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 INITIAL BRIEF

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

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SBC MISSOURI'S INITIAL BRIEF

SBC Missouri,[1] respectfully submits this Initial Brief to the Missouri Public Service Commission ("Commission") in support of its request that all of Petitioner MITG Companies'[2] claims against SBC Missouri be dismissed or denied.

For the convenience of the Commission, the substantive portion of this Brief has been divided into three sections: I. Issues Presented During the August 5-9, 2002 Hearing; II. Commission Questions from the August 5-9, 2002 Hearing; and III. Issues Presented During the September 8, 2004 Hearing.

[1] Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as "SBC Missouri" or "SBC."

[2] Petitioners in this case consist 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. As Petitioners refer to themselves as the Missouri Independent Telephone Group ("MITG"), they will be referred to in this Brief as the "MITG Companies" or "MITG," or "Petitioners."

EXECUTIVE SUMMARY

The Commission should deny the MITG Companies' Complaints. At the most fundamental level, their attempt to apply access charges to wireless traffic is patently unlawful.[3] Their attempt to impose liability on SBC Missouri for calls made by other carriers' customers -- simply because SBC Missouri served as the connecting or "transiting" company between the originating wireless carrier and the terminating company -- is wholly unsupported in the law and squarely conflicts with the MITG Companies' own access tariffs.

Under longstanding FCC rules that go back to the mid-eighty's, access charges generally have not been permitted to be assessed on wireless traffic. The FCC's August 8, 1996, Local Competition Order continued this prohibition holding that traffic to or from a wireless carrier's network that originates and terminates within the same Major Trading Area (MTA) "is subject to transport and termination rates under Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act"), rather than interstate and intrastate access charges."

Consistent with this clear and controlling precedent, the Missouri Commission on two occasions rejected MITG tariffs seeking to apply their access rates to wireless traffic. While the Missouri Court of Appeals has recently reversed and remanded that case to the Commission for further consideration light of the Commission's state regulatory authority, the Commission is not bound by the Court's Order to approve the proposed tariff revisions. Rather, the Commission on remand retains discretion in reviewing the proposed tariffs and could reject them on a myriad of grounds (e.g., for unreasonableness, contrary to the public interest). But even if the Commission

[3] SBC Missouri understands that three MITG Companies, Alma, Choctaw and MoKan Dial, currently have Commission approved wireless termination service tariffs and that their claim in this case originally consisted of claims for access charges on pre-tariff traffic and wireless termination tariff charges on post-tariff traffic. Based on the testimony presented at hearing, SBC Missouri understands that all of the wireless carriers, with the exception of Voicestream, have paid amounts due under Alma, Choctaw and MoKan Dial's wireless termination service tariffs. The other four Complainants' claims are based solely on their access charge tariffs.

were to approve the MITG's proposed tariff amendment adding the language the Court ruled would allow access charges to be assessed on to wireless traffic, such a decision could only have prospective effect and cannot be applied retroactively in this case.

Moreover, the MITG Companies' attempt to impose liability on transit carriers like SBC Missouri and Sprint Missouri for this traffic violates accepted industry standards as expressed by the FCC, other state Commissions -- and the MITG Companies' own access tariffs. These authorities all call for the originating carrier to be responsible for compensating all downstream carriers involved in completing the call. Transit companies receive little or no benefit from serving as transit carriers and it is inappropriate to impose any financial obligation on them for such traffic. The Commission should make clear that transit carriers have no liability for this type of traffic.

BACKGROUND

This complaint case now focuses only on wireless calls originated by T-Mobile and U.S. Cellular's retail end-user customers that terminate to retail end-user customers in Petitioner MITG's exchanges. (The MITG Companies' complaints against Cingular, Sprint PCS, and the other wireless carrier Respondents have been fully resolved.[4]) SBC Missouri serves as the transiting carrier for these calls, meaning that SBC Missouri switches and transports the calls from the wireless carriers' networks to the Petitioners' networks.[5]

As the retail service providers, T-Mobile and U.S. Cellular receive all retail revenue generated on calls at issue in this case. As a transit carrier, SBC Missouri receives no

[4] T. 1388-1391.
[5] Exhibit 13, Hughes Rebuttal, pp. 2-3. This rate has been reduced even further to $.001999 per minute of use pursuant to the true-up provisions in the interconnection agreements.

compensation from the retail end-user customer making the call (it also receives no compensation from the retail end-user customer receiving the call). Pursuant to the terms and conditions in Commission-approved interconnection agreements with T-Mobile and U.S. Cellular, SBC Missouri charges $0.004 per minute of use (significantly less than a penny per minute) for providing the transiting function.[6]

Although the MITG Companies claim that SBC Missouri as a transit carrier should be primarily or secondarily liable for this traffic, the charges they seek are many times greater than SBC Missouri's transiting rate. (Chariton Valley seeks to impose access charges of "six, seven, eight cents,"[7] which is 15-20 times SBC Missouri's transit rate. Northeast's $.15 access rate is over 37 times higher.[8]) The transit rates in the interconnection agreements with T-Mobile and U.S. Cellular do not provide compensation to SBC Missouri for paying terminating compensation to other carriers like Petitioners. Rather, these agreements place responsibility for terminating charges on T-Mobile and U.S. Cellular as the originating carrier, and call for them to enter into agreements with third-party providers like Petitioners for the termination of traffic.[9]

[6] Id., p. 3.
[7] T. 1482.
[8] T. 1538.
[9] Exhibit 13, Hughes Rebuttal, p. 18.

ARGUMENT

I. ISSUES PRESENTED DURING THE AUGUST 5-9, 2002 HEARING

Issue 1 – Traffic Subject To A Wireless Termination Tariff

1. For each Wireless Carrier Respondent named in the respective complaints, have each of the Petitioners with Wireless Termination Service Tariffs established that there are any amounts due and owing for traffic that was delivered after the effective date of any of the Wireless Termination Service Tariffs?

SBC Missouri has not taken a position in this case on this issue. Petitioners have acknowledged that the small company Wireless Termination Service Tariffs apply only to the originating wireless carrier. Such tariffs were not intended to apply to other local exchange companies that merely served as an intermediate transit carrier.[10]

Issue 2 – Traffic Not Subject To A Wireless Termination Tariff

2. In the absence of a wireless termination service tariff or an interconnection agreement, can Petitioners charge access rates for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Petitioners' respective networks?

No. Complainants cannot charge access rates for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Complainants' respective networks. (Ex. 13, Hughes Rebuttal, pp. 14-15).

[10] See Petitioners' Proposed Findings of Fact and Conclusions of Law, p. 7, para. 4: "For 'intraLATA' 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." (Emphasis added).

