BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

Revised/Substituted
Initial Brief of Petitioners

Executive Summary

There have been many settlements reached during these complaint proceedings. There are two CMRS providers for whom traffic settlements have not been reached: T-Mobile and US Cellular. The traffic terminated between 1998 and 2001, and over three more years of traffic has since accumulated. All parties, including T-Mobile and US Cellular, agree that the MITG companies are entitled to compensation for this traffic. A decision is needed now to bring these disputes to an end.

There is no dispute that the Petitioner MITG companies are owed terminating access compensation for interMTA traffic. There is a disagreement as to who should pay the MITG companies: SBC or the wireless carriers.

For intraMTA traffic terminated when a wireless termination tariff was in effect, there is no dispute that Alma, Choctaw, and MoKan are owed the wireless termination tariff rate. There is no disagreement that under that tariff it is the obligation of the originating wireless carrier to pay.

The traffic that is the subject of the most dispute is intraMTA traffic terminated before a wireless termination tariff was in effect, and when no reciprocal compenation agreement was in effect. For this traffic there is a dispute as to what compensation can be applied, and also a dispute as to who has the obligation to pay Petitioners.

Petitioners suggest that access compensation is to be applied to intraMTA traffic terminated before a wireless termination tariff and before a reciprocal compensation agreement. There simply was no other compensation vehicle legally in effect. Only if access is awarded will the two remaining CMRS Respondents--T-Mobile and US Cellular--have the incentive to complete the reciprocal compensation agreement process and end this 6 year old dispute

Only if access is ordered can this Commission provide for an end to the continued "calculated inaction" of US Cellular and T-Mobile. As the Commission and the Courts have observed, this calculated inaction consists of:

1. not obtaining reciprocal compensation agreements;

2. refusing to pay because there is no reciprocal compensation agreement.

There are now two separate Opinions of the Missouri Courts of appeal that hold state tariffs *can* be applied to intraMTA wireless traffic when there is no reciprocal compensation agreement in place. The first was in the appeal of the Commission's Order approving wireless termination service tariffs, or the "*Sprint*" decision. 112 SW3d 20, 25 (Mo App W.D. 2003). The second was in the appeal of the Commission's rejection of the small companies' proposed tariff clarification that access would continue to apply until superseded by an approved interconnection agreement, or the "*Alma*" decision.

October 5, 2004 Opinion of the Western District of Missouri Court of Appeals, Case No. WD 62961, et al. (this Opinion is subject to pending rehearing and/or transfer motions).

There is now no legal basis in Missouri to conclude Petitioners' access tariffs cannot be applied to intraMTA traffic terminated before a wireless termination service tariff was effective, or before a reciprocal compensation agreement becomes effective. The access tariff was the only compensation mechanism addressing traffic coming from outside the rural ILEC network. The access tariff was the only mechanism in existence before the wireless termination tariff, and before a reciprocal compensation agreement.

The Commission previously entered an order saying wireless carriers should get approved agreements with Petitioners before sending traffic to SBC destined to terminate to Petitioners.[1] At that time, over six years ago, the Commission wanted to change the existing regime. Under that regime SBC paid Petitioners terminating access for wireless traffic, and SBC obtained compensation from the wireless carriers for this service under SBC's Wireless Interconnection Tariff. The Commission knew that, in order to change to reciprocal compensation, the wireless carriers had to obtain reciprocal compensation agreements with the MITG companies.

Without approved agreements reciprocal compensation could not replace access compensation. T-Mobile and US Cellular failed to get the necessary agreements. SBC allowed the traffic to terminate when there were no such agreements. The access regime was not seamlessly replaced by the reciprocal compensation regime, as the Commission Order contemplated. Because access was not replaced, it remained in effect.

Under Petitioners' access tariffs, it is the access customer that pays. This would be SBC. Neither T-Mobile nor US Cellular have ordered access and made themselves

subject to Petitioners' access tariffs. This is why in the complaint cases of United, Chariton Valley, and Mid-Missouri, the Commission ordered SBC to pay access.[2]

If SBC is required to pay for this access traffic, it will not harm SBC. The cost will ultimately be placed upon T-Mobile and US Cellular. In their agreements with SBC, which this Commission has approved, T-Mobile and US Cellular have agreed to indemnify SBC for **"any charges rendered"** by the MITG companies. Indemnifying SBC for terminating access compensation will assure that T-Mobile and US Cellular are provided the necessary incentive to complete reciprocal compensation agreements.

This is the only lawful result. This is the only logical result. There is no such thing as reciprocal compensation until an agreement is approved. The Commission cannot order that reciprocal compensation be applied to 1998-2001 intraMTA traffic. There were no reciprocal compensation agreements then in effect between Petitioners, T-Mobile, and US Cellular.

There is no reciprocal compensation for intraMTA traffic until it terminated pursuant to an approved interconnection agreement.

In 1996 the Telecommunications Act introduced a new compensation vehicle for local traffic, a reciprocal compensation agreement. That Act also set forth a specific statutory procedure that was required to be completed before reciprocal compensation was effective. 47 USC 252 requires a request from a CMRS provider, negotiations, and that voluntary agreements be approved by the state commissions. If voluntary agreements could not be reached, either the CMRS provider or the ILEC was given the

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[1] December 23, 1997 Report and Order, TT-97-524

[2] April 11, 1997 Report and Order, TC-96-112, Complaint of United Telephone Company against Southwestern Bell Telephone Company for Failure to Pay United its Terminating Access for Cellular-Originated Calls which are Terminated in United's Territory; and June 10, 1999 Report and Order, TC-98-

option, between the 135th and 160th days following receipt of the request to petition the state commission for arbitration of the open issues.[3]

The 1996 Act, which became effective in February of 1996, gave the FCC six months to establish the regulations necessary to implement reciprocal compensation. 47 USC 251(d). About six months later the FCC handed down its August 8, 1996 "Interconnection Order" and reciprocal compensation rules. It was not until then that Major Trading Areas were announced and the telecommunications world informed that the intraMTA call jurisdiction would be the basis for negotiating reciprocal compensation agreements.

