BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Northeast Missouri Rural Telephone Company and Modern Telecommunications company, Petitioners v. 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	)	Case No. TC-2002-57

SOUTHWESTERN BELL TELEPHONE COMPANY'S
<u>REPLY BRIEF</u>

In its Initial Brief, Southwestern Bell Telephone Company[1] explained that the claims in the MITG Companies'[2] Complaint conflict with controlling federal law, prior decisions of the Missouri Public Service Commission, and Industry Standards. Nothing in MITG Companies' or Amicus Small Telephone Company Group's (STCG's) Initial Briefs disturbs this. Applicable law simply compels rejection of the MITG Companies' complaints.

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

[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."

A. Controlling Law Makes the Application of Access Charges to Intra-MTA Wireless Traffic Patently Unlawful

The MITG Companies attempt to prosecute their claim in this case by trying to portray the law on wireless interconnection as unclear. But it is not. Federal law makes absolutely clear that access charges may not be applied to wireless originated traffic that originates and terminates within the same Major Trading Area (MTA).[3] The FCC did not make any exception to this absolute prohibition when a wireless carrier seeks an indirect interconnection or when more than two carriers are involved in completing the wireless carrier's call.

Section 251(b)(5). Despite the various contortions the MITG Companies go through, they cannot avoid the obvious illegality of their attempt to apply their access tariffs to intraMTA traffic. For example, the MITG companies question the applicability of the Section 251(b)(5) reciprocal compensation requirement in this situation claiming that there is no "reciprocal" two-way exchange of traffic since its member companies have their customers' calls to wireless carriers handled by IXCs.[4] But there is nothing in the FCC's prohibition against charging access rates on intraMTA wireless traffic making it dependent on the existence of a two-way traffic flow. Reading such an exception into the rule would allow LECs (like the MITG Companies) to deprive wireless carriers of their right to terminate traffic under Section 251(b)(5) -- and completely defeat the FCC's absolute prohibition against charging access rates on intraMTA wireless traffic -- by simply electing not to handle their customers' land to mobile traffic. Given

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

the explicit language the FCC's Local Competition Order, it is clear that the FCC did not intend such an anomalous result.

47 CFR 51.701(c). The MITG companies similarly misapply the FCC's definition of the term "transport" in 47 CFR Section 51.701(c)[5] in an attempt to read the present situation out of the obligation to apply reciprocal compensation rates instead of access charges. They claim that under the FCC's definition, "transport" can only take place between two carriers since it is to be measured from the "interconnection point between the two carriers" to the terminating LEC's end office. They state that because more than two carriers are involved with an indirect interconnection, there is no point of interconnection between the first and third carrier from which the "transport" can be measured.[6]

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

> Many alternative arrangements exist for the provision of transport between the two networks. These arrangements include: dedicated circuits provided either by the incumbent LEC, the other local service provider, separately by each, or jointly by both; facilities provided by alternative carriers; unbundled network elements provided by incumbent LECs; or similar network functions currently offered by incumbent LECs on a tariffed basis. . . .[7]

In this case, transport is being provided by two carriers, the transiting LEC and the terminating LEC. Instead of the terminating LEC providing all of the transport, the transiting carrier is providing part of it (usually transporting the call from the meet point between the wireless carrier

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[4] (MITG Initial Brief pp. 32-37).

[5] 47 CFR Section 51.701(c) states:

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

[6] (MITG Initial Brief pp. 33-36).

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

47 CFR 51.70(b). The MITG Companies also incorrectly claim that the FCC's definition of "local telecommunications" in 47 CFR Section 51.701(b)[8] addresses only the context of a direct interconnection between two carriers and that "the plain meaning of this rule is that reciprocal compensation only applies to traffic exchanged between a LEC and a CMRS provider."[9] But, contrary to the MITG Companies' assertions, there is absolutely nothing in the definition requiring or limiting its application to direct interconnections. Rather, by referencing "telecommunication traffic" in general, it is clear that the FCC intended it to apply to all telecommunications traffic between a LEC and a CMRS provider within the MTA.

