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.	)	

Initial Brief of Petitioners
the Missouri Independent Telephone Company Group

Executive Summary

Of the four possible decisions the Commission is presented with[1], the MITG respectfully suggests that the Commission determine that the MITG companies' access tariff applies to all traffic terminated in the absence of either an approved interconnection agreement or an approved Wireless Termination Service tariff. This decision would allow the MITG companies' access tariff to apply to the traffic in dispute, except for traffic terminated to Alma, Choctaw, and MoKan after the effective date of their Wireless Termination Service Tariffs in February, 2001. The Commission has already held the

[1] 1. The Commission can apply a rate which has yet to be approved, and apply this rate to previous periods when no Wireless Termination Service Tariff was in effect (Staff's suggestion).
2. The Commission can accept the wireless carrier's argument that *de facto* bill and keep was in place during the period the traffic in question was terminated (Wireless Carrier's suggestion).
3. The Commission can apply the presumption that all of the traffic in dispute is interMTA traffic for which access is appropriate, in that Respondents have failed to preserve records upon which the jurisdiction can be determined (MITG suggestion).
4. The Commission can clarify that its prior decision holding access cannot be charged on intraMTA traffic is applicable to the terms of reciprocal compensation agreements, but

Wireless Termination Tariffs do apply after February, 2001. The applicability of either the wireless termination or access tariff would remain subject to being superseded by an approved interconnection agreement. Continued applicability of state tariffs until replaced by reciprocal compensation arrangements is what the Commission has contemplated in its Orders approving tariffs and interconnection agreements. Reciprocal compensation arrangements have yet to happen because Respondents have sent traffic without paying and without completing the statutory interconnection agreement approval procedure.

This decision would be most consistent with the Commission's decisions in the SWBT Tariff case and in the *Mark Twain* Tariff decision. It would also be appropriate for the Commission to clarify its *Alma* Tariff decision.[2] The language of the *Alma* Tariff decision stating that access "cannot apply to any intraMTA wireless traffic" was an overstatement. All parties here agree that access can and does apply to intraMTA traffic delivered by IXCs. The *Alma* decision statement is overbroad in that respect.

The *Alma* decision statement is overbroad in another respect. The intraMTA local calling scope is used for purposes of *developing* reciprocal compensation agreements. Until an agreement between a ILEC and a wireless carrier is approved, the pre-existing compensation can continue to be used. The pre-existing compensation, or "safe harbor", for such traffic to the MITG companies is their access tariff. The utilization of access compensation for intraMTA wireless traffic *prior* to the effective date of an agreement is appropriate.

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that it is appropriate for access to be applied to intraMTA traffic terminated in the absence of such an agreement (MITG suggestion).

[2] Ex 52.

Such a decision will be of no harm to SWBT. In its wireless interconnection service tariff, and in its interconnection agreements, SWBT has protected itself from the risk the wireless carriers would send traffic to the MITG companies absent approved agreements, leaving state tariffs as the only available compensation mechanism. SWBT has reserved a right to indemnity from wireless carriers for payments SWBT makes to the MITG companies. Any access payments SWBT makes to the MITG can be recovered by SWBT from the wireless carriers.

This decision is just as SWBT and the wireless carriers have failed to enforce those provisions of tariff and agreements requiring interconnection agreements *before* traffic was sent to the MITG companies. This decision will end the 4 and ½ years of impasse between MITG companies and wireless carriers, and provide the wireless carriers the needed incentive to complete the interconnection agreement process.

With respect to the other three possible decisions, Staff's suggestion to retroactively apply a rate not in existence is unworkable. The wireless carriers' suggestion that the MITG be awarded nothing, or "defacto" bill and keep, for the MITG's "bad faith" negotiations, is not supported by fact or by law. The last possible decision is presuming that traffic for which jurisdictional call detail has not been provided will be deemed inter-MTA traffic subject to access tariffs. This decision would result in this case being resolved favorably to Complainants. However, such a result would likely be temporary. Instead of incenting the wireless carriers to complete the interconnection agreement process, such a result would likely cause the wireless carriers to attempt to present some type of call information, and continue to maintain the "defacto" bill and keep position. At that time the issues in this case would resurface.

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Introduction

One crucial issue in this case is the notion that SWBT is *obligated* by the Telecommunications Act of 1996 to "transit" traffic destined for termination to other LECs (such as the MITG companies) at reciprocal compensation rates. SWBT relies upon this notion for the conclusion that it is a "transiting carrier", not an interexchange carrier or "IXC". SWBT relies on this notion when it claims it is not being paid sufficient revenues to justify paying terminating access, even though it was SWBT that permitted the traffic to terminate in the absence of approved agreements. It is this notion that gives rise to the wireless carriers' claim that the MITG companies have no right to negotiate for direct interconnections, even though direct interconnections were agreed to with SWBT. This notion is the only possible justification for the actions of SWBT and the wireless carriers in excluding the MITG companies from reciprocal compensation negotiations and agreements which addressed traffic terminating to the MITG companies.

The FCC has recently ruled that ILECS such as SWBT have no such obligation to transit traffic at TELRIC rates:

> "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 statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such 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. Furthermore, any duty Verizon may have under section 251(a)(1) of the Act would not require that service to be priced at TELRIC." [3]

[3] See the July 17, 2002 Memorandum Opinion and Order in the Matter of the Petition of Worldcom, Cox, and AT&T versus Verizon-Virginia, DD Docket No. 00-218, paragraph 117:

The Kansas Corporation Commission has *agreed with SWBT* that ILECs are entitled to reject the transit structure as a basis for reciprocal compensation. If the ILEC prefers direct interconnection, as SWBT stated in Kansas, and as the MITG companies state here, they are entitled to negotiate for direct connections. The FCC decision rejecting the "transiting at TELRIC rates" obligation supports the Kansas decision. The notion that reciprocal compensation principles require a dominant ILEC such as SWBT to transit traffic to third party carriers has been rejected.[4] These decisions are consistent with the MITG position in this case (which was the SWBT position in Kansas).

The Missouri Commission originally intended that, should SWBT and wireless carriers send traffic to small rural ILECs *without* there first being an approved agreement therefore, SWBT would be ultimately responsible for payment to the small rural ILECs.[5] If tariffs and interconnection agreements had been enforced, and the traffic in question not passed in the absence of agreements with the MITG companies, the necessary incentive for agreements between the wireless carriers and MITG companies would have existed.[6]

SWBT has violated the prohibition against terminating traffic in the absence of agreements continually since the date of the Commission's decision in TT-97-524. The traffic has been continually reported by SWBT as terminating, some even prior to the February 5, 1998 effective date in TT-97-524. SWBT bases its reason for doing so on its position that it had an obligation to transit this traffic, and that this supposed obligation

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[4] Such a requirement is the entire underpinning of SWBT's justification to include transit traffic in agreements to which the MITG companies were not party. Ex 13, Hughes rebuttal, pp. 2-6.
[5] Questions of Commissioner Lumpe and Answers of Staff witness Scheperle, T. 928.
[6] Questions of Judge Thompson and Answers of SWBT witness Hughes, T. 977-985.

somehow overrode state tariffs and approved interconnection agreements.[7] Now the FCC has ruled that no such obligation exists. There is no reason to further countenance such actions, as the basis proffered has not been accepted by the FCC.

Some Wireless Carriers have paid access bills rendered. Some have not. Some have been inconsistent in paying some access invoices but not others.[8] Wireless carriers did not begin paying Alma, Choctaw, and MoKan pursuant to wireless termination tariffs until after the complaint herein was filed. Schedule 3 reflects that, after they had been sued, the wireless carriers did commence making some payments.[9]

At the time of hearing, Schedule 1 to MITG testimony indicated that 13,343,747 MOU had been reported as terminating between February 5, 1998 and December 31, 2001. Schedule 2 reflects total amounts owed only for that portion of the total traffic for which compensation was not received, computed at access tariff rates unless a wireless termination tariff was in effect, in which case that tariff's rate was applied. Over $1,300,000 is owed through the end of 2001. The uncompensated amounts are increasing every month thereafter.

Perhaps the Wireless Carriers believe that because they are licensed and directly regulated only by the FCC, they do not have to abide by decisions of the Missouri Public Service Commission in tariff or agreement proceedings. This is not the case. They have either purchased services pursuant to SWBT's Wireless Interconnection Service Tariff,

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[7] Hughes answers to questions from Judge Thompson, T. 982-985, 986-987. Sprint Mo Inc takes the same "transit" position, although it has neither agreements nor tariffs authorizing its provision of "transit" services for traffic it transits to MoKan, and even though it does not provide reports similar to the CTUSR. Idoux, T. 1020.

[8] Ex 1, Jones Direct, pp. 5-6.

[9] See Ex 1, Jones direct, pp. 4-6; also schedules 1, 2, and 3 to MITG surrebuttal, Exs 2, 4, 6, 8, and 10. Stowell, T. 517-518.

approved by this Commission, or they have purchased services pursuant to interconnection agreements approved by this Commission. As customers or users of the facilities of regulated Missouri ILECs, they are subject to the jurisdiction of this Commission, as This Commission made clear in its Order Regarding Subject Matter Jurisdiction[10].

SWBT, Sprint Mo Inc., and the wireless carrier Respondents have failed to meet the obligations imposed upon them by law, by tariff, and by interconnection agreement, to obtain agreements with the MITG companies prior to sending them traffic.[11] In some agreements this was not just the obligation of the wireless carrier, but it was the affirmative obligation of SWBT.[12] In some Commission Orders approving interconnection agreements, the parties were specifically ordered by the Commission to comply with the Order in TO-97-523, and get approved agreements with third party LECs.[13]

If the Respondents had not defaulted on this obligation, this case would not have been necessary. Of course, if the Respondents had not defaulted on this obligation,

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[10] In this February 14, 2002 Order in this docket the Commission held that it did have jurisdiction to determine the obligations of wireless carriers procuring service pursuant to Missouri tariffs, and pursuant to Missouri approved interconnection agreements.