The federal statute, the Interconnection Order, and the reciprocal compensation rules all were put in place for the purpose of *developing* interconnection agreements. Reciprocal compensation did not simply materialize. An agreement had to be developed *and* approved. The 1996 Act did not make local reciprocal compensation for intraMTA traffic automatically effective.

The undisputed facts of this case bear this conclusion out. SBC and the CMRS providers are asking this Commission to accept the proposition that, after the 1996 Act, the only compensation mechanism the MITG can apply to intraMTA traffic is reciprocal compensation. They suggest that reciprocal compensation was somehow automatic after

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251 and TC-98-340, Complaints of Chariton Valley Telephone and Mid-Missouri Telephone against Southwestern Bell Telephone Company for Terminating Cellular Compensation.

[3] This Commission knows full well that reciprocal compensation is contained in interconnection agreements submitted to the Commission for approval. Since 1997 the Commission's docket load has been significantly increased by the filing of scores of such agreements between ILECs and CMRS providers, as well as between ILEC and CLECs. In some instances the Commission has had to resolve petitions for arbitration of uncompleted agreements. One of the least ingratiating aspects of the 1996 Act was its unfunded mandate that State Commissions handle the approval of interconnection agreements

the 1996 Act, and applied before agreements were in place. But their own actions contradict them.

Before they obtained reciprocal compensation with SBC, CMRS providers purchased interconnection services from SBC's Wireless Interconnection Tariff. Thereafter, in order to obtain reciprocal compensation with SBC, the CMRS Respondents all had interconnection agreements approved with SBC and other large ILECs. See Exhibits 25-38. Not only has T-Mobile obtained approved agreements with SBC, it has also obtained approved agreements with three small ILECs.[4]

If the '96 Act made reciprocal compensation automatically materialize, those agreements US Cellular and T-Mobile negotiated and had this Commission approve were unnecessary. However, it is clear that wireless carriers went to a great deal of time, trouble, and expense to request interconnection, engage in negotiations, execute agreements, and submit them to This Commission for approval. The indisputable fact that these agreements were approved by affirmative orders of this Commission establishes that SBC and the CMRS providers knew it was necessary to have an agreement in order to obtain reciprocal compensation for intraMTA traffic.

It is clear that this Commission, like the '96 Act, recognized that there had to be an approved agreement before reciprocal compensation became effective. All of the Commission Orders approving CMRS agreements with ILECs are testament to this.

When the Commission determined to allow SBC to modify its wireless interconnection service tariff, the Commission required SBC's tariff to state that such traffic would not be sent to the MITG companies unless there was an approved

agreement. There would have been no need for this tariff language if reciprocal compensation for intraMTA traffic was automatic.

It is also established fact that this Commission Ordered SBC to pay access for all wireless traffic terminating to United, Chariton Valley, and Mid-Missouri Telephone. The Commission's orders applied to traffic delivered after February of 1996 effective date of the '96 Act. If reciprocal compensation were automatic with the '96 Act, those decisions would have been incorrect.

Finally, precedent establishes that it is permissible to apply state tariffs to this traffic until the CMRS provider obtains a reciprocal compensation agreement. Both This Commission's Order approving wireless termination tariffs, and the decisions of the Court of Appeals, held that reciprocal compensation is NOT required of state tariffs, but is only required of agreements. It is lawful to apply state tariffs prior to the effective date of an agreement. All that T-Mobile and US Cellular will need to do in order to escape the application of state tariffs is complete reciprocal compensation agreements with Petitioners, as they should have done years ago.

The Relief Petitioners Request will not Supplant the Procedures of the 1996 Act.

The 1996 Act set forth the procedure for a Wireless Carrier to obtain reciprocal compensation. An award of access compensation will do nothing to prevent T-Mobile and US Cellular from obtaining reciprocal compensation. The Commission recognized this in approving wireless termination service tariffs. The Court of Appeals also recognized this in affirming that Commission decision. If T-Mobile and US Cellular are

[4] See IK-2004-0165, in which the Commission issued a November 5, 2003 Order approving a traffic terminating agreement between T-Mobile and Goodman Telephone Company; TK-2004-0166 between T-Mobile and Ozark Telephone Company; and IK-2004-0167, T-Mobile and Seneca Telephone Company.

sufficiently incented after indemnifying SBC, they can begin and complete the interconnection agreement process If not they can keep indemnifying SBC.

Awarding Petitioners the decision they request will not prevent future agreements. Many small companies, including Petitioners, have comported with their obligation to negotiate agreements in good faith. Petitioners have completed and had approved agreements with Cingular and Sprint PCS. These agreements do contain rates lower than access rates, and lower than wireless termination service tariff rates.

Conversely, not awarding compensation will prevent future agreements, and will assure more disputes. As long as T-Mobile and US Cellular get a free ride, and partake of further "calculated inaction", they will have no incentive to complete agreements as Sprint PCS and Cingular have done.

Petitioners Proposed Findings of Fact and Conclusions of Law

Petitioners submit accompanying proposed findings and conclusions. There is no need here to further discuss and duplicate the reasoning set forth in the accompanying proposed findings and conclusions. The proposed findings and conclusions have been written to include adequate references to facts and law relied upon. Such an Order would not be subject to reversal and remand for failure to adequately explain the basis of the Commission's decision.

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ATTORNEYS FOR MITG

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, via U.S. Mail, postage prepaid, this 22 day of October, 2004, to all attorneys of record in this proceeding.

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