdiction, and further distinguished as terminating prior to or after the effective date of a wireless termination tariff for Alma, Choctaw, and MoKan:

a. the claim of Alma based upon traffic originated by US Cellular:

1. zero interMTA minutes of use terminated during the period before Alma's wireless termination tariff became effective.

2. zero interMTA minues of use terminated during the period after Alma's wireless termination tariff became effective.

3. 5,141 intraMTA minutes of use terminated during the period before Alma's wireless termination tariff became effective.

4. 2,344 intraMTA minutes of use terminated during the period after Alma's wireless termination tariff became effective.

b. the claim of Alma based upon traffic originate by T-Mobile:

1. zero interMTA minutes of use terminated during the period before Alma's wireless termination tariff became effective.

2. zero interMTA minues of use terminated during the period after Alma's wireless termination tariff became effective.

3. 66,562 intraMTA minutes of use terminated during the period before Alma's wireless termination tariff became effective.

4. 42,882 intraMTA minutes of use terminated during the period after Alma's wireless termination tariff became effective.

c. the claim of Choctaw based upon traffic originated by US Cellular:

1. zero interMTA minutes of use terminated during the period before Choctaw's wireless termination tariff became effective.

2. zero interMTA minues of use terminated during the period after Choctaw's wireless termination tariff became effective.

3. 21,286 intraMTA minutes of use terminated during the period before Choctaw's wireless termination tariff became effective.

4. 7,131 intraMTA minutes of use terminated during the period after Choctaw's wireless termination tariff became effective.

d. the claim of MoKan based upon traffic originated by US Cellular:

1. zero interMTA minutes of use terminated during the period before MoKan's wireless termination tariff became effective.

2. zero interMTA minues of use terminated during the period after MoKan's wireless termination tariff became effective.

3. 7,576 intraMTA minutes of use terminated during the period before MoKan's wireless termination tariff became effective.

4. 3,398 intraMTA minutes of use terminated during the period after MoKan's wireless termination tariff became effective.

e. the claim of MoKan based upon traffic originated by T-Mobile:

1. zero interMTA minutes of use terminated during the period before MoKan's wireless termination tariff became effective.

2. zero interMTA minues of use terminated during the period after MoKan's wireless termination tariff became effective.

3. 199,570 intraMTA minutes of use terminated during the period before MoKan's wireless termination tariff became effective.

4. 113,071 intraMTA minutes of use terminated during the period after MoKan's wireless termination tariff became effective.

f. the claim of Northeast based upon traffic originated by US Cellular:

1. 771,479 interMTA minutes of use terminating during this period.

2. 2,657,317 intraMTA minutes of use terminated during this period.

g. the claim of Northeast based upon traffic originated by T-Mobile:

1. 113,368 interMTA minutes of use terminating during this period.

2. zero intraMTA minutes of use terminated during this period.

h. the claim of Chariton Valley based upon traffic originated by US Cellular:

1. 891,486 interMTA minutes of use terminating during this period.

2. 2,537,309 intraMTA minutes of use terminated during this period.

i. the claim of Chariton Valley based upon traffic originated by T-Mobile:

1. 187,124 interMTA minutes of use terminating during this period.

2. 69,210 intraMTA minutes of use terminated during this period.

34. Petitioner Alma is entitled to be compensated by SBC at Alma's intrastate intraLATA terminating switched access rate for 5,141 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Alma prior to the effective

date of Alma's wireless termination tariff. Upon payment of such compensation to Alma, SBC will be entitled to indemnity from US Cellular.[9]

35. Petitioner Alma is entitled to be compensated by US Cellular at Alma's wireless termination tariff rate for 2,344 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Alma after the effective date of Alma's wireless termination tariff.

36. Petitioner Alma is entitled to be compensated by SBC at Alma's intrastate intraLATA terminating switched access rate for 66,562 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Alma prior to the effective date of Alma's wireless termination tariff. Upon payment of such compensation to Alma, SBC will be entitled to indemnity from T-Mobile.

37. Petitioner Alma is entitled to be compensated by T-Mobile at Alma's wireless termination tariff rate for 42,882 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Alma after the effective date of Alma's wireless termination tariff.