[11] Pertinent excerpts from the SWBT/wireless carrier interconnection agreements, along with the Orders approving them, were admitted as Exs 25-38. All of them obligate the wireless carrier to obtain agreements with third party providers. For example, Ex 30, page 10, prohibits Ameritech Mobile from sending such traffic "unless and until" it has an agreement.

[12] Ex 31, for example, at page 10, states that "The Parties agree to enter into their own agreements with third party providers".

[13] Ex 26, Commission Order in T0-98-156 at page 8; Ex 38, Commission Order in TO-98-219, at page 5, which "conditioned approval of the Cingular/SWBT agreement upon compliance with the decision in TT-97-524. The Order in TT-97-524, Ex 45, at page 22 approved tariff language stating the wireless carriers "shall not" send such traffic to SWBT unless there was an agreement with the other carrier.

neither TT-99-428 (the *Alma* tariff case) nor TT-2001-139 (the *Mark Twain* tariff case) would have been necessary. If the process had been completed as the Commission anticipated, the issues associated with the MITG companies and reciprocal compensation would have been resolved long ago.

Fundamental to intercarrier compensation is the long-standing industry tradition that it take place pursuant to an enforceable compensation mechanism. For reciprocal compensation the mechanism is an approved interconnection agreement. For interexchange traffic terminating to an ILEC, the mechanism is an access tariff.[14] The Commission has recognized this by repeatedly requiring SWBT and the wireless carriers to obtain agreements with rural ILECs before sending them traffic. It is only if this requirement is followed that the traffic will always terminate pursuant to an approved compensation mechanism.

The MITG points out that other ILECs besides themselves are harmed by the pervasive vagaries associated with the transiting scheme. Sprint Missouri Inc. is receiving calls originated by carriers it has no agreement with, and is not receiving compensation for that traffic.[15] Perhaps because Sprint Mo Inc.'s harm is overshadowed by the interests of its wireless affiliate, Sprint PCS, Sprint Mo Inc. has been silenced at the holding company level. This is a major problem with the "transiting scheme". It allows traffic to terminate in the absence of agreements. SWBT claims it is obligated to transit traffic at TELRIC rates, even though there is no agreement involving the third party LECs. As long as carriers such as SWBT transit traffic without agreements in

[14] Ex 1, Jones Direct, pp 6-9.
[15] Idoux, T. 1019.

place, wireless carriers and CLECs have the ability to send traffic without compensation being collected.

SWBT will not be harmed by application of access tariffs until a reciprocal compensation arrangement is approved. In its agreements with Respondent wireless carriers, it is the obligation of the wireless carriers to indemnify SWBT for any and all charges rendered.[16] Upon payment of the charges required by the MITG access tariffs, SWBT will be entitled to full reimbursement by the wireless carriers.

Nothing has displaced the applicability of MITG access tariffs, except for the wireless termination service tariffs of Alma, Choctaw, and MoKan, effective since February, 2001. For traffic SWBT delivered in the absence of an interconnection agreement or wireless termination service tariff, the only mechanism authorizing the delivery of this traffic was the access tariff.[17] Under that tariff, SWBT is the IXC purchasing terminating access services.[18] SWBT ordered access from the MITG companies pursuant to access tariffs. No wireless carrier purchased service under the access tariffs.

The reciprocal compensation arrangements between SWBT and the wireless carrier respondents are not binding upon the MITG companies. The MITG companies are not parties to those arrangements. SWBT is not an ILEC authorized to negotiate reciprocal compensation for local traffic terminating to the MITG companies. Only the

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[16] See Exs 25-27, 30-38. In each of these agreements, SWBT is entitled to indemnity from the wireless carriers for any termination charges, for billing an collection costs, and for attorneys fees rendered by the third party LEC in the absence of an agreement. For example Ex 30, 34, 36, and 37 entitle SWBT indemnity for "any termination charges rendered by a third party provider".

[17] Ex 1, Jones direct, pp 11-13.

MITG companies are authorized to negotiate reciprocal compensation arrangements for traffic terminating to the MITG companies. In a December 1996 Arbitration Order in TO-97-40/TO-97-676, the Commission held that independent LECs are not affected by arbitrations of interconnection agreements to which they are not party, and access tariffs continue to apply.[19]

There is no other relationship established upon which compensation for the traffic at issue can be based. For the traffic at issue, except for the wireless termination tariffs of Alma, Choctaw, and MoKan, the only authorized mechanism applicable to the traffic here are access tariffs.[20]

SWBT claims it "holds itself out" to wireless carriers to provide only a "transiting" function.[21] "Holding itself out" is not a basis for intercompany compensation. In the telecommunications industry, something more than a unilateral "holding out" is necessary. Only approved tariffs, approved interconnection agreements, or executed intercarrier agreements suffice.

SWBT is an access customer of the MITG companies. MITG access tariffs control this relationship. SWBT cannot override approved tariffs by "holding itself out" to Wireless Carriers as providing some limited role contrary to MITG tariffs. The MITG companies, not being a party to any arrangement wherein SWBT has "held itself out".

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[18] It is noted that for MoKan Dial, Sprint Mo Inc is the IXC purchasing access from MoKan.

[19] Ex 2, Jones surrebuttal, pp 8-9.

[20] Ex 1, Jones direct, pp 8-9.

[21] Even though SWBT advocates a "transiting scheme", the evidence shows that SWBT does not accept the transiting scheme for traffic terminating to SWBT. Instead SWBT bills the delivering carrier. The evidence also shows that SWBT cannot even follow its own scheme. SWBT reported to the MITG companies that Cingular was the "originator" of Alltel traffic, when in fact Cingular was the deliverer. Ex 1, Jones direct, pp 21-23.

The MITG companies have never "held themselves out" to accept traffic on any basis other than access tariffs, an approved reciprocal compensation agreement, or a wireless termination tariff.[22]

In fact, when the MITG companies learned of the transit traffic terminating without their consent, and without authorizing agreement, they specifically requested that SWBT and Sprint stop the delivery of this traffic.[23] SWBT and Sprint have failed to comply. It cannot be said the MITG companies have accepted such "holding out".

Access tariffs were the sole "filed tariffs" applicable to traffic terminating prior to a wireless termination tariff or prior to an approved reciprocal compensation arrangement

Access tariffs are the exclusive compensation vehicle applicable to SWBT's trunks to the MITG companies. Under the "filed tariff doctrine", the MITG companies access tariffs are the exclusive source of terms and conditions applicable to SWBT as an access customer. Unless another tariff applies, or unless an approved reciprocal compensation arrangement applies, access tariffs to apply to traffic delivered by SWBT.

MITG access tariffs apply to intra-MTA traffic that is originated by wireless carriers and delivered via an intermediate carrier prior to the wireless termination tariffs or prior to an approved agreement. This is consistent with the filed tariff doctrine and prior decisions by this Commission, Missouri courts, and the United States Court of Appeals for the Ninth Circuit.

The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of published tariffs. *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). "Neither a customer's ignorance nor a utility's misquotation of the applicable tariff provides refuge from the

[22] Biere, T. 679-681.

terms of the tariff." *Id.* Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the exclusive source of the terms and conditions governing the provision of service of a carrier to its customers. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002).

In *Laclede Gas v. Gershman*, 539 S.W.2d 574, 577 (Mo. App. E.D. 1976), the court observed that "lawful tariffs are published and are available to the public." The court reasoned, "The shipper must be held to notice of the lawful rate in effect at the time of shipment. Here, there is no misrepresentation of a lawful rate by the gas company, or a billing based upon an unlawful rate." *Id.* Accordingly, the court explained that the utility must be compensated for the full amount lawfully due to it under the law and the rates fixed by the Commission. *Id.*

In the instant case, MITG companies' access tariffs were the only tariffs in place that would apply to wireless-originated traffic delivered via SWBT's facilities to the MITG prior to the wireless termination tariffs or an approved agreement under the Act. These access tariffs set forth the terms, conditions, and rates for use of the MITG companies' facilities and services. Therefore, the MITG companies must be compensated for the full amount lawfully due under their Commission-approved access rates for any wireless-originated traffic that was delivered before the effective date of the wireless termination tariffs of Alma, Choctaw, and MoKan.

The wireless carriers have relied heavily on the *Three Rivers Telephone Cooperative*[24] decision from the U.S. District Court of Montana in their arguments before the Commission, the Cole County Circuit Court, and the Western District Court of Appeals. For example, in the Western District the wireless carriers stated that they were

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[23] See the July 26, 1999 letters to SWBT, Sprint Mo Inc, and GTE, attached to Ex 2, Jones surrebuttal.

[24] *Three Rivers Telephone Cooperative v. U.S. West Communications*, 125 F. Supp.2d 417 (D. Mont. 2000).

"aware of only one judicial opinion addressing the status of intra-MTA calls originating on a wireless network."[25] The wireless carriers then cited the *Three Rivers* case for the proposition that local exchange companies may not collect terminating access charges for intra-MTA wireless calls.

Unfortunately for the wireless carriers, the *Three Rivers* case has been reversed and remanded by the Ninth Circuit Court of Appeals. The Ninth Circuit explained:

> Because the Independents' tariffs form the exclusive source of the obligations between the independents and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, 47 U.S.C. § 251-52, without interpreting the tariffs themselves.[26]

In this case, the small companies' access tariffs provided the exclusive source of the terms, conditions, and rates for the completion of wireless-originated calls. Therefore, until the Commission approves an alternate compensation arrangement or interconnection agreement for wireless-originated traffic, the Commission must interpret and apply the MITG companies' access tariffs.

Prior decisions by this Commission and the Cole County Circuit Court both hold that access rates are appropriate for intra-MTA traffic that is delivered to the MITG companies' exchanges in the absence of a compensation or interconnection agreement.

In 1997, the Commission addressed a factual scenario similar to the facts presented by this case. See *United Telephone Company Complaint*, Case No. TC-96-112 (6 Mo. P.S.C. 3d 224) *Report and Order*, issued April 11, 1997. In the *United* complaint

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[25] Brief of AT&T Wireless, Verizon Wireless, and Sprint Spectrum L.P., filed July 13, 2001, page 31, filed in *AT&T v. Missouri Public Service Comm'n*, 62 S.W.3d 545 (Mo. App. W.D. 2001). In this case, the Western District reversed and remanded the Commission's *Alma* tariff decision for failure to provide adequate findings of fact.