SWBT's Wireless Interconnection Tariff. In addition, Amicus STCG points to Southwestern Bell's Wireless Interconnection Tariff and claims that "SWBT's tariff rates are based upon SWBT's access rates and demonstrate that access-based rates are appropriate."[10] This claim, however, is inaccurate and misleading. First, Southwestern Bell's Wireless Interconnection Tariff was filed and approved by the Commission long before the enactment of

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

[8] 47 CFR Section 51.701(b) defines "local telecommunications traffic" as:

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

[9] (MITG Initial Brief p. 34, emphasis in original).

the Telecommunications Act of 1996. That tariff fully complied with the FCC's rules. Before Southwestern Bell filed that tariff, as required by FCC rules, it negotiated the rates in that tariff with wireless carriers. And second, since the passage of the Federal Telecommunications Act, Southwestern Bell has negotiated new interconnection arrangements with nearly all wireless carriers. Under those agreements, they are now paying much lower transport and termination rates pursuant to the Act. Undisputed evidence in this case showed that over 99% of all traffic that wireless send to Southwestern Bell for transit or termination is via commission-approved interconnection agreements.[11] None of the wireless carriers in this proceeding interconnect with Southwestern Bell through this tariff.[12] And even the MITG Companies acknowledge that this tariff has no bearing here.[13]

The United and Mid-Missouri/Chariton Valley Cases. In an effort to bolster their claim that access rates are appropriate for intraMTA traffic delivered in the absence on an interconnection agreement under the Act, the MITG Companies and Amicus STCG point to the Commission's decisions in the United Telephone Complaint.[14] (MITG Initial Brief, pp. 14-15; STCG Initial Brief, p. 6-7).

The Commission should give no weight to these decisions. First, these cases arose under Southwestern Bell's former wireless interconnection tariff under which it actually agreed to terminate wireless carrier traffic in third party LEC exchanges. These cases did not involve transiting. And, second, while the lead case (the United decision), was on appeal, Southwestern Bell was able to reach a negotiated settlement with Sprint and all but two small companies.

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[10] (STCG Initial Brief p. 15)
[11] Ex. 13, Hughes Rebuttal, pp. 15-16.
[12] Ex. 13, Hughes Rebuttal, pp. 15-16.
[13] (MITG Initial Brief p. 17).
[14] Case No. TC-96-112, 6 MoPSC 3rd 244, Issued April 11, 1997, and its decision in the Sheraton Valley and Mid-Missouri Complaint. Sheraton Valley and Mid-Missouri's Complaint against SWBT for terminating cellular compensation, Case No.'s TC-98-251 and TC-98-240, Report and Order, issued June 10, 1999.

Although it had very valid grounds for appeal, any decision on appeal would have had no practical application as Southwestern Bell had at that time been deemed to be a transiting carrier through the Commission's approval of Southwestern Bell's revised wireless interconnection tariff. (Southwestern Bell similarly did not appeal the Mid-Missouri Chariton Valley as it too would have required it to incur additional expense in continued litigation on an issue that would have no future impact).[15]

Case No. TC-2002-325. The MITG Companies also cite to the Commission's decision in Case No. TC-2002-325, claiming that the Commission previously held that with respect to MITG Companies' exchanges, "SWBT is an IXC just as any other...since termination of the PTC Plan, SWBT's role in Small Company Exchange is an IXC role."[16] But, as is evident from the language in the Commission's Order (quoted in MITG Companies' Initial Brief), the factual basis of that ruling is completely inapposite, making the Commission's ruling inapplicable to the situation here.

Unlike the present case in which Southwestern Bell and Sprint are simply providing an input (i.e., transiting) on a wholesale basis to another carrier providing a retail telecommunications service, SWBT in TC-2000-325 was providing a complete end-to-end retail interexchange telecommunications service (specifically, SWBT sought to continue providing originating interexchange 800 service calling out of Mid-Missouri's exchanges). The Commission viewed Southwestern Bell as acting like an IXC because its retail offering was no different than similar retail offerings provided by IXCs.

Here, however, neither Southwestern Bell nor Sprint are offering retail telecommunications services. Rather, they are like the terminating carriers, simply providing a

[15] Hughes transcript 1184-1186.

[16] MITG Initial Brief, p. 40. This citation is also inapposite.

wholesale input (transiting) that the wireless carriers need to provide retail telecommunication services to their end-users. There is nothing in the Commission's Order in Case No. TC-2000-325 that supports the proposition that one wholesale provider should be responsible for other wholesale expenses incurred on another carrier's retail telecommunications service.

The Kansas Arbitration Decision. The MITG companies claim that the position Southwestern Bell took for itself in Kansas is the precise opposite of the position it is taking in Missouri. (MITG Initial Brief, pp. 42-44). Even after being informed that the dispute in Kansas concerned the exchange of local traffic and had nothing to do with the traffic at issue here, MITG in its Brief persists in its claim that Southwestern Bell in Kansas was unwilling to accept toll traffic from TCG that was originated by another carrier.