38. Petitioner Choctaw is entitled to be compensated by SBC at Choctaw's intrastate intraLATA terminating switched access rate for 21,286 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Choctaw prior to the effective date of Choctaw's wireless termination tariff. Upon payment of such compensation to Choctaw, SBC will be entitled to indemnity from US Cellular.

39. Petitioner Choctaw is entitled to be compensated by US Cellular at Choctaw's wireless termination tariff rate for 7,131 minutes of use for intraMTA traffic

[9] See Transcript, Volume 1, pp. 5-7

originated by US Cellular and terminated by SBC to Choctaw after the effective date of Choctaw's wireless termination tariff.

40. Petitioner MoKan is entitled to be compensated by SBC at MoKan's intrastate intraLATA terminating switched access rate for 7,576 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to MoKan prior to the effective date of MoKan's wireless termination tariff. Upon payment of such compensation to MoKan, SBC will be entitled to indemnity from US Cellular.

41. Petitioner MoKan is entitled to be compensated by US Cellular at MoKan's wireless termination tariff rate for 3,398 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to MoKan after the effective date of MoKan's wireless termination tariff.

42. Petitioner MoKan is entitled to be compensated by SBC at MoKan's intrastate intraLATA terminating switched access rate for 199,570 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to MoKan prior to the effective date of MoKan's wireless termination tariff. Upon payment of such compensation to MoKan, SBC will be entitled to indemnity from T-Mobile.

43. Petitioner MoKan is entitled to be compensated by T-Mobile at MoKan's wireless termination tariff rate for 113,071 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to MoKan after the effective date of MoKan's wireless termination tariff.

44. Petitioner Northeast is entitled to be compensated by SBC at Northeast's intrastate intraLATA terminating switched access rate for 771,479 minutes of use for interMTA traffic originated by US Cellular and terminated by SBC to Northeast. Upon

payment of such compensation to Northeast, SBC will be entitled to indemnity from US Cellular.

45. Petitioner Northeast is entitled to be compensated by SBC at Northeast's intrastate intraLATA terminating switched access rate for 2,657,317 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Northeast. Upon payment of such compensation to Northeast, SBC will be entitled to indemnity from US Cellular.

46. Petitioner Northeast is entitled to be compensated by SBC at Northeast's intrastate intraLATA terminating switched access rate for 113,368 minutes of use for interMTA traffic originated by T-Mobile and terminated by SBC to Northeast. Upon payment of such compensation to Northeast, SBC will be entitled to indemnity from T-Mobile.

47. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 891,486 minutes of use for interMTA traffic originated by US Cellular and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from US Cellular.

48. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 2,537,309 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from US Cellular.

49. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 187,824 minutes of use for interMTA traffic originated by T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from T-Mobile.

50. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 69,210 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from T-Mobile.

CONCLUSIONS OF LAW

1. The Commission entered an Order earlier in this proceeding, dated February 14, 2002, denying motions to dismiss for lack of subject matter jurisdiction filed by certain Respondent wireless carriers. In that Order, this Commission determined that it has jurisdiction to determine whether any charges are owed to Petitioners with respect to the traffic in questions and, if so, how the charges are to be calculated. That Order stated, in part:

> A complaint may be brought before this Commission by 'any corporation or person,' including regulated utilities, against 'any corporation, person, or public utility' The language is very broad and is clearly intended to extend to entities not subject to Commission regulation. As long as at least one party, whether a petitioner or a respondent, is a public utility, the Commission has jurisdiction under the law. Thus, for example, the Commission has jurisdiction over disputes between public utilities and their customers and often hears such cases. According to the complaints filed in these cases, the respondents are all customers of the petitioners in that they originate or transport traffic intended for termination on

the petitioners' networks, to petitioners' subscribers. The Commission has jurisdiction over the dealings of a pubic utility with its customers."[10]

2. At page 11 of its April 11, 1997 Order in TC-96-112, United's complaint against SBC for compensation for terminating wireless traffic, this Commission held that:

> "in the absence of some other consensual method of payment, termination of this traffic must be paid for under United's access tariff."