[26] *Three Rivers Telephone Cooperative v. U.S. West Communications*, (9th Cir. 2002), No. 01-35065, D.C. No. CV-99-00080-RFC, *Memorandum Opinion*, filed August 27, 2002.

case, SWBT had been delivering wireless calls to United Telephone Company (now Sprint), and United filed a complaint at the Commission seeking compensation for the wireless calls being delivered. In that case, the Commission held, "In the absence of some other consensual method of payment, termination of this traffic must be paid for under United's access tariff, Mo. P.S.C. No. 26." *Id.* at 231 (emphasis added). The Commission concluded that SWBT had delivered wireless-originated traffic to United's exchanges without compensating United, and the Commission stated, "SWBT should have compensated United in accordance with its access tariff." *Id.*

Likewise, in two cases involving MITG companies, the Commission held that access rates apply to wireless-originated traffic delivered by SWBT in the absence of an agreement. See *Chariton Valley and Mid-Missouri's Complaint against SWBT for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-240, *Report and Order*, issued June 10, 1999. The *Chariton Valley* case, which was decided in 1999, held that wireless-originated traffic terminated to Small Companies in the absence of a compensation agreement was "subject to the terminating access rates prescribed by the approved tariff adopted by each of those companies." (emphasis added). Both the *United* and *Chariton Valley* cases were decided after the implementation of the 1996 Act and the release of the FCC's *Interconnection Order*.

The Cole County Circuit Court has squarely ruled that access rates apply to wireless-originated traffic that is delivered to the small companies in the absence of an approved agreement under the Act. The Court explained:

> The Telecommunications Act of 1996 does not preclude Relators from collecting switched access compensation until an interconnection agreement containing reciprocal compensation replaces switched access.

> Switched access rates may lawfully be applied prior to the approval of an interconnection agreement.[5]

Thus, until a compensation or interconnection agreement is approved, the small companies are entitled to be compensated pursuant to their lawfully-approved access rates for wireless-originated traffic that is terminated to their exchanges.

The Commission and Circuit Court rulings that access applies to traffic delivered in the absence of an agreement are consistent with Missouri case law. For example, in *Laclede Gas v. Hampton Speedway*, 520 S.W.2d 625, 630 (Mo. App. E.D. 1975), the court explained:

> The general principle is that, even though there has been no specific request for goods or services, where goods and services are knowingly accepted by the party receiving the benefit, there is an obligation to pay the reasonable value of such services and a promise to pay such reasonable value is inferred by either the conduct of the parties or by law under circumstances which would justify the belief that the party furnishing such service expected payment.

The court went on to state that "by receiving the benefit and use of gas and gas service, a promise to pay the lawful and reasonable charge of such service is implied." *Id.* at 631.

In this case, the wireless carriers acknowledge that they have used the small companies' termination facilities and services. In doing so, the wireless carriers and their customers have received the benefit of completing calls to the small company exchanges. Therefore, they should be expected to pay the reasonable value for the use of those facilities – the small companies' lawful and Commission-approved access rates – for traffic that was delivered prior to a wireless termination tariff or an approved agreement under the Act.

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[5] *State ex rel. Alma Telephone Company v. Missouri Public Service Comm'n*, Case No. 00CV323379, *Findings of Fact, Conclusions of Law, Judgment, Decision and Order*,

The traffic is SWBT interconnection agreement Traffic

The CTUSRs the MITG receive from SWBT do not distinguish between traffic that SWBT carries pursuant to its PSC Mo No. 40 Wireless Interconnection Tariff and traffic that SWBT carries pursuant to interconnection agreements.[27] At hearing, SWBT stated that "over 99%" of the traffic is sent pursuant to interconnection agreements, and *none* of the wireless carrier respondents purchase from SWBT's tariff.[28] This testimony is not disputed by any party. As none of the Respondents purchase from tariff, all of the traffic at issue appears to be interconnection agreement traffic.

The terms and conditions of SWBT's PSC Mo No 40—the wireless interconnection service tariff—therefore do not apply here. It was in the SWBT tariff proceeding—TT-97-524-- that the MITG companies were given the obligation to bill the wireless carriers first, and to bill SWBT for secondary liability[29]. As the tariff structure does not apply, the MITG companies were not required to bill the wireless carriers for the traffic in question. There was no secondary liability of SWBT for interconnection agreement traffic. The indemnity arrangements between SWBT and the wireless carrier apply pursuant to interconnection agreement, not SWBT tariff.

The MITG companies were not parties to any SWBT interconnection agreement. They are not to be bound or to be prejudiced by any provision of any SWBT

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issued Nov. 1, 2000, ¶ 30.

[27] Hughes, T. 945-946.

[28] Hughes rebuttal, Ex 13, page 16, lines 7-10.

[29] See the December 23, 1997 Report and Order in TT-97-524. See testimony David Jones, T. 817-819, establishing that SWBT's CTUSR's do not distinguish between interMTA or intraMTA traffic, do not distinguish between SWBT Tariff traffic or SWBT Agreement traffic, and that the Commission never authorized CTUSR's for Agreement traffic.

interconnection agreement[30]. The terms of the interconnection agreements under which SWBT sent the traffic to the MITG companies have no effect on the MITG companies.

United States Cellular

According to SWBT's CTUSRs, Respondent United States Cellular is the wireless carrier responsible for sending the most terminating traffic to the MITG companies. For the time period covered by testimony filed prior to the hearing, SWBT reported a total of 5,984,696 USCellular terminating MOU. Valued at the access rates or Wireless Terminating Tariff Service rates in effect, the amounts due the MITG companies for uncompensated USCellular traffic is $681,271.54.[31] USCellular alone is responsible for about ½ of the traffic at issue in this case.

Prefiled testimony indicated that, USCellular agreed that most of its traffic destined for Mid-Missouri was inter-MTA traffic (for which access compensation applied).[32] At hearing, evidence was adduced that, as the traffic of USCellular was interMTA, USCellular agreed an interconnection agreement was of no use. USCellular withdrew from negotiations, continued to send interMTA access traffic, and SWBT continued to report access traffic in CTUSR reports no entity has paid for.[33]

Despite all of this evidence, USCellular did not file any rebuttal testimony.[34] USCellular did not cross-examine any MITG witness. As a result, the MITG companies' cases against USCellular have not been contradicted by *any* evidence USCellular proffered in the record.

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[30] 47 USC 252 (e)(2).
[31] See Schedules 1 and 2 to MITG witnesses' surrebuttal, Exs. 2, 4, 6, 8, and 10.
[32] Ex 2, Jones surrebuttal, p 33.
[33] Ex 70, Ex 71, cross examination Jones, T. 252-253.
[34] Ex 2, Jones surrebuttal, p 4.

The MITG companies ask that, as USCellular has failed to respond to the case made against it, the Commission enter an Order awarding the MITG companies compensation at access tariff rates from SWBT[35], the IXC that delivered access traffic pursuant to an access connection, and that SWBT[36] be awarded indemnity from USCellular pursuant to SWBT's Interconnection Agreement with USCellular.

The MITG position would not require the construction of new facilities

MITG testimony at hearing made it clear that a direct connection is equated to a separate, dedicated trunk for the wireless carrier, that is not tandem switched by SWBT and placed on "common" trunks. MITG testimony at hearing also made it clear that the "indirect" interconnection described traffic switched by SWBT's tandem and placed over a "common" access trunk, commingled with other types of traffic.[37]

Some parties claimed that the MITG position would require them to construct brand new facilities in order to obtain a direct interconnection. This is not true. The facilities already exist with the capacity to carry the traffic. All that needs to be done is for the existing trunks to be converted from a "common" or "indirect interconnection" trunk to a trunk ordered by, and dedicated to, the Wireless Carrier traffic. This would only require a conversion of existing facilities, not the construction of new facilities.[38]

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[35] In the case of MoKan, this award would be against Sprint Mo Inc, the IXC delivering the traffic to MoKan.
[36] Again, Sprint for MoKan traffic.
[37] See T. 250-252, 263-264, 280-283, where David Jones described the "direct connection" as an existing circuit dedicated to traffic between a small LEC and a wireless carrier, with no SWBT tandem involved; and an indirect interconnection as a non-dedicated, or "common" circuit where the circuits included the SWBT tandem. See T. 423-426 for similar testimony of William Biere.
[38] Jones, T. 387-388; Biere, T. 423, 431-432;

This is the same arrangement the wireless carriers have with SWBT. They must obtain a dedicated trunk, and be responsible for all traffic. SWBT does not accept "common" or "combined" traffic from the wireless carriers where SWBT is required to bill a carrier other than the deliverer. Applying that same structure to the MITG companies, if there is insufficient traffic to justify a dedicated trunk, by leaving it on SWBT's common trunk they are not obtaining a reciprocal compensation connection with the MITG companies. Instead they are relying upon SWBT delivering the traffic in its IXC capacity[39].

Prior Commission decisions contemplated that access would continue to apply until replaced by an approved agreement

The Commission has previously ruled that in the absence of some other consensual method of payment, termination of wireless traffic must be paid under access tariffs.[40] In its April 11, 1997 Order in TC-96-112 regarding United's Complaint against SWBT for terminated wireless traffic, at page 11, the Commission found that:

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

In the Mid-Missouri and Chariton Valley complaint cases against SWBT for terminated wireless traffic, SWBT was ordered to pay pursuant to access tariffs.[41]

In the Commission's December 11, 1996 Arbitration Order regarding the AT&T and MCI arbitration with SWB, TO-97-40/TO-97-67, the Commission stated:

> "The independent LECs were not a party to this case and should not be affected by the results of this arbitration. Until such compensation agreements can be developed, the company's intrastate switched access rates should be used on an interim basis. The intrastate switched access rates are currently used when toll

[39] Ex 2, Jones surrebuttal, pp 17-18.
[40] Ex 1, Jones direct, pp 15-17.
[41] Ex 1, Jones direct, p. 16

> traffic is exchanged between the companies and would be appropriate to use on an interim basis. This will avoid forcing the results of this arbitration on companies not a party to the case."

The problem presented here is what compensation mechanism to apply when there is no reciprocal compensation agreement. The above decisions suggest that access is appropriate to be applied.

With respect to the safe harbor, § 251(g) of the Act specified continued enforcement of existing compensation structures in existence at the time of enactment of the Act:

> "(g) CONTINUED ENFORCEMENTOF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information services providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996..."

Key Legal Issue—Interconnection/Reciprocal Compensation under the TCA '96

The difference between the parties' interpretations of the Act is at the heart of each issue presented to the Commission. Respondents contend that SWBT is required to transit traffic to the MITG companies at TELRIC rates, the MITG companies are required to accept the traffic on this transited basis, and thus the MITG companies are required to negotiate reciprocal compensation from the transited point. Moreover, they contend the MITG cannot charge access on intraMTA traffic at all.

The MITG companies contend it is the obligation of the wireless carriers to obtain an approved agreement before access is subject to displacement by reciprocal compensation. Until that is done, access continues to apply.

Respondent wireless carriers argue that reciprocal compensation became the "default" mechanism after the Act. Under their interpretation access could not apply to intraMTA traffic, and the ILEC was at risk to obtain compensation until the *ILEC* obtained a reciprocal compensation mechanism. This position was comprehensively refuted.[42]

Under the MITG position, existing access compensation is the safe harbor that applies until the agreement is effective. There is no issue as to what applies prior to the agreement. The access regime was not disturbed by the Act until a reciprocal compensation arrangement superseded it.

Respondent's position does not answer the question of what compensation vehicle applies before the approval of an interconnection agreement. This explains their need to come up with a concept that does not even exist--"defacto bill and keep". But, even if defacto bill and keep were a mechanism recognized by the Act, the wireless carrier logic suffers from a gap. That gap is the lack of any compensation vehicle to apply *before* a company supposedly acts in bad faith. If the Act, effective in February of 1996[43], *ab initio* precluded the application of access to intraMTA traffic, what compensation mechanism applied *prior* to an ILEC negotiating in bad faith? What status quo or "safe harbor" applied then?

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[42] Ex 2, Jones surrebuttal, pp 4-8. In this testimony Mr. Jones demonstrated that the access compensation existing at the time of the 1996 Act remained in place, as a "safe harbor", until a wireless carrier requested interconnection, negotiated or arbitrated its request, and the resultant agreement upon approval created reciprocal compensation. This is why the Act created prospective duties—"to negotiate", "to establish reciprocal compensation", in agreements "to fulfill" the duties imposed by the Act.

[43] . The FCC did not promulgate interconnection and reciprocal compensation rules until August, 1996.

The Act created a time frame for negotiation and/or arbitrating an agreement that can take between 160 days to 9 months[44] *after* the date interconnection is requested. Making the unwarranted conclusion the MITG companies were acting in bad faith as of 135 days after interconnection was requested, what compensation vehicle applied *before* interconnection was requested, or *during* the 135-160 days before arbitration could have been requested?

More importantly, the remedy under the Act for bad faith negotiations is the wireless carriers' right and power to compel, by arbitration, a reciprocal compensation arrangement in which bad faith is construed against the perpetrator. There is nothing in the Act, or FCC rules, authorizing "defacto bill and keep" as a *penalty* for bad faith.

The Respondent's view of the Act is not reconcilable with the continuation of the access regime, the "safe harbor" provisions of the Act. Respondent's view is not reconcilable with the logical and orderly continuation of the safe harbor compensation mechanism until replaced by reciprocal compensation as contained in an approved agreement. The MITG position is supported by the Act, the federal rules, and decisions interpreting them.

Reciprocal Compensation rules apply to the establishment of an agreement, not to the safe harbor existing prior to the agreement.

A legal issue in this case deals with construction of FCC's establishment of the MTA. All parties agree that the FCC has established the MTA as being the "local" area for purposes of *establishing* reciprocal compensation for wireless traffic. Where the parties differ is whether, *prior* to the establishment of reciprocal compensation

[44] 47 USC 252(b).

arrangements, this FCC rule precludes the application of access tariffs to intraMTA traffic.

The MITG suggests that the designed use of the MTA as local for purposes of *developing* reciprocal compensation arrangements to replace access has been contorted into a flat prohibition against applying access tariffs to intraMTA traffic. Such a prohibition does not exist. All parties agree that when an IXC delivers intraMTA traffic, access applies. Today IXCs pay access for intraMTA traffic. Both Sprint PCS and Verizon Wireless collect access from the terminating IXC on intraMTA traffic.[45] Sprint PCS has successfully sued AT&T before the FCC for application of access to such traffic delivered by AT&T.

The *Alma* decision held that the mere *designation* of the MTA as local for purposes of developing reciprocal compensation arrangements precluded the application of access tariffs. In essence the *Alma* tariff decision held that the reciprocal compensation rules, designed to be the rules for the *process* of developing reciprocal compensation arrangements, precluded the necessity of completing that process—a reciprocal compensation agreement. The *Alma* decision is incorrect in that regard.

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

> "we will define the local service area for calls to or from a CMRS network [wireless carrier] **for the purposes of applying reciprocal compensation obligations under section 251(b)(5)**. ... Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-

[45] Sprint PCS recently won such a complaint against AT&T. Verizon Wireless also believes it should be receiving access from the delivering IXC. Clampitt answers to questions from Commissioner Gaw, T. 1093-1095.

> authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation. Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."

Thus, the FCC defined the MTA as the wireless carriers' local service area for the purposes of applying reciprocal compensation obligations under section 251(b)(5).[46] The FCC did not determine that access could never be applied to intraMTA traffic. The FCC did not decide that access did not continue until replaced by an interconnection agreement. In the absence of applying reciprocal compensation—where there is no arbitration to decide, or no agreement to approve—reciprocal compensation does not apply. The FCC recognized that state tariffs can continue to apply until replaced by interconnection agreement.

This Commission followed suit, in the *Mark Twain* Order[47], and recognized that reciprocal compensation concepts apply to the *development* of terms of reciprocal compensation arrangements, but that state tariffs can and do apply until replaced:

> "Thus, it is apparent from the Act that reciprocal compensation arrangements are a mandatory feature of **agreements** between the CMRS carriers and the small LECs. However, the record shows that at present there are no such agreements between the parties to this case. The Act does not state that reciprocal compensation is a necessary component of the **tariffs** of LECs or ILECs. Therefore, the Commission concludes that **Section 251(b)(5) of the Act simply does not apply to the proposed tariffs** herein at issue. For the same reasons the Commission concludes that the proposed **tariffs are not unlawful** under Section 251(b)(5) of the Act."

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[46] David Jones testified, in response to questions from Judge Thompson, that the FCC definition of the MTA as a local calling scope only applies in the confines of an interconnection negotiation and agreement, not outside those confines. T. 763.
[47] February 8, 2001 Report and Order, TT-2001-139, pages 29-30, Ex 62.

The conclusions reached by the Commission regarding the state wireless termination tariffs in *Mark Twain* are equally applicable to the MITG state access tariffs, which have been in effect prior to adoption of the Telecommunications Act of 1996. Reciprocal compensation is a mandatory feature of interconnection agreements, not access tariffs. MITG access tariffs do apply in the absence of agreements between the wireless carriers and the MITG companies containing reciprocal compensation arrangements. Section 251(b)(5) does not apply to the access tariffs. Application of the access tariffs is not unlawful. If the wireless carriers dislike application of the access tariffs, they can take advantage of the reciprocal compensation provisions of the Act.[48]

The *Mark Twain* decision stands in vivid contrast to the *Alma* decision. In *Alma* the Commission held that the designation of the MTA as local for purposes of *developing* reciprocal compensation flatly *prohibited* the application of state access tariffs to *any* intraMTA traffic. The *Alma* decision failed to consider the proposition that section 251(b)(5) does not apply to state tariffs, and is only a mandatory feature of interconnection agreements. The *Alma* decision is an overstatement of the law, in that it does not recognize access does apply to intraMTA traffic carried by IXCs. The *Alma* decision is also an overstatement of the law in that it does not recognize that access *does* apply to intraMTA traffic to small ILECs prior to the approval of a reciprocal compensation agreement.

MITG witness Jones, at pages 9-11 of his surrebuttal, Ex 2, made these observations of the *Mark Twain* decision. He testified that, in the *Mark Twain* decision the Commission found that the Wireless Termination Tariffs were in the nature of access

[48] Staff witness Scheperle admitted that there was no difference in applying access tariffs

tariffs. If reciprocal compensation is not a necessary component of Wireless Termination tariffs, which are in the nature of access tariffs, it is likewise not a necessary component of access tariffs. If the reciprocal compensation principles of the Act do not apply to state-approved Wireless Termination Tariffs, which are in the nature of access tariffs, they do not apply to state-approved access tariffs. If the Wireless Termination Tariffs, which are in the nature of access tariffs, are not unlawful if applied to terminating intraMTA wireless traffic, then it should likewise not be unlawful to apply access tariffs to the same traffic. If the CMRS providers do not like the access tariff rates, they can compel arbitration under the Act, just as the Commission recognized they could do if they did not like Wireless Termination Tariff rates.

The only difference between the Wireless Termination Tariffs and Access Tariffs is one of rate. The Wireless Termination Tariffs charge all access element rates, with a partial CCL element. The access tariffs charge the very same elements. Mr. Jones pointed out that there was no regulatory difference justifying allowing Wireless Termination Tariffs to apply, but not allowing access tariffs to apply.

Interconnection and Reciprocal Compensation under the Act

The conclusion that reciprocal compensation does not apply to indirect, transiting, three carrier collaborations is borne out by the terms of the federal statutes as well as the federal rules. The structure of the Act and FCC rules state that, while there is an obligation to *connect* indirectly, there is no requirement that *reciprocal compensation* be constructed over an indirect interconnection.

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to the traffic than in applying the wireless termination tariffs. T. 861.

When the FCC announced its reciprocal compensation rules, its Interconnection Order[49], at paragraphs 1034 and 1043, it recognized that reciprocal compensation was intended for situations in which two carriers collaborate to complete a local call:

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

At the time the FCC failed to specifically address the situation in which three carriers are involved in completing what would be a local call under the rules established for negotiating reciprocal compensation agreements. This Commission, in its December 23, 1997 Report and Order in TT-97-524, pages 15 and 16, recognized that the FCC's failure left the Commission without guidance:

> "The FCC's order does not appear to consider a situation in which three carriers are needed to complete a local call, as may be the case where interconnection is indirect rather than direct....Whether the FCC also intends for reciprocal compensation arrangements to apply in situations where there is an indirect interconnection between a wireless carrier and a third-party LEC, and consequently three carriers are needed to terminate the traffic, is an open question."

[49] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, August 8, 1996.

Since that time, the FCC has provided the guidance missing in December of 1997. In 2000, the FCC decided a complaint case involving paging carriers and local exchange carriers (LECs). Paging carriers have the same status as CMRS providers in this regard. In *TSR Wireless, LLC, et al. v. US West Communications, Inc., et al.*, File Nos. E-98-13 et al., *Memorandum Opinion and Order*, FCC 00-194 (2000 FCC LEXIS 3219) rel. June 21, 2000, p. 19, para. 3.In that case, the FCC observed:

> Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. **Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.**

Paragraph 26 of that same Order recognized that the term "interconnection" under section 251(c) (2) refers only to the physical linking of two networks for the mutual exchange of traffic. The FCC's decision was part of the basis, along with interpretation of the Act, underlying the November 1, 2000 Judgment of the Cole County Circuit Court in Case No. 00CV323379 which held that the MITG interpretation of the Act was correct, and the *Alma* decision incorrect.[50]

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[50] Ex 2, Jones surrebuttal, pp 28-29,quoted these pertinent excerpts from that Judgment:
"27. The Commission's January 27, 2000 Report and Order is unlawful and unreasonable in the following respects:
28. This Court's prior ruling and the Commission's prior decisions establish an obligation upon wireless carriers and CLECs to establish interconnection agreements containing reciprocal compensation arrangements with Relators prior to sending traffic terminating to Relators.
29. This obligation is consistent with the Telecommunications Act of 1996, which requires carriers desiring interconnection under a reciprocal compensation arrangement instead of access charges to obtain an approved agreement. 47 USC 251(b)(5).
30. The Telecommunications Act of 1996 does not preclude Relators from collecting switched access compensation until an interconnection agreement containing

In response to questions from Commissioner Gaw, Staff witness Scheperle correctly quoted the FCC Interconnection Order, paragraphs 1043-1044, for the propositions that the current access charge was preserved, so that current charges for wireless traffic would also be preserved. The mistaken assumption in Mr. Scheperle's response was that, for purposes of wireless traffic terminating to the MITG companies, was that access was not being applied at the time of the Act.[51] The record demonstrated that SWBT was ordered to pay access on traffic delivered at the time the Act was adopted.

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reciprocal compensation replaces switched access. Switched access rates may lawfully be applied prior to approval of an interconnection agreement.

33. The Commission's actions in approving interconnection agreements between SWBT and CMRS providers, and between SWBT and CLECs, which agreements encompassed traffic destined to terminate in Relators' exchanges, did not effect the applicability of Relators' access tariffs to such traffic. If the approval of interconnection agreements to which Relators were not parties were to have such an effect, the result would be the termination of traffic to Relators for which Relators receive no compensation, and for which Relators have no mechanism to preclude the termination of such traffic. This would, and indeed has, resulted in prejudice to Relators in that Relators have suffered the use of their facilities without compensation, and has resulted in discrimination in that Relators are effectively precluded from obtaining direct interconnection agreements allowing for the identification of the responsible carrier, jurisdiction of the traffic, appropriate compensation rates, and the ability to preclude the delivery of such traffic until a business relationship was established, as SWBT has been able to obtain, in violation of 47 USC 252(e)(2)(A)(i).

34. This Court further concludes that Relators cannot be compelled to enter into interconnection agreements constructed over an "indirect" interconnection. Under an indirect interconnection there is no direct physical connection between Relators and the CLECs or CMRS providers transiting terminating traffic to Relators over SWBT's intermediate facilities, and as such there is not "transport' as required under the law for reciprocal compensation. 47 USC 251(c)(2); *Comptel v FCC*, 117 F.ed 1068 (Ith CCA 1997); 47 USC 251(c)(1); 47 CFR 51.701(c); 47 CFR 51.701(b); *In the Matter of Implemenation of Local Competition Provision in the Telecommunications Act of 1996*, CC Docket No. 96-325, First Report and Order, rel. Aug. 1, 1996, paragraphs 1033-1044. The Commission's conclusion of law number 2 is an erroneous interpretation of law."

[51] T. 1125-1126.

47 USC 251(a), general duty to interconnect

47 USC 251(a) provides:

> "GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.—Each telecommunications carrier has the duty—
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"

Subsection (a) of §251 is silent with respect to compensation. It does not state, as Respondents suggest, that reciprocal *compensation* can be required over an indirect interconnection. All subsection (a) requires is the duty to *interconnect* directly or indirectly. The parties to this case, including the MITG companies, have met the duty to interconnect indirectly. The parties all agree that the traffic in question has terminated. It has terminated because the parties have interconnected their networks.

47 USC 251(c)(2) duty to establish interconnection points

47 USC 251(c)(2) provides:

> (c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
> (2) INTERCONNECTION—The duty to provide, for the facilities and equipment of any **requesting** telecommunications carrier, interconnection with the local exchange carrier's network—
> (b) at any technically feasible point **within the carrier's network**"; (emphasis added)

The duty of the ILEC is to interconnect at a point within the ILEC's network. This refers to a direct interconnection. The duty to provide interconnection is owed by the ILEC to a "requesting carrier". This refers to the local competitor—the CLEC or wireless carrier—who starts the interconnection agreement process set forth in section 252 of the Act.

47 CFR 51.5, the definitions section of the federal interconnection rules, defines "interconnection" as "the linking of two networks for the mutual exchange of traffic." This rule is contrary to the "transiting" or indirect interconnection scheme involving three or more carriers. First, the rule requires the linking of two networks, not three. Second, the rule is for the mutual exchange of traffic, which contemplates two carriers, not three. Third, the rule contemplates a mutual exchange of traffic. That does not occur under the transiting scheme, as traffic from MITG exchanges to wireless carriers does not go over the same SWBT trunk, and it is not carried by the same carriers.

The "transiting" scheme postulated by Respondents does not fit the mandatory language of the Act. Under this "transiting" scheme, there is no connection of the facilities and equipment of any wireless carrier within any technically feasible point within the network of any MITG company.

When SWBT, Sprint Mo Inc., or Verizon bill for "transit" tandem switching and transport services, they bill out of their state access tariffs.[52] It defies logic and common sense for the MITG companies to have to receive reciprocal compensation when, on the same call, an intermediate carrier bills its "transit" out of its access tariff. The same call should not be subject to both access and reciprocal compensation charges. These incongruities are the result of the logical disconnects encountered in trying to make the "transit" theory work in a structure it was not designed for.

It is the duty of the ILEC to establish reciprocal compensation with *requesting* wireless carriers. SWBT is not the ILEC in MITG exchanges. SWBT did not request an interconnection for reciprocal compensation. Only the MITG companies can enter into

[52] Hughes, T. 954-955.

reciprocal compensation arrangements for local traffic terminated to them. SWBT and the wireless carriers are not empowered, particularly in the absence of participation by the MITG companies, to negotiate the terms and conditions of reciprocal compensation for traffic terminating to the MITG companies. Only the MITG companies can provide both transport and termination to the wireless carriers. Only the MITG companies can enter into interconnection agreements containing reciprocal compensation arrangements with the wireless carriers.

47 USC 251(b) (5), duty to establish reciprocal compensation

Subsection 251(b)(5) is the first provision of the 1996 Act that mentions reciprocal compensation:

> (b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.—Each local exchange carrier has the following duties:
> (5) RECIPROCAL COMPENSATION.—The duty to establish **reciprocal compensation arrangements for the transport and termination of telecommunications**."

This subsection does not state that there is a duty to establish reciprocal compensation arrangements over an ""indirect interconnection". Instead the subsection states the reciprocal compensation arrangements are for the "transport and termination" of telecommunications.

FCC rule, 47 CFR 51.701, sets forth the scope of applicability of the reciprocal compensation rules:

"Subpart H—Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic

§ 51.701 Scope of Transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for the transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic.* For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area as established by the state commission;

or

(2) Telecommunications traffic between **a** LEC and **a** CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in §24.022(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal Compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network of the other carrier."

It is noted that under subparagraph (e), a reciprocal compensation arrangement is applicable between two carriers, not three. Second, the title of this subpart H, as well as the language of all of the subsections to subpart H, specifies that reciprocal compensation can only be applied to local traffic. For wireless traffic, subsection (b)(2)[53] specifies that the intraMTA calling scope is applicable only to traffic exchanged between a LEC and a CMRS provider. The plain meaning of this rule is that reciprocal compensation only applies to traffic exchanged between a single LEC and a single CMRS provider, two carriers. The corollary is that reciprocal compensation does not apply when a third

[53] The section was relied upon by Judge Hopkins in the *Alma* tariff decision.

carrier is involved. The definitions used for transport and termination prove this corollary.

The FCC in rule 47 CFR 51.701(c), has defined "transport" for purposes of reciprocal compensation, as:

> "the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch..."

Reciprocal compensation is for the transport and termination of local traffic. Transport is defined as the transmission and switching of local traffic from the interconnection point between the two carriers. Termination is the end office switching and the delivery of the call to the called person's premises.

In the transiting structure there are two interconnection points between three carriers. The first is between the wireless carrier and SWBT. The second is between SWBT and the MITG company. For traffic from a wireless carrier over these two interconnections to terminate to a MITG company, the reciprocal compensation definitions cannot be met.

At the first interconnection point between SWBT and the wireless carrier, SWBT provides only *part* of the transport of this traffic to the MITG company. SWBT provides no termination services at this point.[54] The reciprocal compensation rules apply to the provision of both transport and termination. The use of the conjunctive "and" means both transport and termination services are required for reciprocal compensation. But the service provided by SWBT is not transport and termination. Hence the service provided

[54] SWBT witness Hughes agreed that for traffic going to the MITG companies, SWBT provides part of the transport and none of the termination. T. 952-953.

by SWBT at its interconnection with the wireless carrier, for traffic destined to terminate to the MITG companies, is not reciprocal compensation service.

At the second interconnection point between SWBT and the MITG company, SWBT provides part of the transport thereto[55]. The MITG company provides the balance of the transport to its end office[56]. The MITG company provides all of the termination[57]. Only the MITG company provides both transport and termination. Mr. Scheperle agreed with this analysis, but continues to argue that SWBT's anointment as a "transiting carrier", a concept he admits is not stated in the Act, justifies different treatment for SWBT.[58]

There is no single interconnection point between the wireless carriers and the MITG companies. As set forth above, there can be no transport for purposes of reciprocal compensation in the three carrier collaboration. If there were an obligation to establish reciprocal compensation arrangements over an indirect interconnection involving use of the intermediate facilities of a third carrier, the Act or the FCC rules would have been written to accommodate such a structure.

Under SWBT's "transiting" scheme whereby SWBT attempts to portray itself as a "LEC" operating in MITG exchanges as opposed to an IXC in MITG exchanges, there are *two* carriers—SWBT and the MITG company—handling the CMRS provider's traffic. There is not *a* single LEC and a single CMRS provider involved. SWBT is also

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[55] That transport between SWBT's tandem and its access trunk meetpoint with the MITG company.
[56] The transport from its access trunk meetpoint with SWBT to the MITG company end office.
[57] The MITG company provides all end office switching and delivery of the call to the end user premises.
[58] T. 1139-1140.

involved. The transiting scheme does not fit the definitions of controlling federal statute and rules.

The very nature of the term "reciprocal" connotes a bilateral or mutual arrangement between two parties. Other provisions of the federal rules suggest that two carriers are contemplated. For instance, 47 CFR 51.713(a) addressing bill-and-keep, states that:

> "For purposes of this subpart, bill-and-keep arrangements are those in which neither of the two interconnected carriers charges the other for the termination of local telecommunications traffic that originates on the other carrier's network."

MITG witness Jones succinctly summarized, from the operational standpoint of a LEC, the above distinctions at pages 12-17 of his surrebuttal testimony, Ex 2. Under indirect interconnection, it is not possible for the LEC to provide reciprocal traffic without violating 1+ presubscription requirements.[59]

ILECs and IXCs

Staff witness Scheperle agrees that, for an intraMTA wireless to landline call carried by AT&T, AT&T owes terminating access.[60] SWBT 'witness Hughes agreed.[61] Mr. Scheperle recognized that this conclusion was inconsistent with the Alma decision holding access could *never* apply to an intraMTA call. He recognized that there is no difference in physical facilities or function between AT&T delivering and intraMTA call and SWBT delivering an intraMTA call.[62]

Mr. Scheperle admits that SWBT is not the ILEC in MITG exchanges. He admits that SWBT is not entitled to negotiate reciprocal compensation for MITG companies. He

[59] T. 390-392.
[60] T. 846-847.
[61] T. 1153.

admits that, under SWBT's "transiting scheme", SWBT provides only partial transport, not transport and termination under Section 251(b)(5).[63]

Despite these admissions, Mr. Scheperle refuses to acknowledge that SWBT acts as an IXC in bringing traffic to MITG companies. He readily admitted that when AT&T provides the identical transport function on an intraMTA call, access applies.[64] SWBT also agreed there is identity in function.[65] Instead Mr. Scheperle attempts to differentiate SWBT's role from that of an IXC by denominating SWBT as a "transiting" carrier, even though he agrees that term is not used by the Act.[66] Now that the FCC has rejected the notion that SWBT is required by the Act to transit traffic to third party LECs, the basis for the "transiting carrier" denomination has been eliminated. Now we are back to the basics of the Act's initial delineation of IXC and ILEC roles.

SWBT maintains the position that they are a "LEC carrying interexchange traffic", but in that capacity is not acting as an "interexchange carrier".[67] This is a distinction that makes no sense. When a carrier carries interexchange traffic, it is acting as an interexchange carrier. When SWBT carries interexchange traffic to MITG companies, it acts as an interexchange carrier, as defined in access tariffs. When a LEC acts as a local exchange carrier, it carries local traffic within its exchanges or their local calling scope. More importantly here, SWBT is not the local exchange carrier for MITG company exchanges, the MITG companies are.

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[62] T. 848-851.
[63] T. 849-852.
[64] T. 1139.
[65] Hughes, T. 1158.
[66] T. 850.
[67] Hughes, T. 1154.

For instance, if a landline customer subscribing to SWBT toll services places a call to a wireless customer, SWBT admits that here it functions as an IXC, just as AT&T does for the same call.[68] The only difference is that SWBT would charge AT&T originating access on this call. But this difference substantiates the conclusion that the call is an interexchange call.

Under the Interconnection Order, and under the *TRS* decision, traffic falls under reciprocal compensation if carried by the incumbent LEC, and under access charge rules if carried by an interexchange carrier.[69] Under § 251(h)(1) of the Act, an Incumbent Local Exchange Carrier (ILEC) is defined:

> "For purposes of this section, the term incumbent local exchange carrier means, with respect to an area, the local exchange carrier that--
> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area;"

For purposes of the areas served by the MITG companies, only they meet this definition. SWBT is not an ILEC in MITG company service areas.[70] SWBT was not providing telephone exchange service in MITG company service areas on the effective date of this Act. SWBT never has. Only the MITG companies have the rights and duty to negotiate the terms and conditions of ILEC obligations to negotiate interconnection agreements containing reciprocal compensation arrangements for traffic terminating to their service areas.

The term "interexchange carrier" is not directly defined in the federal Act. However, the FCC, in deciding that reciprocal compensation applied to interconnection agreements between **a** LEC and **a** CMRS provider, but did not apply when an

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[68] Hughes, T. 1159-1163.
[69] See Ex 2, Jones Surrebuttal, p 27; T. 331-333.

interexchange carrier carries the call, assumed the distinction was sufficiently important as to determine when reciprocal compensation applies and when access applies.

The MITG access tariffs define SWBT as an IXC.[71] This Commission has previously held that, with respect to MITG company exchanges, SWBT is an IXC just as any other and must abide by the MITG company access tariffs. This Commission has previously held that, since termination of the PTC Plan, SWBT's role in small company exchange is an IXC role, and as an IXC SWBT is required to abide by this access tariff:

> "SWBT also asserts that it should be allowed to continue to use FGC because it is a LEC, not an IXC, and FGC was created as a pathway for traffic from one LEC to another. SWBT is, of course, a LEC. However, when the PTC plan was eliminated, SWBT's relationship to the Respondents was changed. For the purpose of originating intraLATA interexchange traffic, **SWBT is now essentially just another intraLATA IXC**, which may, if its chooses to comply with the Respondents' respective tariffs, originate traffic in the Respondents' exchanges."[72]

The evidence at hearing established that there is no functional difference between the transporting service provided by SWBT and that provided by a traditional IXC such as AT&T. For a wireless call destined for Mid-Missouri the wireless carrier can deliver the call either to AT&T or to SWBT. If handed off to AT&T in Kansas City, AT&T will route the call through the building housing AT&T's switch. If handed off to SWBT, SWBT will route the call through the building housing its McGee tandem switch. AT&T's switch and SWBT's McGee switch are in the same building. From there AT&T puts the traffic on its trunks going to Mid-Missouri's Pilot Grove tandem. SWBT does

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[70] Ex 2, Jones surrebuttal, p 25. Scheperle, T. 848-851.
[71] Ex 2, Jones surrebuttal, pp 24-25, also Ex 2 Schedule 5, PSC Mo No. 6, Sheet 44.1. T. 267-269
[72] September 26, 2000 Report and Order in TC-2000-325, et al., pages 10-11.

the same.[73] The AT&T trunks are identical in function to the SWBT trunks. Both the SWBT and AT&T trunks share the same trenches and conduit. Both trunks deliver the traffic to Pilot Grove in the same manner. Upon receipt of either call, Mid-Missouri terminates either call in precisely the same fashion.

It is undeniable that, when SWBT carries wireless traffic destined for MITG companies, it performs an identical role to that performed by AT&T. There is no functional difference justifying the use of access when AT&T performs this function, but the use of "indirect reciprocal compensation" when SWBT performs this function.[74]

With respect to traffic SWBT contracts to terminate in its *own* exchanges, the analysis is different. SWBT *is* the ILEC in its own exchanges. This is an arrangement between *a* LEC and *a* CMRS provider. This traffic is properly the subject matter of a interconnection agreement involving traffic terminating to SWBT. But, traffic going to a MITG company is properly the subject matter of an interconnection agreement only if the MITG company is the ILEC party to that agreement.

When SWBT sends traffic to any MITG company, the only authorization therefore is the MITG access tariff. As the MITG is not party to any approved interconnection agreement with SWBT or the wireless carriers, there is no authorization besides the access tariff for the traffic in dispute (prior to the wireless termination service tariffs of Alma, Choctaw, and MoKan effective in February of 2001).

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[73] See answers of David Jones to questions of Commissioner Gaw, T. 733-740. See answers of William Biere in response to questions from Commissioner Gaw, T. 638-647

[74] See testimony of William Biere that all IXCs other than SWBT are paying Chariton Valley terminating access for wireless originated calls the IXCs deliver to Chariton Valley, T. 444-445.

Kansas transiting decision

The Kansas Corporation Commission was presented with the question of whether an ILEC was required to accept transit traffic under the Act. In Kansas, SWBT opposed such a conclusion, arguing that, if it were required to accept transit traffic, it would prevent SWBT from achieving its right under the Act to have direct interconnections. SWBT in Kansas posited that, if it were required to accept transit traffic indirectly, that would result in the transiting carrier interjecting itself into the efforts of SWBT to obtain direct interconnections.[75]

The Kansas Corporation Commission sided with SWBT as follows[76]:

> "The Arbitrator agrees with SWBT that local exchange carriers have a duty to establish reciprocal compensation arrangements for the transport and termination of traffic. 47 U.S.C. § 251(b)(5). Consistent with that obligation, no other carrier should be authorized to interject itself into the interconnection arrangements of the local exchange carrier, without its agreement. There is no indication in the statute that transit services are considered. Clearly, parties *may* accept calls on a transiting basis, but SWBT has indicated its unwillingness to do so and has expressed a preference for negotiating its own agreement. SWBT's last best offer is adopted."

Under the Act, the MITG companies' rights as ILECs are identical to the right of SWBT as ILEC in SWBT exchanges. What SWBT wanted to prevent in Kansas is exactly what the MITG companies have tried to prevent in Missouri. What has happened

[75] See Exs 41, and 51, the testimony of SWBT in the Kansas proceeding, pages 16 and 17, where SWBT testified that TCG was attempting to require SWBT to accept transit traffic originating from third party carriers, that this would deny SWBT's right to arrange direct interconnections with those carriers, and that such an arrangement would constitute TCG's interjection into SWBT's direct interconnection efforts. See also the arbitration decision, Ex 40, Issue 16, at pages 25-26.

[76] Ex 40, August 7, 2000 Arbitrator's Order 5: Decision in the Matter of the Petition of TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to section 252 of the

in Missouri is that SWBT has actively pursued interconnection agreements providing for traffic being indirectly transited to the MITG companies.

In Missouri SWBT pursues for the MITG the very opposite of what it successfully pursued in Kansas. SWBT's agreements approved in Missouri, negotiated without participation by the MITG companies, adopted a structure that was totally inconsistent with its position in Kansas. This has resulted in SWBT's injecting itself into the efforts of the MITG companies to obtain direct interconnections, their legitimate preference as ILECs.

In order to accomplish this positional duplicity, SWBT has done four things, all of which are inappropriate. First, SWBT has negotiated its interconnection agreements in Missouri promising wireless carriers it would transit traffic to the MITG companies. This is inappropriate as the MITG ILECs are the only carriers authorized to negotiate for the transport and termination of local traffic to MITG exchanges. Second, SWBT's agreements purport to condition the carrying of this traffic upon the wireless carrier's effectuation of an agreement with the MITG companies.[77] However, by preconditioning the agreement to traffic that SWBT transits, SWBT's agreement would inappropriately limit the MITG companies to indirect interconnection when they are equally entitled to negotiate for direct interconnection. Third, SWBT failed to include the MITG companies in the negotiations for local traffic to be transported and terminated to the MITG companies, thus inappropriately excluding them from an arrangement that directly effected them. Fourth, having done the first three, SWBT has failed to live up to the

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Telecommunication Act of 1996, Docket No. 00-TCGT-571-ARB, at pages 25-26; also Ex 2, Surrebuttal Jones, pp. 18-21.

requirement that agreements with the MITG companies be effectuated before allowing the wireless carrier to send the traffic in dispute.

The result of this positional duplicity is exactly what SWBT sought to avoid in Kansas, and what the KCC agreed was not lawful. The result has been SWBT has interjected itself into the interconnection arrangements of the MITG ILECs. The result has been that such interjection has undermined the MITG companies preference for negotiating their own direct interconnection agreements.

FCC Transiting Decision

Contrary to SWBT's claim, there is nothing in the Telecommunications Act of 1996 that required SWBT to include "transit" traffic destined for MITG companies in its agreements with wireless carriers.[78] A recent FCC decision supports this conclusion. In an arbitration between CLECs and ILEC Verizon, the FCC rendered an arbitration decision, which will be referred to herein as the FCC's "Verizon decision".[79] One of the issues decided by the FCC in its Verizon decision was whether ILEC Verizon could be required to transit traffic from the interconnecting CLECs to third party ILECs using reciprocal compensation principles. Verizon pointed out that under the Act there was no duty to transit traffic to third party LECs not party to the negotiation. Verizon also pointed out that, if such an obligation existed, it would provide a means by which CLECs

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[77] Even so, some of the SWB agreements specifically state that transit traffic is NOT subject to Reciprocal Compensation. Ex 25, p 17.

[78] As demonstrated by Cingular's cross examination of Staff witness Scheperle, the continued assumption that ILECs are required to transit traffic to other ILECs is critical to the "transit scheme". T. 869.

[79] 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

could avoid their duty of negotiating and implementing direct interconnection/reciprocal compensation with third party ILECs. At paragraph 119 of that decision the FCC, in discussing whether ILECs are obligated to transit traffic to other LECs, stated:

"We cannot find any clear precedent or Commission rule requiring this function".

This conclusion of the FCC that one ILEC is not required to transit traffic to another ILEC undermines the basis of the "transiting scheme" of SWBT and the Wireless Carriers.[80] SWBT has maintained it was so obligated in order to justify negotiating with wireless carriers regarding traffic destined for MITG companies, without including the MITG companies in those negotiations.

The inclusion of traffic terminated to MITG companies in the scope of the SWBT agreements provided the means for the wireless carriers to claim that, since SWBT had performed its obligation and brought the traffic to the MITG companies, the MITG companies were required to negotiate reciprocal traffic exchange and compensation from the point to which SWBT had "transited" the traffic. Now the FCC has ruled that this is not so. SWBT was not required to transit this traffic. The wireless carriers were not entitled to have SWBT "transit" this traffic. The MITG companies are not required to negotiate from the "transit" point.

MITG negotiations with wireless carriers have not been conducted in bad faith.

Wireless carriers pin their case on the conclusion that the MITG companies have not negotiated reciprocal compensation arrangements with them in good faith. The three bases for the wireless carriers' claims the MITG companies have not negotiated in good

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Expedited Arbitration, et al., CC Docket No. 00-218, et al., Memorandum Opinion and Order, released July 17, 2002.

faith are generally: (1) MITG companies negotiated for direct connection; (2) MITG companies in negotiations claimed they had no obligation to pay the wireless carriers for landline to mobile traffic originated by IXCs; and (3) the forward looking rates the MITG companies proposed were excessive.

The record establishes that none of these three negotiating positions can seriously be considered to be in bad faith. With respect to item (1), direct interconnection, the MITG companies simply asked for the same type of connection the wireless carriers had *agreed to* with SWBT for traffic going to SWBT. The MITG simply requested to negotiate for the same rights as SWBT had obtained in the Kansas arbitration. A direct connection creates the ability of small LECs to provide their local customers with an expansion of local calling to include wireless customers without the necessity of making a "1+" call, thereby avoiding "slamming".[81] With respect to item (2), 1+ traffic to the wireless carriers, the MITG took exactly the same position as taken by SWBT, and which was *agreed to* by the wireless carriers in their negotiations with SWBT[82]. With respect to item (3), excessive rates, the wireless carriers have failed to prove that the rates the MITG companies proposed were excessive. If the wireless carriers could make such a case, they should have arbitrated the interconnection request and proved their case as part of obtaining an agreement. It is inappropriate for them to make such an unsubstantiated conclusion in the context of this proceeding.

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[80] MITG witness Jones set forth the same position adopted by the FCC in his surrebuttal testimony, Ex 2, pp 18-21, filed prior to the FCC decision.

[81] Biere responses to Commissioner Gaw questions, T. 637-638; also T. 696. See also T. 705.

[82] Verizon Wireless witness Clampitt indicated his company would not attempt to negotiate for reciprocal compensation from a small LEC for a call originated on a 1+ basis. T. 1100.

There is no dispute in the evidence that the arrangements we wished to negotiate were the same type of protections and interests that these same wireless carriers had already agreed to with SWBT.[83] MITG companies want direct connections because they want to be able to measure the traffic, record the jurisdiction of traffic, agree to billing arrangements, collection arrangements, and service termination arrangements, just as SWBT has done.[84]

The MITG companies are just as entitled as SWBT to negotiate for the same rights with the wireless carriers that SWBT successfully negotiated for.[85] It is unreasonable in the extreme for the wireless carriers to accuse the MITG of bad faith negotiations. The law is the same for all ILECs. Any MITG company is an ILEC in its own exchanges equal to the legal status of SWBT as an ILEC in its exchanges. It is unreasonable for the wireless carriers to even contend that the MITG negotiated in bad faith by requesting the opportunity to negotiate for direct interconnection, and by taking the position the were not responsible to pay reciprocal compensation for 1+ landline to

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[83] See Exs 48, 50, and 63. Sprint PCS as far back as November of 1997 admitted that, although it was an administrative burden to Sprint PCS, it was required to negotiate its own agreements with the independent Missouri LECs, and that its existing agreements with SWBT and GTE "do not purport to govern the terms and conditions of interconnection with third parties". Ex 66.

[84] Godfrey, T. 479-480; Stowell, T. 506-507. Biere response to Commissioners Gaw and Lumpe questions, and Judge Thompson questions, T. 641-658.

[85] See cross examination of SWBT witness Hughes, T. 964-977. At hearing SWBT agreed the MITG negotiation requests were the same or similar to SWBT's. SWBT agreed it was not bad faith to negotiate for payment of traffic terminated prior to the agreement, to take the position it was not the MITG responsibility to pay reciprocal compensation for landline to wireless traffic originated by IXCs , to negotiate for direct interconnections, to negotiate for a direct structure where the MITG company would not have to rely on other carriers to record terminating traffic, to negotiate for a direct structure where traffic sent by the MITG to the wireless carriers could be sent over MITG facilities without having to use or pay for the facilities of an intermediate carrier, to terminating to SWBT,

wireless traffic. The claim of the wireless carriers that the forward looking reciprocal compensation rates proposed by the MITG companies constituted "bad faith" is completely unsubstantiated.[86]

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[86] After adoption of the Act and reciprocal compensation rules in August of 1996, the wireless carriers deemed that reciprocal compensation was favorable to their existing arrangements. Therefore, in order to effectuate reciprocal compensation, as "requesting carriers" they had to make interconnection requests of ILECs.

Naturally the first ILEC they would go to in Missouri would be SWBT. SWBT served about 2.7 million of Missouri's 3.4 million access lines. SWBT was by far the dominant ILEC in each Missouri LATA. SWBT had extensive interexchange facilities, and tandem switches, in each LATA. Even though SWBT's access rates were generally lower than those of other ILECs, obtaining agreements with SWBT first was understandable.

After SWBT, the wireless carriers then, to a smaller extent, approached Verizon and Sprint. They negotiated the same type of direct interconnection agreements with Verizon and Sprint.

When the largest national wireless carriers—Cingular, Sprint PCS, and Verizon Wireless—did their first negotiations in Missouri, they negotiated with their own affiliates. Cingular negotiated with SWBT. Sprint PCS negotiated with Sprint Missouri Inc., and Verizon Wireless negotiated with Verizon.

The reciprocal compensation rates negotiated with their own affiliates did not need to be based upon forward looking costs. One affiliate's expense becomes the other affiliate's revenue. In terms of the precedent established for other ILECs with no national wireless affiliate, SBC, Sprint, and Verizon had an interest in these reciprocal compensation rates being as low as possible. But SWBT went a step further and had its agreements address traffic destined for ILECs other than SWBT. This helped set the stage for the current impasse.

When the wireless carriers made interconnection requests of the MITG companies, their traffic was terminating whether an agreement was approved or not. When the MITG companies provided forward looking costs that were comparable to their own access rate elements, the wireless carriers simply denied that that could be true. They claimed it could not be true simply by comparing non-cost based rates that were negotiated in substantial part with their own affiliates. No wireless carrier has ever disputed, on a cost basis, the forward looking cost calculations the Missouri small ILECs have done. The non-cost-based rates wireless carriers negotiated with their own affiliates may be less than 2 cents per minute. This does not mean that cost based rates of high-cost small rural Missouri ILECs will be at the same level. The wireless carriers refuse to even recognize the possibility that, if small rural ILEC costs are five times higher than urban ILEC costs, small ILEC access rates may be five times higher for good reason, and our forward looking reciprocal compensation rates may legitimately be many times higher.

While these rates may be more than the wireless carriers wanted to pay,[87] the fact remains that there is a process in place to resolve these differences. While the wireless carriers may disagree that we are entitled to require a direct interconnection, or dedicated facility, there is a process to resolve that dispute. While they may disagree with us that we are not responsible for return traffic carried by IXCs, there is a process to resolve that dispute. That process is the arbitration provisions of the Act.

What is missing here is the *need* or incentive for the wireless carriers to avail themselves of the arbitration process. With the traffic terminating for free whether or not an agreement is arbitrated, they have no real incentive to push the issue. That is why the wireless carriers have failed to abide by the mandatory terms of the SWBT interconnection agreements requiring agreements with the MITG companies prior to sending the traffic in dispute to SWBT.[88] That is why it is inappropriate for the SWBT agreements to address traffic destined for third party LECs, at least without the participation of those third party LECs in the development of that agreement.

The initial fault lies with the wireless carriers, not the MITG companies. They have failed to do what was required by the Act, what was required by SWBT's tariff, what was required by the Commission Order approving SWBT's tariff, and what was required by the terms of the very interconnection agreements that they are party to. Some

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See Ex 2, Jones surrebuttal, pp 9-10, wherein Mr. Jones testified that the only forward-looking rate study conducted produced rates higher than access rates. See Schedule I-16 to Pruitt rebuttal, Ex 17, that showed forward looking rates for the MITG companies between 11 and 18 cents per minute (excluding Peace Valley's 38 cent per minute rate).

[87] Chariton Valley did not file a wireless termination tariff because it did not think it appropriate to file a tariff with rates higher than its terminating access rate. T. 445. Stowell, T. 516. T. 603, Glasco.

[88] T. 962.

of the Commission Orders approving their agreements even made special provision to *direct* the wireless carriers to get agreements with the MITG companies. They have failed to follow up on interconnection requests with arbitration. They have failed to negotiate and arbitrate the MITG's legitimate insistence on direct interconnection, or dedicated trunks.[89] They have failed to get an approved reciprocal compensation arrangement prior to sending traffic to the MITG companies. Had they done what was required, this complaint proceeding would not be necessary.[90]

SWBT also permitted the wireless carriers to send traffic in the absence of an agreement. As the Commission found in its 2001 *Mark Twain* tariff decision, three years after the obligation to obtain agreements with small ILECs was imposed, SWBT has done nothing to enforce this obligation. SWBT's claims that it was not so obligated rings hollow.[91] SWBT has admitted it has done nothing to enforce its own agreements.[92] If SWBT cannot be expected to police its own agreements, who will? The Commission should also remember that the obligation to obtain these agreements was sometimes expressly the obligation of SWBT.[93]

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[89] Wireless carrier witnesses agreed that the MITG companies were not empowered to compel arbitration if they requested interconnection. Only the wireless carriers can both request interconnection and compel arbitration. Tedesco, T. 767, at T. 776-777 in response to Commissioner Lumpe questions; and at T. 787 in response to Judge Thompson's questions.

[90] Biere, T. 403, 676-677.

[91] At hearing SWBT witness Hughes admitted that it was obligated to enforce its agreements, but had done nothing to its facilities to prevent traffic destined for an ILEC with whom the originating wireless carrier had no agreement. See T. 963-964.

[92] Hughes, T. 962-965.

[93] See T. 790-794, where Mr. Tedesco admitted that neither Western Wireless nor Voicestream nor SWBT had complied with that provision of interconnection agreements,

Defacto bill and keep does not exist

Wireless carrier claims of "defacto bill and keep" are false in every sense of reciprocal compensation principles. The MITG companies have never agreed to bill and keep. There is no agreement containing bill and keep. There has been no arbitration ordering bill and keep. There has been no required showing of balance of traffic, or a showing that the two carriers costs were symmetrical, FCC prerequisites to approving an agreement containing bill and keep.[94]

Verizon Wireless witness Clampitt candidly stated it was not his company's position the MITG had been compensated by defacto bill and keep. T. 1104.

PSC requested briefing issues:

1. **Can this Commission order negotiations between telecommunications carriers?**

2. **Can the Commission order you to enter into negotiations?**

3. **Can the Commission order companies to have interconnection agreements?**

The analysis for the above questions is similar, therefore they will be addressed together. The statutes establishing the interconnection agreement/reciprocal compensation process are federal statutes, not state statutes. State Commissions are delegated the authority to mediate, arbitrate, and approve or reject agreements. Under this statutory scheme promoting local competition, it is the prerogative of the wireless competitor to request negotiations. It is the duty of the ILEC, upon request, to negotiate

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Exhs. 33, 36, and 37, requiring SWBT and the wireless carriers to obtain agreements with third-party providers.

in good faith. If the ILEC makes an interconnection request, even at the direction of the Missouri Commission, the wireless carrier is not obligated to negotiate in good faith, and there is no right for the ILEC to compel mandatory arbitration.

There is no federal statute or rule giving any regulatory body authority to order any entity to request negotiations. There is no Missouri statute or Commission rule which portends to involve the Missouri Commission in the decision to request interconnection.

With respect to wireless carriers, the Commission's jurisdiction is more limited than it is with LECs who are certificated within Missouri. 47 U.S.C. § 332(3)(A) explicitly preempts State regulation of CMRS providers rates or entry into a market. Missouri statutes exempt wireless carriers from Commission regulated telecommunications services. § 386.020 (53)(c) RSMo.

4. Please provide the cite that prohibits wireless companies from filing tariffs, and whether or not that applies to state tariffs.

Pursuant to 47 C.F.R. §20.15 "(c) Commercial mobile radio service providers shall not file tariffs for international and interstate service to their customers, interstate access service, or international and interstate operator service. ... Commercial mobile radio service providers shall cancel tariffs for international and interstate service to their customers, interstate access service, and international and interstate operator service." As discussed above, 47 U.S.C. § 332(3)(A) explicitly preempts State regulation of CMRS providers rates or entry into a market. The FCC has stated that "[o]ur decision to proceed under section 251 as a basis for regulating LEC-CMRS interconnection rates should not

[94] Ex 2, Jones surrebuttal, pp 11-12, citing the FCC rule requiring these prerequisites.

be interpreted as undercutting our intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry...." FCC *First Report and Order*, FCC 96-325, Docket No. 96-98, para. 1026. The FCC then provided examples of state actions that may constitute CMRS entry or rate regulation, including Hawaii and Louisiana requirements that CMRS providers file tariffs with the state commission.

5. Can wireless carriers file a landline-originated traffic termination tariff here in Missouri?

The FCC required CMRS providers to cancel tariffs "for international and interstate service to their customers, interstate access service, and international and interstate operator service." 47 C.F.R. §20.15(c). In a recent decision, the FCC stated, "[t]he Commission decided that the market for retail CMRS services was sufficiently competitive that it was not necessary to regulate the retail rates of CMRS carriers, or to require (or permit) CMRS carriers to file tariffs for retail services." FCC *Declaratory Ruling*, WT Docket No. 01-316, p. 4 para. 7 (July 3, 2002). Given that CMRS providers are prohibited from filing tariffs with the FCC, and that state commissions are prohibited from regulating CMRS provider rates or entry, CMRS providers are not permitted to file landline-originated traffic termination tariffs here in Missouri. The customer who originates landline-originated traffic to a CMRS customer picks an IXC carrier of choice who is the originating carrier for that call. The basic local carrier in an exchange is not the originating carrier. The FCC stated in its *Declaratory Ruling* cited above, that CMRS providers may negotiate access tariff rates with IXCs that terminate traffic to CMRS

See 47 CFR 51.711(b).

providers, however CMRS providers are prohibited from filing access tariffs to establish such rates. *Id.* at pp. 1, 4.

Respectfully submitted,

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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 18 day of October, 2002, to all attorneys of record in this proceeding.

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