It is obvious that MITG either still does not understand the nature of the dispute that occurred in Kansas, or is intentionally misrepresenting it. There, TCG was primarily seeking to preclude Southwestern Bell from establishing a direct interconnection with other carriers for the exchange of local traffic. On Southwestern Bell-originated local traffic to another CLEC, TCG wanted to force Southwestern Bell to subscribe to TCG's transiting service to reach other CLECs. The arbitration had nothing to do with interexchange toll traffic or wireless traffic.

And the record from the Kansas arbitration confirms this. Throughout the arbitration, TCG inappropriately attempted to raise several access charge compensation issues. In each instance, Southwestern Bell objected as they were not local interconnection issues. And each time, the Arbitrator consistently ruled that access related issues were beyond the scope of the arbitration.[17]

[17] Arbitrator's Order 5: Decision, filed August 7, 2000 in KCC Docket No. 00-TCGT-571-ARB at p. 15 (Exhibit 31) ("Kansas Arbitration Order").

When the record from the Kansas arbitration (e.g., testimony, briefs and the arbitration award) is reviewed in its entirety, it is clear that the "pertinent parts" MITG has trotted out in this case have nothing to do with the issues in this case. The full Kansas record reveals that when the parties and the Arbitrator discussed "transit traffic," they were only referencing local traffic. The carriage of toll traffic across a tandem LEC's network for termination in another LEC's exchange (which is properly called "transport" under traditional LEC access tariffs) or the transit of wireless traffic, was not subject to arbitration. This is easily seen by the Arbitrator's rejection of TCG's attempt to avoid paying Southwestern Bell access charges on TCG's toll services (by claiming local reciprocal compensation rates applied because TCG intended to offer its customers a LATA-wide local calling scope). Holding that this was not an arbitrable local interconnection issue, the Arbitrator ruled that it was a matter controlled by Southwestern Bell's approved access tariffs.[18]

While there may have been a dispute over appropriate compensation, at no time did Southwestern Bell indicate it would refuse to transport TCG's traffic.

B. Imposing Liability on Transit Carriers Violates Industry Standards.

The MITG Companies also challenge the well-established standard industry practice under which the originating carrier is responsible for compensating all other carriers for the use of their facilities in carrying and terminating its customers' calls. Instead, the MITG Companies claim tandem companies like Southwestern Bell and Sprint should be held liable for traffic transited in absence of an interconnection agreement or wireless interconnection tariff. The MITG Companies assert that the only authorized mechanism for the delivery of this traffic is their access tariff and under that tariff, the transit company "is the IXC purchasing access services." (MITG Initial Brief p. 10).

[18] Kansas Arbitration Order, pp. 13-15.

But undisputed evidence shows that this position is incorrect and that the vast majority of traffic involving two terminating LECs is completed as Southwestern Bell has described: the originating carrier is responsible for paying the applicable charges of the terminating LECs. At hearing, all of the MITG Company witnesses conceded that when an IXC brings a call to a LEC tandem for termination to another LEC subtending that tandem, the standard industry practice is for both the tandem LEC and the terminating LEC to bill the IXC on a meet point billing basis. The terminating LEC does <u>not</u> bill the tandem LEC that merely transits the call to the terminating LEC.[19]

The MITG Companies also seek to support their view that transit companies should be responsible for the traffic at issue here claiming that they are the IXC purchasing terminating access services and that they "ordered access from the MITG Companies pursuant to access tariffs." (MITG Initial Brief, p. 10.) This too, however, was refuted by undisputed evidence, including admissions from one of the MITG Companies own witnesses. The evidence showed that the common trunk groups between the LECs (i.e., the facilities over which the traffic at issue flows) were not established through placing access service orders (like IXCs order service). Rather, the establishment of facilities between LECs considered "joint provisioning of the common trunk group" and such facilities are established through "mutual discussions" between the LECs.[20]

<u>The STCG's Position before the FCC</u>. In an effort to assist the MITG Companies avoid the affirmative defenses of estoppel and waiver that have been pled, Amicus STCG asserts that the "small companies have consistently and vigorously pursued compensation for wireless-originated traffic before this Commission and "have filed comments in various proceedings