3. In its June 10, 1999 Orders in TC-98-251 and TC-98-340, Mid-Missouri and Chariton Valley's complaints against SBC for compensation for terminating wireless traffic, this Commission held that such traffic terminating between April 1, 1993 and February 4, 1998 was:

> "subject to the terminating access rates prescribed by the approved tariff adopted by each of those companies…"

4. Sections 251(b)(5) and 252(c)(1) of the 1996 Telecommunications Act used the future tense in describing reciprocal compensation. 251(b)(5) created a duty "to establish" reciprocal compensation. 252(c)(1) created a duty "to negotiate". Section 252 of that Act set forth a future process for requesting interconnection, negotiation, arbitration, and state commission approval of the resulting agreements. Respondents' contention that reciprocal compensation for intraMTA traffic was a "default" or "automatic" after the 1996 Act is erroneous. There would have been no need for the provisions set forth above if reciprocal compensation were automatically implemented by the 1996 legislation.

[10] Order, p. 4. Section 386.020(53)(c).

5. The F.C.C. stated in its *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, August 8, 1996 (First Report and Order), at paragraph 1036:

> "we will define the local service area for calls to or from a CMRS network [wireless carrier] <u>for the purposes of applying reciprocal compensation</u> obligations under section 251(b)(5). ... Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."

Thus, the FCC defined the MTA as the wireless carriers' local service area only for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Until an agreement containing reciprocal compensation provisions was approved pursuant to 47 USC 252, reciprocal compensation did not exist.

6. 47 CFR 51.717(a) recognized that, prior to the 1996 Act, there were prior compensation arrangements between ILECs and CMRS providers. This rule provided that CMRS providers with arrangements with ILECs established prior to August 8, 1996 were entitled to renegotiate these arrangements, without termination liability or contract penalties:

> "Renegotiation of existing non-reciprocal arrangements.
>
> (a) Any CMRS provider that operates under an arrangement that existed with an incumbent LEC that was established before **August 8, 1996** and that provides for non-reciprocal compensation for transport and termination of telecommunications traffic is entitled to **renegotiate** these arrangements with no termination liability or other contract penalties."

This FCC rule also contradicts Respondent's assertion that reciprocal compensation was "automatic" with the 1996 Act.

7. The actions of Respondent wireless carriers in negotiating and having approved agreements between them and SBC contradicts their assertion that reciprocal compensation for intraMTA traffic was automatic under the 1996 Act.

8. Although the agreements between US Cellular T-Mobile and SBC Respondents encompassed compensation between them for traffic destined for Petitioners, those agreements did not determine compensation for Petitioners. As This Commission stated in its December 11, 1998 Arbitration Order regarding the AT&T and MCI arbitration with SWB, TO-97-40/TO-97-67:

> "The independent LECs were not a party to this case and should not be affected by the results of this arbitration. Until such compensation agreements can be developed, the company's intrastate switched access rates should be used on an interim basis. The intrastate switched access rates are currently used when toll traffic is exchanged between the companies and would be appropriate to use on an interim basis. This will avoid forcing the results of this arbitration on companies not a party to the case."

9. In its February 8, 2001 Report and Order in TT-2001-139 the Commission approved small company wireless terminating tariffs. Since approval, these tariffs have applied to the traffic in question until those tariffs were superseded by an approved reciprocal compensation agreement. Wireless termination service tariffs were approved for Alma, Choctaw, MoKan, and many other small rural ILECs. In approving these state tariffs, This Commission concluded that reciprocal compensation was a mandatory feature of agreements, not state tariffs, that it was lawful to apply state tariffs to wireless traffic absent an approved agreement, and if any wireless carrier disliked application of state tariffs all it had to do to terminate their application was to obtain an agreement as provided by the 1996 Telecom Act:

> "However, because the proposed tariff and rates herein at issue are **in the nature of exchange access**, the Commission concludes that it does have jurisdiction over

the proposed tariffs and rates filed by the telephone cooperatives that are parties in this proceeding."

"Thus it is apparent from the Act that **reciprocal compensation arrangements are a mandatory feature of agreements** between the CMRS carriers and the small LECs….**The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs**. Therefore, the Commission concludes that **Section 251(b)(5) of the Act simply does not apply to the proposed tariffs** herein at issue. For the same reason, the Commission concludes that the proposed tariffs are **not unlawful** under Section 251(b)(5) of the Act."