The FCC has historically prohibited the application of access charges to wireless carrier traffic, except in the case of roaming traffic. The FCC's "Policy Statement on Interconnection of Cellular Systems,"[11] which was released in 1986,[12] required LECs' interconnection rates for terminating cellular calls to be negotiated in good faith between the cellular operators and telephone companies, and it specifically prohibited LECs from applying access charges:

> The terms and conditions of interconnection depend, of course on innumerable factors peculiar to the cellular system, the local telephone network, and local regulatory policies; accordingly, we must leave the terms and conditions to be negotiated in good faith between the cellular operator and the telephone company.
>
> * * *
>
> Compensation Arrangements - In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal concern. We therefore express no view as to the desirability or permissibility of particular compensation arrangements, such as calling-party billing, responsibility for the cost of interconnection, and establishments of rate centers. Such matters are properly the subject of negotiations between the carriers as well as state regulatory jurisdiction. Compensation may, however, be paid under contract or tariff provided that the tariff is not an "access tariff" treating cellular carriers as interexchange carriers, except as noted in footnote 3.[13]

More recently, the FCC has unequivocally ruled that access charges may not be imposed on intraMTA traffic:

> We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties'

[11] In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 1986 FCC LEXIS 3878, Appendix B, Paragraph 5, released March 5, 1986.

[12] As early as 1984, however, the FCC determined that wireless traffic is generally local. See, In re: MTS and WATS Market Structure, 97 FCC 2nd 834 para. 149, 1984 WESTLAW 251063 (February 15, 1984)("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.")

[13] The exception noted by the FCC in footnote 3 pertains to roaming cellular traffic, which is not at issue here. Ex. 11, pp. 3-4 (emphasis added).

> locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5),[14] rather than interstate or intrastate access charges. [15]

Based on this ruling by the FCC, the Missouri Commission has twice concluded that access charges are inappropriate for terminating intraMTA wireless traffic:

> In the First Report and Order, the FCC made it abundantly clear that access charges do not apply to local traffic exchanged between LECs and CMRS providers. Traffic to or from a CMRS provider's network, the FCC held, that originates and terminates in the same MTA is subject to transport and termination rates under the Act but is not subject to interstate or intrastate access charges. In the present case, if its tariffs were approved, Alma would be allowed to apply access charges to traffic exchanged with CMRS providers within the same MTA. Such an action would clearly violate both the Act and the First Report and Order.[16]

While the Missouri Court of Appeals has recently reversed and remanded that case to the Commission for further consideration light of the Commission's state regulatory authority,[17] the Commission is not bound by the Court's Order to approve the proposed tariff revisions. Rather, the Commission on remand retains discretion in reviewing the proposed tariffs and could reject them on a myriad of grounds (e.g., for unreasonableness, or because they are 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

[14] 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."
[15] 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").
[16] See, In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2, et al., Case No. TT-99-428, et al., Report and Order, issued January 27, 2000 at p. 12. See also, In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2, et al., Case No. TT-99-428 et al., Report and Order, issued April 9, 2002 at pp. 12-13 (reaching the same conclusion) (the "Alma decisions").
[17] 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) (Post-decision motions have been filed. Accordingly, this decision is therefore not final and is subject to revision by the Court).

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.

And while the Missouri Court of Appeals has ruled that the Missouri Commission is not preempted under certain circumstances by federal law, the Commission can in its discretion be guided by the federal Court's interpretations in this area. Within the last year, the Federal District Court in Montana considered this same issue and ruled that intraMTA wireless traffic is local and not subject to interstate or intrastate access charges, even when the traffic flows through a transit carrier:

> It is Qwest's position that . . . the 1996 Local Competition Order specifically provide[s] that traffic between an LEC and a CMRS provider that originates and terminates within the same MTA is local traffic and it is, therefore, not subject to terminating access charges, but rather to reciprocal compensation. The Court agrees.
>
> Paragraph 1036 expressly states that the FCC, for purposes of applying Section 251(b)(5)'s reciprocal compensation obligations, defines the local service area for calls to or from a CMRS network as the Major Trading Area (MTA). In other words, traffic that both originates and terminates in the same MTA is considered "local" and thus, "subject to transport and termination rates under Section 251(b)(5) [reciprocal compensation], rather than interstate or intrastate access charges." The FCC's order makes no distinction, with respect to CMRS traffic that originates and terminates in the same MTA, between traffic that flows between two carriers or among three or more carriers before termination. This traffic is all local traffic subject to the reciprocal compensation scheme.
>
> This conclusion is further bolstered by language in paragraphs 1043 of the 1996 Local Competition Order . . . In this Court's opinion, the underlined text further supports the conclusion of traffic between an LEC and a CMRS network that originates and terminates in the same MTS local and, therefore, subject to reciprocal compensation rather than access charges. The FCC order makes no distinction between such traffic and the traffic that flows between a CMRS carrier and a LEC in the same MTA that also happens to transit another carrier's facility prior to termination.[18]

[18] 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) (Finding Qwest liable under specific structure of terminating LECs' state access tariffs - which were different than Petitioners' Missouri tariffs - but finding claims concerning intraMTA wireless traffic preempted by federal law) (emphasis and brackets in original).

Moreover, both the Iowa and Oklahoma public utility commissions reached the exact same conclusion reached by the Missouri Commission that access charges may not be applied to intraMTA wireless traffic. The Iowa Utility Board held:

> 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 (as contemplated by the ITA [Iowa Telephone Association] tariff) are not applicable. The ITA tariff was intended to address the traffic at issue in this case, and only this traffic, but it attempts to impose access charges on traffic that is not subject to such charges. Thus, the ITA tariff, identified as TF-00-275, has no application and is rejected as unjust, unreasonable and unlawful.[19]

And a similar conclusion was reached by the Corporation Commission of the State of Oklahoma in an arbitration under the Act between various wireless carriers and the rural telephone companies in that state:

> Issue 1: What traffic within an MTA is subject to reciprocal Compensation?
>
> Arbitrator Decision: 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 the call.
>
> Issue 2: Do reciprocal compensation principles apply when the parties are not directly interconnected?
>
> Arbitrator Decision: The Arbitrator agrees with the position of the CMRS providers that the FCC requires that the parties must pay each other reciprocal compensation for all intraMTA traffic whether the parties are directly or indirectly connected, and regardless of the intermediary carrier.
>
> Issue 3: May the rural telephone companies charge terminating access rates for any intraMTA traffic?
>
> Arbitrator Decision: The Arbitrator concurs with the position of the staff. No. The FCC has clearly stated that calls made to and from a CMRS network within

[19] In re Exchange of Transit Traffic, 2001 Iowa PUC. LEXIS 548, at *27-*28 (Iowa Utils. Bd. November 26, 2001) (proposed decision), aff'd, 2002 Iowa PUC LEXIS 103 at *6 - *9, and *14 - *15 (March 18, 2002), rehearing denied 2002 WL 1277812 (May 3, 2002).

the MTA are subject to transport and termination charges rather than interstate and intrastate access charges.[20]

Thus, to the extent that Petitioners' complaints seek the recovery of access charges on intraMTA traffic, the Commission should summarily deny such claims.

3. For each Wireless Carrier Respondent named in the respective complaints, does the record support a finding that the traffic in dispute is intraMTA wireless traffic?

Please see SBC Missouri's discussion under Section III of this Brief.

4. What compensation, if any, is due Petitioners without wireless termination service tariffs or an interconnection agreement for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Petitioners' respective networks after the date of an order by the Commission in this case?

As explained under Section I(2), supra, of this Brief, interstate or intrastate access charges may not be assessed on intraMTA wireless traffic. Under Section 251(a)(1) of the Act, the appropriate compensation for such wireless traffic is to be set through negotiations. If a rate or compensation mechanism cannot be agreed to, the wireless carriers and the MITG companies should ask the Commission to arbitrate the rate under Section 252(b)(1) of the Act. (Ex. 13, Hughes Rebuttal, p. 16). In SBC Missouri's view, the specific compensation to be paid on such traffic is a matter between the originating wireless carrier and terminating LEC.

5. What compensation, if any, is due Petitioners without wireless termination service tariffs or an interconnection agreement for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Petitioners' respective networks prior to the date of an order by the Commission in this case?

As explained under Section I(2), supra, of this Brief, interstate or intrastate access charges may not be assessed on intraMTA wireless traffic. Under Section 251(a)(1) of the Act,

[20] 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 appropriate compensation for such wireless traffic is to be set through negotiations. If a rate or compensation mechanism cannot be agreed to, the wireless carriers and the MITG companies should ask the Commission to arbitrate the rate under Section 252(b)(1) of the Act. (Ex. 13, Hughes Rebuttal, p. 16). In SBC Missouri's view, the specific compensation to be paid on such traffic is a matter between the originating wireless carrier and terminating LEC.

6. For each Wireless Carrier Respondent named in the respective complaints, does the record support a finding that the traffic in dispute is interMTA traffic?

Please see SBC Missouri's discussion under Section III of this Brief.

7. To the extent that the record supports a finding that any of the traffic in dispute is interMTA traffic for each Wireless Respondent, what amount is due under Petitioners' applicable Intrastate Access Tariffs?

Intrastate interMTA wireless-originated traffic is subject to the Complainants' intrastate access tariff rates. The FCC has ruled, "traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges."[21]

8. Is it appropriate to impose secondary liability on transiting carriers for the traffic in dispute?

No. Accepted industry standards call for the originating carrier to be responsible for compensating all downstream carriers involved in completing the call. The MITG Companies' attempt to impose liability on transit carriers like SBC Missouri and Sprint Missouri for this traffic violates these standards, which are clearly and consistently reflected in decisions rendered by the FCC and other state utility Commission -- as well as in the MITG Companies' own state and federal access tariffs. These authorities all call for the originating carrier to be responsible for compensating all downstream carriers involved in completing the call.

[21] FCC Local Competition Order, para. 1035.

Companies like SBC Missouri and Sprint receive little or no benefit from serving as transiting carriers and it is inappropriate to impose any financial obligation on them for such traffic. The Commission should make clear that transiting carriers have no liability for this type of traffic. (Ex. 13, Hughes Rebuttal, pp. 2, 4-10).

a. Imposing Liability on Transit Carriers Violates Accepted Industry Standards as Expressed by the FCC.

Under standards reflected by the FCC in its Unified Carrier Compensation docket, the originating carrier - - the one who has the relationship with the calling party - - is responsible for compensating all downstream carriers involved in completing the call:

> 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. Hence, these interconnection regimes may be referred to as "calling-party's-network-pays" (or "CPNP"). Such CPNP arrangements, where the calling party's network pays to terminate a call, are clearly the dominant form of interconnection regulation in the United States and abroad.[22]

As the FCC made clear, the originating carrier is the party with the relationship with the end user who originated the call. It is through this relationship with the end user that the originating carrier is able to recover the cost of terminating calls. (Ex. 13, Hughes Rebuttal, pp. 10, 12)

The FCC reaffirmed this standard in the Verizon-Virginia Arbitration with AT&T, Cox and WorldCom.[23] There, WorldCom proposed interconnection agreement language that would

[22] 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 ("Unified Carrier Compensation NPRM")(emphasis added).
[23] 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").

have required Verizon to compensate WorldCom for all transit traffic that flowed through Verizon to WorldCom (i.e., as if the traffic were exchanged solely between WorldCom and Verizon). Under WorldCom's proposed language, Verizon would have been required to bill the originating carrier for reimbursement of those charges. Verizon objected to WorldCom's proposed language, which essentially required Verizon to act as a billing intermediary for transit traffic that WorldCom exchanges with third-party carriers.[24]

Consistent with the long-standing industry standard under which the calling party's network pays, the FCC Common Carrier Bureau specifically rejected WorldCom's proposal to make Verizon financially responsible for terminating expenses on transit traffic:

> We also reject WorldCom's proposal to Verizon . . . WorldCom's proposal would . . . require Verizon to serve as a billing intermediary between WorldCom and third-party carriers with which it exchanges traffic transiting Verizon's network. We cannot find any clear precedent or Commission rule requiring Verizon to perform such a function. Although WorldCom states that Verizon has provided such a function in the past, this alone cannot create a continuing duty for Verizon to serve as a billing intermediary for the Petitioners' transit traffic. We are not persuaded by WorldCom's arguments that Verizon should incur the burdens of negotiating interconnection and compensation arrangements with third-party carriers. Instead, we agree with Verizon that interconnection and reciprocal compensation are the duties of all local exchange carriers, including competitive entrants. Accordingly, we decline to adopt WorldCom's proposal for this issue.[25]

And in an Order released in December, 2003, the FCC reaffirmed the continued appropriateness of the "calling-party's-network-pays" standard in its decision in the Verizon-Virginia arbitration with Cavalier Telephone. Specifically referencing transit traffic, the FCC

[24] FCC Verizon-Virginia Arbitration Order, paras. 107, 112 and 114.
[25] FCC Verizon-Virginia Arbitration Order, para. 119 (internal citations omitted).

stated that it agreed that the "originating party is the appropriate party to be billed for the traffic it originates."[26]

b. Other State Utility Commissions have Rejected Imposing Liability on Transit Carriers for Other Companies' Traffic.

State Public Utility Commission that have addressed this issue have rejected imposing liability on the transit carrier for other companies' traffic. For example, in the Iowa Network Systems[27] case, a group of independent LECs sought to impose access charges on Qwest for terminating wireless calls transited to them by Qwest. There, wireless carriers delivered their calls to Qwest, which transported the traffic to Iowa Network Systems ("INS"), a centralized equal access service provider (formed by the independent LECs) which then carried the traffic to the independent LECs for connection to the called customer. INS and the independent LECs (called "INS participating telephone companies" or "PTCs") sought to impose access charges on Qwest for this traffic. Rejecting the claim, the Iowa Commission stated:

> INS and the PTCs based their interpretation on this section of paragraph 1043 [of the FCC's Local Competition Order] that states:
>
> > 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, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under Section 251(g) to preserve the current interstate access charge regime, 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

[26] In the Matter of Petition of Cavalier Telephone L.L.C. Pursuant to Section 252(e)(5) of the Telecommunication Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration, WC Docket No. 02-359, Memorandum, Opinion and Order, released December 12, 2003, para. 49. The FCC's Wireline Competition Bureau served as the arbitrator because the Virginia Commission declined jurisdiction. In its decision, the FCC indicated that in deciding the unresolved issues presented, it applied "current Commission rules and precedence, including those most recently adopted in the Triennial Review Order," Id., at para 2.