[19] Jones, T. 242-245; Biere, T. 406-407; Godfrey, T. 469-470; Stowell, T. 524-525; Glasco, T. 591-594.

before the Federal Communications Commission," and specifically reference the FCC's Unified Carrier Compensation Regime docket[21]. Amicus STCG, however, neglects to inform the Commission that in that docket, they took the exact opposite of what the MITG Companies are arguing here. The STCG's position was that the existing intercompany compensation arrangements under which the originating party's network pays, has worked well and can continue to work well into the future:

> While the MoSTCG does not necessarily oppose the concept of a unified approach to intercarrier compensation, the Commission's proposal to implement a "bill and keep" intercarrier compensation regime is ill advised. The existing intercompany compensation regime known as calling party's network pays (CPNP) has worked well for a number of years and, with recent rulings by the Commission to address particular problems such as intercarrier compensation for ISP-bound traffic, CPNP can continue to work well into the future. There is no need or reason for the Commission to "throw the baby out with the bath water" for a purely hypothetical regime which has not withstood any empirical analysis.[22]

Transit Carriers as IXCs. In an attempt to impose liability on transiting companies like Southwestern Bell and Sprint, the MITG Companies attempt to portray the transit companies as IXCs. (MITG Initial Brief, pp. 37-41). The evidence, however, does not support their view.

First, transiting carriers like SWBT and Sprint-Missouri are not IXCs. While they each have IXC affiliates, SWBT and Sprint-Missouri are and have always been LECs. Second, transiting LECs and IXCs offer significantly different functions that are not competitive with each other. While the MITG Companies attempt to portray a wireless carrier's transit of a call through a LEC's network as the same as an IXC's using another IXC's network, the two

[20] Hughes, transcript pp. 1189-1197, quoting MITG witness Jones' testimony from p. 260 of the transcript in Case No. TO-99-593).
[21] In the Matter of Developing a Unified Carrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, released April 27, 2001 ("Unified Carrier Compensation NPRM").

situations are very different. IXCs that use another IXC's network have entered into private resale agreements. Under these types of agreements, the reselling IXC (which may not have any physical facilities of its own) often purchases large blocks of transmission capacity on the facility-based IXC's network. Under these agreements, the facility-based IXC not only agrees to carry resellers' traffic across its own network, but also to terminate it on an end-to-end basis. In offering this type of end-to-end service, the facilities of the terminating LEC(s) are a component of the facility-based IXC service and the facility-based IXC must compensate the terminating LEC(s) for using those facilities. Compensation to the terminating LEC(s) is under LEC access tariffs, which call for meet point billing.[23]

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

Transiting LECs are in a very different position. First, they are not offering other carriers an end-to-end service that includes the actual termination of the connecting carrier's traffic to a customer on a third carrier's network. Instead, the transiting LEC offers actual termination of the connecting carrier's calls only to customers within the transiting LEC's own exchanges. If the call is destined for a customer on another LEC's network, the transiting LEC only holds itself out to transport or "transit" the call across its own network so the connecting carrier can reach the network of the terminating LEC. Under the transiting LEC's access tariffs and

[22] See, Initial Comments of the Missouri Small Telephone Company Group, in CC Docket No. 01-92, filed with the FCC on August 21, 2001 at p. 3 (emphasis added, internal citations omitted), a copy of this filing is appended as Attachment 1.
[23] See, Ex. 13, Hughes Rebuttal, pp. 12-13.

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interconnection agreements, it only bills for the pieces of its network used by the connecting carrier. It is up to the connecting carrier to separately compensate the terminating LEC for using its network.[24] And as the admissions from each of the MITG Companies' witnesses demonstrate, that is also what the terminating LECs' access tariffs calls for.[25]

Conclusion

The MITG Companies and Amicus STCG have gone to great lengths attempting to sow seeds of doubt concerning the application of the FCC's wireless interconnection rules. But the truth of the matter is that the FCC's rules leave no such doubt. The FCC's rules are clear and absolute. If the MITG Companies or Amicus STCG truly believed the rules were in doubt, they at any time could have taken their concerns to the FCC. But they have not. Such failure is telling: it shows that they know the rules really are not ambiguous, and that the FCC would reject their views.

WHEREFORE, Southwestern Bell respectfully urges the Commission to reject the MITG Companies' Complaints.

Respectfully submitted,

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[24] See, Ex. 13, Hughes Rebuttal, pp. 12-14.
[25] See note ____, supra.

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on November 22, 2002.

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