"Like the obligation to establish reciprocal compensation arrangements considered above, the pricing standards at Section 252(d) simply do not apply to the proposed Wireless Termination Tariffs. Therefore the Commission concludes that the proposed tariffs are not unlawful pursuant to Section 252(d) of the Act or the F.C.C.'s regulations implementing and interpreting the Act."

"The Commission has concluded that the provision of the Telecommunications Act of 1996 do not invalidate the proposed tariffs under consideration here."

"If the CMRS carriers do not like these rates, they have the option of compelling arbitration under the Act."

10. On the wireless carriers' appeal of This Commission's February 8, 2001, the Court of Appeals for the Western District of Missouri agreed with This Commission's analysis, stating:

> We disagree that federal law preempts the Commission's authority to approve tariffs in the instant case. The Commission determined that the Act's 'reciprocal compensation arrangements' were inapplicable because no agreements were ever entered into by the wireless companies and rural carriers. The Act requires 'local exchange carriers'—such as the rural carriers—to negotiate in good faith and establish compensation arrangements for the termination of traffic, but it does not impose the same obligations on wireless carriers…..The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers. In the absence of a comprehensive scheme to address the wireless companies' conduct, the Commission did not use its tariff-approval authority to supplant federal law….Although the wireless companies have done nothing to bring themselves within the purview of the Act, they now seek to invalidate the subject tariffs by claiming federal law must be applied. We agree with the Commission's determination that federal law does not preemptively govern under the facts of

> this case…the Commission's action does not prevent the negotiation of reciprocal compensation arrangements or otherwise conflict with the Act's procedural requirements…To supercede the tariffs, all the wireless companies have to do is initiate negotiations with the rural carriers and, thereby, invoke the Act's mandatory procedures for reciprocal compensation arrangements and pricing standards….The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements."

See 112 SW3rd 20, 24-26 (Mo App 2003), the "*Sprint*" Opinion.

11. In its January 27, 2000 Report and Order in TT-99-428, et al., the Commission rejected tariff language that would have clarified Petitioners' access tariff continued to apply until superseded by an approved agreement. It was rejected on the ground it would not be lawful to apply access tariffs to intraMTA traffic.

The Commission's decision in TT-99-428 has been reversed by the October 5, 2004 Opinion of the Missouri Court of Appeals, Western District, in Case WD 62961, et al. (the "*Alma*" Opinion). The Court of Appeals recognized that the Commission's rejection of the proposed access tariff clarification was based on an erroneous interpretation of federal law, and that federal law did not prohibit the application of access tariffs to intraMTA traffic in the absence of a reciprocal compensation agreement. The following four excerpts from the *Alma* Opinion demonstrate:

> "The primary issue now in dispute is whether the switched access tariffs can be applied to intraMTA wireless traffic terminated in the rural companies' networks from February 1998 through February 2001, the three-year period prior to the implementation of the termination tariffs approved in ***Sprint."***

> "… it is clear the Commission's rejection of the amended tariffs was partially based on an interpretation of the Act's reciprocal compensation provision that is inconsistent with our more recent ruling…."

"The Respondents contend the federal Act and related regulatory rulings support the Commission's conclusion that existing access tariffs cannot be lawfully applied to the wireless intraMTA traffic at issue."

"We disagree that federal law is controlling in this situation where the wireless companies have not taken the necessary steps to invoke the reciprocal compensation procedures under the Telecommunications Act of 1996. The rural companies had no alternative but to pursue tariff options under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act. ***Sprint,* 112 S.W.3d at 25.** To avoid the tariffs, all the wireless companies have to do is engage in rate negotiations with the rural companies and, thereby, invoke preemptive application of the Act's reciprocal compensation procedures and pricing standards. ***Id.* at 25-26.** Until that happens, the wireless companies should not be heard to complain that the access tariffs must be rejected under federal law.

12. This 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 the absence of an agreement. The legal reasoning of the Commission and the Court of Appeals in *Sprint*, as later confirmed in its October 5, 2004 *Alma* Opinion, is applicable here. 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. The wireless termination tariffs of Petitioners Alma, Choctaw, and MoKan apply in the absence of an approved agreement. If T-Mobile or US Cellular dislike the application of these tariffs, their remedy is to complete the interconnection process set forth in 47 USC 252.