[27] 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).

> charges for traffic that currently is not subject to access charges and are assigned such charges for traffic that is currently subject to interstate access charges.
>
> The INS and PTC interpretation depends on Qwest being defined as an IXC is 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. The FCC has deemed intraMTA traffic local, therefore, access charges do not apply.[28]

Similarly, the Public Service Commission of Wisconsin in an arbitration between AT&T and Wisconsin Bell refused to impose any financial responsibility on Wisconsin Bell for traffic that is exchanged between AT&T and a third-party carrier that transits Wisconsin Bell's network:

> The panel agrees that neither carrier should have to act as a billing agent or conduit for compensation between other carriers that exchange traffic that transit its network. The panel also finds that AT&T is not required to give Ameritech proof of its authority to deliver traffic to other CLECs as a precondition to Ameritech providing transit service.[29]

[28] In re Exchange of Transit Traffic, 2002 IOWA PUC LEXIS 548 at *16-17.

[29] 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.

c. Imposing Liability on Transit Carriers for Another Carrier's Traffic is Inappropriate in Staff's View.

The Missouri Commission Staff concurs that it is inappropriate to impose liability on transit carriers like SBC Missouri and Sprint for the traffic in dispute. On the issue of whether it is appropriate to impose such liability, Staff in their position statement stated:

> No. The originating carrier (CMRS provider) is responsible for payment of traffic in dispute. Staff requests the Commission to find that wireless traffic may terminate on MITG network(s) absent an Interconnection Agreement (IA) between the CMRS provider and MITG companies consistent with Section 251(a)(1) of the Telecommunications Act of 1996. This recommendation is based on sound public policy and it is in the public interest to allow traffic to originate and terminate on CMRS providers and MITG companies networks with a compensation arrangement (e.g. Wireless Termination Tariff) in place if no IA between CMRS providers and MITG companies exist.[30]

At the September 8, 2004 hearing, Staff confirmed that it has consistently taken the view that the originating carrier should be financially responsible for its own traffic:

> Q. [From Commissioner Murray] Ok. And then in terms of the secondary liability, you're clearly taking the position that the transiting carrier should not be secondarily liable; is that correct?
>
> A. That is correct. We've been consistent in both this case and a previous wireless case also that Southwestern Bell should not be secondarily liable, no matter if the traffic is interMTA or intraMTA. It's the originating wireless carrier that should be responsible.[31]

As the FCC and Staff's position recognize, imposing liability on transit carriers for other carriers' traffic would be inappropriate, and inconsistent with industry standards under which the calling party's network provider is the one responsible for paying any compensation that may be due on such traffic.

[30] See, Staff's Statement of Positions, Case No. TC-2002-57, filed July 12, 2002, pp. 3-4.
[31] T. 1578.; see also, T. 1420.

d. Petitioners Own Access Tariffs Call for the Joint Provisioning of Access Services by the Transit and Terminating LECs and for Them to Meet-Point Bill Their Respective Charges to the Originating Carrier.

Petitioner MITG Companies' own intrastate and interstate access charges do not allow them to impose their access charges on transit companies that serve merely as the connecting carrier between the originating and the terminating companies. Rather, these tariffs, consistent with national standards promulgated at the Ordering and Billing Forum ("OBF"), recognize that access services often must be provided by more than one LEC. The tariffs call for both the transit company and the terminating company to bill their respective access charges attributable to the portion of the jointly provided service they each supply. These tariffs specifically call for both the transit and the terminating companies to bill the carrier whose call they are jointly handling:

2. General Regulation (Cont'd)

2.4 Payment Arrangements and Credit Allowance (Cont'd)

2.4.5 Access Services Provided by More Than One Telephone Company

When an Access Service is provided by more than one Telephone Company, the Telephone Companies involved will mutually agree upon one of the billing methods described in (A) or (B) following based upon the interconnection arrangements between the Telephone Companies. The Single Company Billing Method will only be used where technical limitations prohibit interconnection billing.

* * *

(B) Multiple Company (Interconnection Point Billing:

(1) Each Telephone Company receiving an order or copy of the order from the customer, as specified in 5.9 following will determine the applicable charges for the portion of the service it provides and bill in accordance with its Access Services tariff as follows:

(a) For Switched Access

> (i) For Feature Group C Switched Access service, the portion of the Local Transport provided by the Telephone Company is not distance sensitive. The Local Transport rate described in 12.1.2(B) will apply to the total number of access minutes. The rate charged for the portion of Local Transport provided by a connecting exchange Telephone Company will be based on the connecting exchange Telephone Company's Access tariff and may be distance sensitive.[32]

Despite Petitioners' claims that wireless carriers have not ordered exchange access service from this tariff,[33] Petitioners admitted that they are billing the wireless carriers out of this access tariff.[34] In fact, their wireless termination agreements, which have been approved by the Commission, specifically call for the application of this tariff. They state that "rates for termination of non local intrastate traffic shall be taken from ILECs' access tariff for intrastate intraLATA traffic."[35]

Petitioners also concur in the National Exchange Carrier Association ('NECA") tariff, which is filed at the federal level. This tariff similarly provides for meet-point billing for access services provided by more than one telephone company. That tariff states that under the multiple bill option, each company providing access service will render an access bill to the carrier whose

[32] Exhibit 305, Oregon Farmers Mutual Tel. Co. Access Service, P.S.C. MO. No. 6, Original Sheet 34, Effective January 1, 1987 (emphasis added). All of Petitioner MITG Companies concur in the Oregon Farmers Mutual Telephone Company Access Service Tariff. T. 1438, 1518-1519.
[33] Exhibit 301, Biere Direct, p. 10.
[34] T. 1440.
[35] See, e.g., Exhibit 304, Chariton Valley Traffic Termination Agreement with Sprint PCS, Section 4.1.2 and Appendix 1. The Agreement defines "non local traffic as "traffic between ILEC and Sprint PCS that is not local traffic. Non local traffic may be either interstate or intrastate traffic, depending on the locations where the call originates and terminates." Id., Section 2.9. The same provisions are in Chariton Valley's Agreement with Cingular, which was approved in Case No. TK-2004-0518. T. 1433; and in Northeast Missouri Rural's Agreements with Cingular and Sprint, which were approved in Case No. TC-2004-0513 and TK-2004-0544. T. 1519-1520.

call they are handling for their respective portions of the service provided under their own access tariff rates and regulations.[36]

Coordinating meet-point billing provisions are also contained in the transit carriers' access tariffs. The coordinating provisions in SBC Missouri access tariffs states, under the section titled "Ordering, Rating and Billing of Access Services where More Than One Exchange Telephone Company is Involved," states:

> When an Access Service is ordered by a customer where one end of the service is in one Exchange Telephone Company operating territory and the other end is in another Exchange Telephone Company operating territory (i.e. Jointly Provided Access Service), the Exchange Telephone Companies involved will agree upon a billing, design and ordering arrangement which is consistent with the provisions contained in this section and the Ordering and Billing Forum standards, Multiple Exchange Carrier Access Billing (MECAB) and Multiple Exchange Carrier Ordering and Design (MECOD).[37]

The meet-point billing provisions of this tariff describes a multiple bill as follows:

> The Multiple Bill Arrangement allows all exchange telephone companies providing service to bill the customer for their portion of a jointly provided access service according to its Access Service Tariff charges.[38]

Petitioners' witness conceded that this description is how the Multiple Bill Arrangement under meet-point billing works.[39]

e. The Parties' Ordinary Course of Business Show the Appropriateness of Applying Meet-Point Billing Here

.

While SBC Missouri and other LECs provide intraLATA toll (also known as "local toll") or expanded calling plans (both of which are interexchange services provided on a retail basis to their own subscribers), a LEC does not provide interexchange service and is not "acting as an

[36] T. 1455-1462.
[37] SBC Missouri Access Services Tariff, P.S.C. Mo.-No. 36, Section 2.4.5, Effective April 11, 1993.
[38] Id., Section 2.4.5.B.3.
[39] T. 1448.

IXC" when it merely provides intermediate "transit" or "transport" between an originating carrier and another LEC that terminates the call.

Rather, the provision of intermediate transport or "transiting" is a traditional LEC function as can be seen in the testimony of Bob Schoonmaker, a recognized expert on small LEC access tariff.[40] In advocating the application of switched access charges to wireless traffic in Case No. TT-99-428, Mr. Schoonmaker describes the function provided by the LEC supplying the intermediate carriage and the LEC supplying the final termination as the "joint provisioning of exchange access to other carriers," which are both LEC functions:

> Q. What are the current contractual relationships between the incumbent local exchange carriers (ILECs) in the state?
>
> A. From my experience I believe that there are two primary contractual documents that establish terms and conditions for network connections between all the ILECs in the state at this time, with, in certain circumstances a few other limited contracts . . . the second is the ILEC access tariffs which provide for the **joint** provisioning of exchange access to other carriers. . . .
>
> * * *
>
> Q. Are you saying then that SWBT should not be transiting traffic to the LECs under any other basis than the **joint** billing of access traffic?
>
> A. That's exactly what I'm saying. . . .
>
> * * *
>
> Q. How does this prior discussion relate to the tariff provisions filed by the MMG companies?
>
> A. The tariff provisions filed by the MMG companies clarify and make more specific the appropriateness of using the access tariff to bill all companies who are using the network connections established via the **joint** provision of access services. . . .
>
> * * *

[40] T. 1452.

Q. Does this mean that the STCG believes that SWBT should be "blocking" this traffic?

A. No. As long as the traffic is being delivered under the auspices of the **joint** provisioning of the access tariff there should be no blocking of the traffic.[41]

Mr. Schoonmaker's description of jointly provided access being a traditional LEC function is confirmed by testimony heard in this case from Petitioners' witnesses who acknowledged that intraLATA toll calls that transit SBC Missouri's network and terminate in their exchanges are handled on a meet-point billing basis under the parties' respective access tariffs:

Q. For example, a call from a Verizon land line customer could go through Southwestern Bell and terminate to a Mid-Missouri land line end-user in Pilot Grove, for example?

A. That's correct.

Q. Okay. And on that call would you agree with me the compensation arrangement between the carriers would be handled on a meet-point billed basis?

A. Yes. It's handled under the -- for Mid-Missouri specifically, it's handled under the Missouri PSC Missouri No. 6, which is the Oregon -- or concurrence in the Oregon Farmers access tariff which also contains the meet-point billing provisions that you allude to.

Q. Okay. And what happens under those provisions is Mid-Missouri bills its terminating charges under its intrastate access charges to the originating carrier. Right?

A. That's correct.

Q. And in this particular example, that would be Verizon, the LEC?

A. That's correct.

Q. You don't bill the delivering company, Southwestern Bell; is that correct?

A. That's correct.

[41] T. 1453-1455 (Jones).

Q. Okay. And Southwestern Bell provides a transport service to the originating carrier, Verizon in this example?

A. Our tariff contains a meet-point billing provision that does allow us to provide the service to a meet-point that was mutually negotiated with Southwestern Bell and then that meet-point is filed in federal tariffs that delineates exactly where your facilities start and our facilities end . . . We bill for our portion of those facilities just like you bill for your portion of those facilities. And we would bill our portion of those facilities to Verizon.[42]

Although at the September 8, 2004 hearing, Petitioner Chariton Valley's witness could not remember who his company billed for transited local toll and IXC traffic,[43] he previously testified on August 6, 2002 hearing in this issue consistently with Mr. Jones:

Q. Do you agree with Mr. Jones that on LEC originated toll, that's meet-point billed between our companies?

A. I think today that's true one way.

Q. Okay. Let's take the call -- same call we talked about yesterday . . . Call from Verizon through Southwestern Bell to one of your end-user customers. Chariton Valley does not bill the deliverer, it does not bill Southwestern Bell for that call, is that correct, today?

A. I believe that's correct.

Q. You bill Verizon, the land line company, whose customer placed that call. Correct?

A. . . . I believe that's correct.

Q. And before your company established itself as an access tandem, you received interexchange carrier traffic through Southwestern Bell; is that correct?

A. That's -- that's correct.

Q. And intercompany compensation between our companies was handled the same way, we both billed the IXC that sent us the traffic, is that correct?

A. And we did so as a result of a prior arrangement, yes.

[42] T. 242-244 (Jones).
[43] T. 1441-1442.

Q. And that was meet-point billed too?

A. I believe that's correct.

Q. You did not bill the deliverer of that traffic to you, you billed the IXC?

A. I believe that is correct, yes.[44]

Petitioner Northeast Missouri Rural's witness concurred with both Mr. Jones and Mr. Biere's description of how such jointly provided access service is provisioned and billed.[45]

f. Transit Carriers Receive No Benefit from Transiting Other Carriers' Traffic and Should Have No Financial Responsibility for It.

Companies receive no special privilege or benefit from serving as transit carriers. Transit traffic only adds to the congestion on a carrier's network and brings its network facilities, which are a finite resource, closer to exhaust. (Ex. 13, Hughes Rebuttal, p. 4) It is therefore inappropriate to impose any liability, secondary or otherwise, on them for another carrier's traffic.

Because facilities at its tandem offices were prematurely approaching exhaust, SBC Missouri previously asked the Commission to allow limits on the amount of traffic carriers could transit through SBC Missouri's network to other telecommunications carriers. In its last arbitration with AT&T (in its capacity as a CLEC, including its affiliate TCG), SBC Missouri proposed contract language that would have required AT&T/TCG to establish a direct trunk group to another LEC, CLEC or wireless carrier when AT&T/TCG's traffic to that other carrier reached a threshold of 24 voice grade trunks:

5.1 When transit traffic through the SBC-13STATE Tandem from CLEC to another Local Exchange Carrier, CLEC or wireless carrier requires 24 or more trunks,

[44] T. 406-407 (Biere).
[45] T. 469-470 (Godfrey).

> CLEC shall establish a direct End Office trunk group between itself and the other Local Exchange Carrier, CLEC or wireless carrier . . .[46]

During the arbitration, SBC Missouri explained that it proposed the 24-trunk threshold because that is the same standard it applies to itself in determining when to establish direct trunks. And the application of the standard to interconnecting carriers would extend the life of its tandems and would allow additional capacity for other interconnecting carriers. (Although this language would have required AT&T/TCG to provide their own direct trunking when their traffic reached this threshold, SBC Missouri indicated that it was still willing to accept their overflow traffic in order to help prevent disruption of their traffic flows.)[47]

The Commission, however, denied SBC Missouri's request stating:

> AT&T objects to SWBT's language, arguing that it essentially allows SWBT to design AT&T's network, it permits SWBT to impose a business plan on AT&T, it permits SWBT to evade its interconnection obligations under the Act, and that the 24-trunk threshold is too low. AT&T proposes language at Part A, Section 1.0, that asserts AT&T's right to interconnect with SWBT at any technically feasible point . . . The Commission will resolve these DPs [Decision Points] by directing the parties to adopt the positions and language suggested by AT&T. SWBT is obligated to interconnect with AT&T at any technically feasible point, without regard to traffic volume. AT&T is free to design its network and to capitalize on any competitive advantages conferred by its network architecture in conjunction with SWBT's interconnection duty . . .[48]

Clearly, any benefits from transiting flow to carriers seeking to use the transit carrier's network, as it allows those carriers to gain efficiencies for themselves and their customers. For

[46] Ex. 13, Hughes Rebuttal, pp. 6-7, referencing Joint Decision Point List ("Joint DPL") filed May 3, 2001, in Case No. TO-2001-455, Exhibit II-E, Issue 8.
[47] Ex. 13, Hughes Rebuttal, p. 7, referencing Joint DPL filed May 3, 2001, in Case No. TO-2001-455, Exhibit II-E, Issues 8 and 9.
[48] In the Matter of the Application of AT&T Communications of the Southwest, Inc, TCG St. Louis, Inc. and TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996, Case No. TO-2001-455, Arbitration Order, issued June 7, 2001 at p. 42.

example, SBC Missouri's network has been in place for years and extends to nearly every other telephone company in the state (in cases where SBC does not directly connect with a particular telephone company, SBC connects with the tandem company, like Sprint, that serves the MITG Company). Thus, by establishing a direct connection with SBC Missouri, wireless carriers can indirectly reach all other telephone companies in the LATA, including the MITG Companies. The alternative would be for the wireless carriers to physically build their networks to all other carriers operating in the state, which wireless carriers have indicated would be inefficient for them.[49]

Until the FCC Common Carrier Bureau's decision in the Verizon-Virginia arbitration, SBC Missouri generally believed that it was required to carry this traffic. Consistent with this understanding, it entered into interconnection agreements (that were subsequently approved by the Commission) with most of the wireless carriers that operate in the State, under which SBC Missouri would transit their traffic to third party carriers. (Ex. 13, Hughes Rebuttal, p. 6)

But in light of the FCC Common Carrier Bureau's decision in the Verizon-Virginia arbitration, it now appears that the FCC has not imposed an obligation to carry transit traffic, particularly at TELRIC rates. In that decision, the Bureau rejected the various CLECs' attempt to require Verizon to handle an unlimited amount of transit traffic:

> We reject AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking cost under the Commission's rules implementing section 251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statue, nor do we find a clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates.

[49]Ex. 13, Hughes Rebuttal, p. 8.

> Furthermore, any duty Verizon may have under section 251(a)(1) of the act to provide transit service would not require that service to be priced at TELRIC.[50]

While it is apparent that carriers do not have a general obligation to transit another carrier's traffic, SBC Missouri recognizes that it has Commission-approved interconnection agreements that call for SBC Missouri to provide transiting service, and will fulfill its obligations under those agreements. It is also apparent from the Commission's approval of these agreements and Staff's position in this case[51] that the Commission and Staff view transiting (regardless of who provides it) as an important service through which the various networks in the state are connected.

If the Commission believes it appropriate, SBC Missouri is still willing to handle transit traffic, provided that the transit carrier (1) is not made financially responsible for the terminating or other expenses associated with another carriers' traffic; (2) is permitted to charge a compensatory, market-based rate for handling the traffic; and (3) is permitted to establish reasonable limits on the amount of transit traffic it must handle.[52]

Further, SBC Missouri charges between $0.003 and $0.004 per minute of use (significantly less than a penny per minute) for transiting traffic pursuant to interconnection agreements with wireless carriers. The Commission has approved interconnection agreements between SBC Missouri and all of the wireless carriers listed in the complaint of the MITG Companies. Their proposed termination rates are many multiples greater than SBC's transiting rate (Chariton Valley's is 15-20 times SBC Missouri's transit rate and Northeast's is over 37

[50] Verizon-Virginia Arbitration Order, para. 117.
[51] See, Staff's Statement of Positions, Case No. TC-2002-57, filed July 12, 2002, p. 3-4.
[52] This is the same position SBC Missouri has taken in Case No. TC-2002-1077, BPS Telephone Company et. al's. complaint against Voicestream and Western Wireless.

times greater).[53] SBC's transiting rates do not provide compensation for paying ILEC terminating charges. Four of the MITG Companies are billing terminating access pursuant to their access tariffs, while three of the MITG Companies are currently billing pursuant to their wireless interconnection tariffs. In either case, the rates they are seeking for terminating the wireless carriers' traffic is far greater than the rate SWBT charges the wireless carriers for transiting traffic. (Ex. 13, Hughes Rebuttal, pp. 3-4).

With respect to the instant case, the Commission should reject the MITG Companies' attempt to impose liability on SBC Missouri and Sprint for transit traffic. The imposition of such liability would violate long-standing industry standards as expressed by the FCC. And given the absence of any benefit to transit carriers for allowing their networks to be used by other carriers, and the Commission's refusal to allow limits to be placed on the amount of such traffic that must be handled, it would be inappropriate and unfair to impose any financial obligation for this traffic on transit companies. The transiting rates charged by SBC in its Commission approved interconnection agreements were not designed to recover the terminating rates of the MITG Companies for traffic originated by the Wireless Carriers and in no way provide SBC any compensation for such a terminating expense. SBC Missouri therefore respectfully requests the Commission to make clear that transit carriers have no liability for this type of traffic.

9. Does the record support a finding that Petitioners are barred from collecting compensation for traffic in dispute under the principles of estoppel, waiver, or any other affirmative defense pled by any of the Wireless Carrier Respondents?

SBC Missouri has not taken a position in this case on this issue.

10. Are Petitioners obligated to negotiate interconnection agreements with wireless carriers on an indirect basis that provide for reciprocal compensation for traffic exchanged between their respective networks through a transiting carrier?

[53] T. 1482, 1538.

Yes. The interconnection obligations of the Act do not distinguish between direct interconnection and indirect interconnection. The Act defines the very first duty of all telecommunications carriers as the duty "to interconnect *directly or indirectly* with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1) (emphasis added). Section 251(b)(5) obligates local exchange carriers to establish reciprocal compensation, and Section 251(c)(1) requires local exchange carriers to engage in good faith negotiations to establish those arrangements. Nothing in the Act or the FCC's rules requires wireless carriers to directly interconnect as a prerequisite to negotiating an interconnection agreement.

11. What, if any, relevance do any of the terms and conditions of SBC Missouri's Wireless Interconnection Tariff (PSC Mo. No. 40) have in connection with the determination of any of the issues in this proceeding?

None. SBC Missouri handles virtually no traffic under its Wireless Carrier Interconnection Services Tariff. This tariff dates back to the early 1990s[54] and is not an access tariff. (Ex. 13, Hughes Rebuttal, p. 15).

Prior to the Act, the FCC permitted LECs to file state tariffs for wireless interconnection. But even then, it required that those rates be negotiated with the wireless carriers:

> Compensation arrangements. In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal concern. We therefore express no view as to the desirability or permissibility of particular compensation arrangements, such as calling-party billing, responsibility for the costs of interconnection, and establishment of rate centers. Such matters are properly the subject of negotiations between the carriers as well as state

[54] With respect to traffic to third party carriers, the Commission approved SWBT's restructuring of its Wireless Carrier Interconnection Tariff to be a transiting only tariff on February 4, 1998, in Case No. TT-97-524. (Ex. 13, Hughes Rebuttal, p. 15).

> regulatory jurisdiction. Compensation may, however, be paid under contract or tariff provided that the tariff is not an "access tariff" treating cellular carriers as interexchange carriers, except as noted in footnote 3.[55]

After the Act, the FCC promulgated regulations that recognized such pre-existing wireless interconnection arrangements and provided a safe-harbor for them as long as the LEC was willing to negotiate reciprocal compensation agreements:

> Section 51.717 Renegotiation of existing non-reciprocal arrangements.
>
> (a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-reciprocal compensation for transport and termination of local telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties.
>
> (b) From the date that a CMRS provider makes a request under paragraph (a) until a new agreement has been either arbitrated or negotiated and has been approved by a state commission, the CMRS provider shall be entitled to assess upon the incumbent LEC the same rates for the transport and termination of local telecommunications traffic that the incumbent LEC assesses upon the CMRS provider pursuant to the pre-existing arrangement.[56]

As the Commission is aware from the numerous interconnection agreements it has approved between SBC and wireless carriers, SBC has complied with this FCC requirement. Now, over 99% of all traffic that wireless carriers send to SBC for transit or termination is via Commission approved interconnection agreements. None of the wireless carriers in this proceeding interconnect with SBC via SBC's Wireless Carrier Interconnection tariff. (Ex. 13, Hughes Rebuttal, pp. 15-16).

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[55] In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 1986 FCC LEXIS 3878, Appendix B, "Policy Statement on Interconnection of Cellular Systems," para. 5, released March 5, 1986 (the exception noted by the FCC in footnote 3 pertains to roaming cellular traffic).

[56] 47 C.F.R. section 51.717

12. Who is responsible to pay compensation due, if any, to the Petitioners for intraMTA traffic terminated prior to the effective date of a Petitioner's Wireless Termination Tariff?

If any compensation is found to be due, such compensation is the responsibility of the originating carrier. As the FCC stated in its Unified Carrier Compensation Regime docket, "existing access charge rules and the majority of exiting 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."[57]

13. Should SBC block uncompensated wireless traffic for which it serves as a transiting carrier?

No. Without a specific order from the Commission, a transiting carrier has no authority to block transiting wireless traffic at the request of a terminating carrier when it is having a dispute with the originating carrier.[58] From a practical perspective, transiting carriers are not in a position to know the status of the relationship between the originating wireless provider and the terminating company, or whether there are appropriate grounds for stopping the flow of traffic. Moreover, without a specific order from the Commission, transit carriers have expressed serious concerns about the possibility of incurring liability to the originating carrier for cutting off its traffic. (Ex. 13, Hughes Rebuttal, p. 20).

In the event the Commission authorizes such blocking, the LEC requesting the blocking should be responsible for the transiting carrier's cost of implementing the blocking, consistent with the Commission's Order in Case No. TT-2001-139, in which it stated, "the requesting small LEC must pay SBC the cost of blocking the traffic."[59]

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[57] Unified Carrier Compensation NPRM, at para. 9 (emphasis added).

[58] In Case No. TC-2001-20, the Commission ordered SWBT to block certain traffic destined for Mid-Missouri. SWBT complied with the Commission's order. (Ex. 13, Hughes Rebuttal, p. 21).

[59] See, Report and Order in Case No. TT-2001-139, issued February 8, 2001 at p. 43.

Not only is such cost recovery appropriate, it is essential. The rates received by transiting companies only help recover the cost of providing the transiting function. They do not cover any of the costs that would be incurred to modify the network to block a particular originating carrier's traffic to a particular terminating carrier's exchanges. Because this type of work is not in any carrier's normal mode of operation, transit companies would be required to divert their resources away from other activities such as central office conversions, NPA relief, large customer requests for services such as Centrex and establishing interconnection trunks for CLECs. Blocking is a detailed process that requires numerous hours of switch translations work to complete and there is currently no means to recover these costs. (Ex. 13, Hughes Rebuttal, pp. 21-23).

If an ILEC is not being compensated for completing a carrier's calls, ultimately blocking may be appropriate. However, it should be a last resort, as customers of both the wireless carrier and the ILEC would be adversely affected by having the traffic blocked. Requiring a specific Commission order would help insure that blocking was justified under the circumstances and that the costs of implementing such blocking are appropriately recovered from the requesting carrier. (Ex. 13, Hughes Rebuttal, p. 23)

II. COMMISSION QUESTIONS FROM THE AUGUST 5-9, 2002 HEARING

SBC Missouri respectfully submits the following responses to the questions posed by Deputy Chief Regulatory Law Judge Thompson during the course of the hearing August 5-9, 2002in this case:

1. Can the Commission order negotiations between telecommunications carriers?[60]

2. Can the Commission order companies to have interconnection agreements?[61]

The Act does not specifically grant state Commissions the authority to order telecommunications carriers to enter into negotiations under Section 252 of the Act or to have interconnection agreements.

In this case, however, there is no dispute that most of the wireless carriers have actually requested the MITG Companies to negotiate interconnection agreements (and many have indicated that they continue to stand ready to negotiate).[62] There also is no dispute that the MITG Companies rejected those overtures, insisting that the wireless carriers establish direct interconnections with the MITG Companies as a prerequisite to negotiations.[63]

The Commission should make clear that the MITG Companies' position is neither tenable nor consistent with federal law. Under Section 251(a)(1) of the Act, all telecommunications carriers have the duty to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." As Staff has explained, this statutory provision obligates the MITG Companies to accept the wireless carriers' traffic, even if it is sent indirectly through another carrier's (like SBC's or Sprint's) network.[64] Accordingly,

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[60] Tr. 754.

[61] Tr. 754-755.

[62] See e.g., Exhibit 49 (1999 letter from Cingular requesting negotiations for Interconnection and attaching draft agreement as a starting point); and Tr. 1212 (Cingular's commitment of its continued willingness to participate in the negotiation of an Interconnection Agreement and, if necessary, Arbitration of the matter with Complainants). See also Exhibit 17, Pruitt rebuttal, pp. 12-13, Schedules E, G and I (reflecting Sprint's effort to negotiate an Interconnection Agreement with Mid-Missouri Telephone Company).

[63] See, e.g., Exhibit 50 (MITG Companies rejection of Cingular's request to negotiate). See also, Exhibit 17, Pruitt Rebuttal, pp. 12-13, Schedules F, H and I (reflecting Mid-Missouri's rejection of Sprint's requests indicating that "unless Sprint wants to establish a direct physical interconnection with Mid-Missouri, there will be no basis upon which to establish reciprocal compensation.")

[64] See, Staff's Statement of Positions, Case No. TC-2002-57, filed July 12, 2002, pp. 3-4.

the Commission should clarify that a direct interconnect is not necessary before negotiations are to take place under the Act, and that a party's insistence on a direct interconnection as a prerequisite to such negotiations constitutes a failure to negotiate in good faith in violation of Section 251(c)(1).[65]

3. Can the Commission order a company to adopt a wireless termination tariff? [66]

No. The Commission cannot require a company to file a wireless termination tariff. The decision of whether to offer a particular service should be left to the individual carrier. While the powers of regulation delegated to the Commission are comprehensive, the courts have held that those powers "do not clothe the Commission with the general power of management incident to ownership" and that the Commission "has no authority to take over the general management of any utility."[67]

In this case, however, the Commission may outline the parties' obligations under federal law. The Commission should make clear that indirect interconnections between wireless carriers and the MITG Companies are permitted and that a request for negotiation of an interconnection agreement must be honored, regardless of whether the interconnection between the carriers is direct or indirect.

[65] Section 251(c)(1) of the Act imposes on incumbent local exchange carriers "the duty to negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties prescribed in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."

[66] Tr. 755.

[67] State ex rel. Public Service Comm. v. Bonacker, 906 S.W. 2d 896, 900 (Mo. App. 1995); State ex rel. Laclede Gas Co. v. P.S.C., 600 S.W.2d 222, 229 (Mo. App. 1980).

4. Can the Commission unilaterally modify tariffs?[68]

No. The Commission is required to follow Section 392.240, RSMo. (2000). Under this statutory provision, the Commission can order modifications to a tariff only after determining "after a hearing had upon its own motion or upon complaint," that a rate is "unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law . . . or insufficient to yield a reasonable compensation for the service rendered;"[69] or that a rule, regulation or practice is "unjust or unreasonable."[70]

5. What authority prohibits wireless companies from filing tariffs?[71]

6. Can wireless carriers file landline-originated traffic termination tariffs in Missouri?[72]

No. While the Commission's jurisdiction extends to all intrastate "telecommunications facilities and services" and to the "telecommunications companies" providing them,[73] it does not extend to the services offered by wireless carriers. Section 386.020 (53)(c) RSMo (2000) specifically excludes services offered by wireless carriers from the definition "telecommunications service." That section states that "telecommunications service" does not include "the offering of radio communications services and facilities when such services and facilities are provided under a license granted by the Federal Communications Commission under the commercial mobile radio services rules and regulations."

[68] Tr. 755.
[69] Section 392.240(2) RSMo. (2000).
[70] Section 392.240(1) RSMo. (2000).
[71] Tr. 1103.
[72] Tr. 1104.
[73] Section 386.250(2) RSMo. (2000).

III. ISSUES PRESENTED DURING THE SEPTEMBER 8, 2004 HEARING.

1. Unopposed InterMTA Factors.

a. The interMTA factors listed below were negotiated and agreed to between the respective parties and are not opposed by any party. Should the Commission adopt these factors for the purpose of determining interMTA traffic in this Complaint case?

1. Mid-Missouri Tel. Co. and Sprint PCS - Stipulated Factor 43%
2. Alma Tel. Co and Sprint PCS -Stipulated Factor 10%
3. MoKan Dial, Inc. and Sprint PCS -Stipulated Factor 0%
4. Alma Tel. Co and Western Wireless -Stipulated Factor 2.5%
5. MoKan Dial, Inc. and Western Wireless -Stipulated Factor 2.5%

SBC Missouri does not contest these factors.

b. The interMTA factors listed below have been proposed by three Complainants and are not opposed by any party. Should the Commission adopt these factors for the purpose of determining interMTA traffic in this Complaint case?

1. Alma Tel Co and Cingular - Factor 0%
2. Alma Tel Co and US Cellular - Factor 0%
3. Alma Tel Co and T-Mobile - Factor 0%
4. Alma Tel Co and Western Wireless - Factor 0%
5. Choctaw Tel Co and Cingular - Factor 0%
6. Choctaw Tel Co and US Cellular - Factor 0%
7. MoKan Dial Inc. and Cingular - Factor 0%
8. MoKan Dial Inc. and US Cellular - Factor 0%
9. MoKan Dial Inc. and T-Mobile - Factor 0%

SBC Missouri does not contest these factors.

2. Contested InterMTA Factors.

InterMTA factors have not been agreed to between the following Complainants and Respondent wireless carriers. The factors proposed by Complainants are opposed by Respondent wireless carriers and SBC Missouri. What factors should be adopted based upon the evidence for traffic between the following petitioners and wireless carrier respondents?

[The factor issues listed at 1-7 and 10-11 have been resolved.]

8. Chariton Valley Tel. Corp. and T-Mobile USA, Inc.
9. Northeast Missouri Rural Tel. Co. and T-Mobile USA, Inc.

The Commission should not adopt Complainants' proposed interMTA factors. Complainants have not met their burden of proof in that they have failed to present sufficient evidence to enable the Commission to determine appropriate factors with any degree of accuracy.

3. Burden Of Proof.

Who has the burden of proof on the interMTA factors that will be used for the purpose of determining interMTA traffic in this complaint case?

Complainants have the burden of proving the accuracy of their proposed factors as a necessary element of their claim.

CONCLUSION

No party is contending that the MITG Companies should not be compensated at appropriate rate levels. However, their attempt to extract access charges on intraMTA wireless traffic from either the originating wireless carrier or the transit carrier violates 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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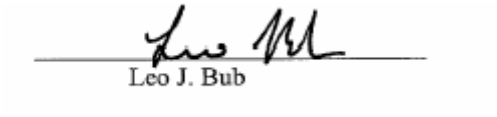
CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on October 22, 2004.



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