13. The federal reciprocal compensation rules contemplate that ILECs such as petitioners can only be *required* to effectuate reciprocal compensation when two carriers—the originating wireless carrier and the terminating incumbent LEC (ILEC)—are involved in completing the call.[11]

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[11] 47 USC 251(c)(2) imposes the duty upon ILECs to provide, for the facilities and equipment of any requesting telecommunications carrier, **interconnection with the local exchange carrier's network**–(B) at any technically feasible **point within the carrier's network**. 47 USC 252(d)(2)(A)(i) similarly specifies that reciprocal compensation pricing should provide for the **mutual** and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of **the other carrier**".

FCC rule 47 CFR 51.5 defines an interconnection as the "**linking of two networks** for the mutual exchange of traffic". 47 CFR 701 specifies the scope of transport and termination contemplates a two-carrier collaboration:

"TITLE 47--TELECOMMUNICATION
PART 51--INTERCONNECTION--Table of Contents
Subpart H--**Reciprocal Compensation for Transport and Termination of Telecommunications Traffic**

Sec. 51.**7**01 Scope of transport and termination pricing rules.
(a) The provisions of this subpart apply to **reciprocal compensation for transport and termination of telecommunications traffic** between LECs and other telecommunications carriers.
(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or
(2) Telecommunications traffic exchanged between **a LEC** and **a CMRS provider** that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in Sec. 24.202(a) of this chapter.
(c) **Transport**. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act **from the interconnection point between the two carriers** to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.
(d) Termination. For purposes of this subpart, termination is the

14. In its Interconnection Order, paragraphs 1034 and 1043, the FCC recognized that, where three carriers—the originating wireless carrier, a transporting IXC, and a terminating LEC—collaborated to complete a call, that call was subject to access tariffs, not reciprocal compensation:

> "¶ 1034. Access charges were developed to address a situation in which **three** carriers—typically, the originating LEC, the IXC, and the terminating LEC—collaborate to complete a long-distance call. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which ***two carriers*** collaborate to complete a local call. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.
> …….
> ¶ 1043.Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges, ***unless it is carried by an IXC.*** We conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges."

The traffic in dispute is carried by three carriers, the originating wireless carrier, SBC, and the terminating Petitioner ILEC. SBC's role in transporting the traffic is that of an interexchange carrier, or IXC. SBC is not a LEC in Petitioner's exchange service areas. 47 USC 251(h)(1). Petitioners are the only ILECs in their exchange service areas.

> switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.
> (e) **Reciprocal compensation**. For purposes of this subpart, a reciprocal compensation **arrangement between two carriers** is one in which **each of the two carriers receives compensation from the other carrier** for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier."

15. The contention that Petitioners have been compensated pursuant to a "de facto" bill and keep form of reciprocal compensation is rejected. Although bill and keep is a permissible from of reciprocal compensation, it must be contained in an approved interconnection agreement. There is no provision under the 1996 Act, or implementing regulations, providing for an unapproved or "de facto" agreement.

16. Petitioners are incumbent local exchange companies subject to rate of return regulation under §392.240 RSMo. They have a constitutional right to a fair and reasonable return on their investment, and wireless calls should not continue to be permitted to terminate on their facilities for free. Their access or wireless termination service tariffs, as in effect at a particular time, should be applied in the absence of an approved reciprocal compensation agreement.

17. The Commission concludes that Petitioners access tariffs can lawfully be applied to the traffic in dispute, whether interMTA or intraMTA, that terminated prior to the effective date of a wireless termination tariff, and prior to the effective date of an approved interconnection agreement. If T-Mobile or US Cellular are dissatisfied with the application of state tariffs, they can complete the reciprocal compensation process set forth in the 1996 Telecommunications Act, at which time the state tariff will no longer apply to intraMTA traffic. See *Sprint* and *Alma*.

18. The Commission finds that Petitioners have timely and repeatedly asserted their right to payment under effective tariffs against Respondents. They have billed and demanded payment under their tariffs. All Respondents refused to pay. Petitioners have timely implemented access tariff clarification proceedings, have timely prosecuted appeals thereof, have timely implemented wireless termination service tariffs, and timely

implemented the complaint proceedings consolidated here. Respondents have negotiated and had approved agreements between them and SBC in a timely fashion following the FCC Interconnection Order, and following this Commission's December 23, 1997 Order in TT-97-524. Respondents have failed to enforce the provisions of SBC's wireless interconnection tariff, This Commission's December 23, 1997 Order, and the terms of their own approved interconnection agreements. Respondent wireless carriers have failed to complete interconnection agreements with Petitioners. As the equities lie with Petitioners, not Respondents, the Commission rejects the Respondents' requests to bar the small companies from collecting compensation for the traffic in dispute under principles of estoppel, waiver, or any other affirmative defense pled by SBC, US Cellular, or T-Mobile.

19. Staff witness Scheperle's suggestion that this Commission in this Order create and apply new rates to the traffic in dispute is rejected. Exhibits 11 and 12. The Commission refuses to accept this suggestion, as the only rates that can be applied to the traffic in question are those contained in tariffs or approved agreements that were in place at the time the traffic terminated.

20. Petitioner Alma is entitled to be compensated by SBC at Alma's intrastate intraLATA terminating switched access rate for 5,141 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Alma prior to the effective date of Alma's wireless termination tariff. Upon payment of such compensation to Alma, SBC will be entitled to indemnity from US Cellular.

21. Petitioner Alma is entitled to be compensated by US Cellular at Alma's wireless termination tariff rate for 2,344 minutes of use for intraMTA traffic originated

by US Cellular and terminated by SBC to Alma after the effective date of Alma's wireless termination tariff.

23. Petitioner Alma is entitled to be compensated by SBC at Alma's intrastate intraLATA terminating switched access rate for 66,562 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Alma prior to the effective date of Alma's wireless termination tariff. Upon payment of such compensation to Alma, SBC will be entitled to indemnity from T-Mobile.

24. Petitioner Alma is entitled to be compensated by T-Mobile at Alma's wireless termination tariff rate for 42,882 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Alma after the effective date of Alma's wireless termination tariff.

25. Petitioner Choctaw is entitled to be compensated by SBC at Choctaw's intrastate intraLATA terminating switched access rate for 21,286 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Choctaw prior to the effective date of Choctaw's wireless termination tariff. Upon payment of such compensation to Choctaw, SBC will be entitled to indemnity from US Cellular.

26. Petitioner Choctaw is entitled to be compensated by US Cellular at Choctaw's wireless termination tariff rate for 7,131 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to Choctaw after the effective date of Choctaw's wireless termination tariff.

27. Petitioner MoKan is entitled to be compensated by SBC at MoKan's intrastate intraLATA terminating switched access rate for 7,576 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to MoKan prior to the

effective date of MoKan's wireless termination tariff. Upon payment of such compensation to MoKan, SBC will be entitled to indemnity from US Cellular.

28. Petitioner MoKan is entitled to be compensated by US Cellular at MoKan's wireless termination tariff rate for 3,398 minutes of use for intraMTA traffic originated by US Cellular and terminated by SBC to MoKan after the effective date of MoKan's wireless termination tariff.

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30. Petitioner MoKan is entitled to be compensated by T-Mobile at MoKan's wireless termination tariff rate for 113,071 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to MoKan after the effective date of MoKan's wireless termination tariff.

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payment of such compensation to Northeast, SBC will be entitled to indemnity from US Cellular.

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35. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 2,537,309 minutes of use for intraMTA traffic originated by US Cellular T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from US Cellular T-Mobile.

36. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 187,124 minutes of use for interMTA traffic originated by T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from T-Mobile.

37. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 69,210 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from T-Mobile.

IT IS THEREFORE ORDERED:

1. That any motions which have not been previously ruled upon, if any, are hereby overruled.
2. That any objections which have not been previously ruled upon, if any, are hereby denied.
3. This Complaint is resolved in favor of Petitioners Alma Telephone Company, Chariton Valley Telephone Corp., Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial Inc., and Northeast Missouri Rural Telephone Company and against Respondents SBC, T-Mobile, and US Cellular as set forth before in this Report and Order.
4. This Report and Order shall become effective on _____.
5. This case may be closed on _____.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge