Sprint

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Missouri Public Service Commission

October 18, 2002

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 650
P. O. Box 360
Jefferson City, Missouri 65102

Re: Northeast Missouri Rural Telephone Company and Modern Telecommunications Company, et al. v. Southwestern Bell Telephone Company, et al.
Case No. TC-2002-57

Dear Judge Roberts:

Please accept for filing Sprint's Post Hearing Brief in the above-captioned matter If you have any questions or comments, please do not hesitate to call me at 913-315-9783.

Very truly yours,

Kenneth A. Schifman

Kenneth A. Schifman
for Lisa Creighton Hendricks

KAS:mkj
Enclosure

cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

Northeast Missouri Rural Telephone Company And Modern Telecommunications Company,	)	
Petitioners,	)	
v.	)	Case No. TC-2002-57, et al.
Southwestern Bell Telephone Company, Southwestern Bell Wireless (Cingular), Voicestream Wireless (Western Wireless), Aerial Communications, Inc., CMT Partners (Verizon Wireless), Sprint Spectrum LP, United States Cellular Corp., and Ameritech Mobile Communications, Inc.,	)	
Respondents.	)	

SPRINT MISSOURI, INC. AND SPRINT SPECTRUM L.P. d/b/a SPRINT PCS POST-HEARING BRIEF

OCTOBER 18, 2002

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BEFORE THE PUBLIC SERVICE COMMISSION

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SPRINT MISSOURI, INC. AND SPRINT SPECTRUM L.P. d/b/a SPRINT PCS POST-HEARING BRIEF

Comes now Sprint Missouri, Inc., and Sprint Spectrum L.P. d/b/a/ Sprint PCS (collectively "Sprint")[1], and for their post hearing brief state as follows:

INTRODUCTION

This case is about what compensation should be applied to wireless calls that originate and terminate within the same Major Trading Area ("MTA"). Contrary to clear federal law, Petitioners attempt to assess wireless carriers' access charges or access charge-based wireless termination tariff rates for intraMTA traffic. The FCC in the *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*[2] ruled that intraMTA traffic is local traffic and only the transport and termination rates specified in Section 251(b)(5) of the Federal

[1] Sprint PCS and Sprint Missouri, Inc. are identified separately throughout where necessary.
[2] CC Docket 96-98, August 8, 1996 (hereinafter referred to as "*First Report and Order*"), ¶ 1043.

Telecommunications Act ("§ 251(b)(5)") apply. Therefore, under the 1996 Federal Telecommunications Act (the "Act") Petitioners have an affirmative duty to establish reciprocal compensation arrangements for the transport and termination of intraMTA traffic.[3]

Sprint PCS repeatedly requested that the Petitioners fulfill this affirmative duty to offer reciprocal compensation. Sprint PCS requested reciprocal compensation in 1997, as it entered the market, again in 1998, 1999, 2000, 2001, and most recently in 2002. Each time, Petitioners refused to fulfill their obligations to enter a reciprocal compensation arrangement. Therefore, Petitioners must accept bill-and-keep as the only compensation arrangement that this Commission can allow in the absence of a reciprocal compensation agreement.[4]

Despite the FCC's ruling and the mandates of the Act, the Petitioners have repeatedly sought to apply their intrastate, intraLATA switched access tariffs to intraMTA traffic. In January of 2000, in *In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff et al.*,[5] this Commission explicitly rejected Petitioners' attempts to modify their access tariffs to apply them to intraMTA traffic. In response, some of the Petitioners filed Wireless Termination Service Tariffs. While Sprint does not believe that these tariffs are lawful, as they are access-based tariffs, Sprint has paid all amounts due under the tariffs.

Petitioners' Complaint presents two claims. First, three of the seven Petitioners – Alma Telephone Company (Alma), Choctaw Telephone Company (Choctaw) and MoKan Dial Inc.(MoKan) raise claims under the Wireless Termination Service Tariff.

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[3] 47 U.S.C. 251(b)(5).
[4] 47 C.F.R. §§ 51.705 and 51.713.
[5] Case No. TT-99-428 (Hereinafter referred to as "*the Alma Case*").

Second, all the Petitioners raise claims for amounts due in the absence of a Wireless Termination Service Tariff. For Petitioners Northeast Missouri Rural Telephone (Northeast), Modern Telecommunications Company (Modern), Mid-Missouri Telephone Company (Mid-Mo) and Chariton Valley Telephone Company (Chariton Valley) these claims cover all the traffic they have terminated for the Wireless Respondents. For Alma, Choctaw and MoKan, these claims cover the traffic terminated for Wireless Respondents before the effective date of their Wireless Service Termination Tariff.

As with any complaint case, the burden is on the Petitioners to prove each element of the claim. *See Aetna Casualty and Surety Company and SWBT v. General Electric,* 581 F. Supp. 889 (E.D. Mo. 1984) (In Missouri, the burden of proof is on the movant to establish its case by substantial evidence); *Sheldon Margulis v. Union Electric Company*, Case No. EC-91-88 (March 27, 1991) (Complainant failed to discharge his burden of proof against respondent). To prevail on their first claim, Petitioners must establish that they terminated Sprint PCS originated traffic pursuant to a Wireless Termination Tariff, that they billed Sprint PCS for the amount due under the tariff and those amounts remain unpaid. As demonstrated below, the Petitioners have failed to meet their burden. No amounts are due by Sprint PCS under any applicable Wireless Termination Service Tariff.

With respect to their second claim, Petitioners again seek to apply intrastate access charges to traffic that is originated by a wireless carrier, transited by Southwestern Bell Telephone Company (SWBT) and terminated in the Petitioners' serving area. Both the FCC and this Commission, however, have ruled that this very traffic is not subject to intrastate access charges. Therefore, Petitioners cannot prevail on their second claim.

The Commission should make it clear that Petitioners are not above the law. Federal law requires that Petitioners offer reciprocal compensation arrangements to interconnecting carriers. If Petitioners believe they are entitled to some compensation other than bill-and-keep, they should respond to the numerous offers extended by Sprint PCS and negotiate a different rate. If negotiations fail, then the Petitioners may force arbitration according to Section 252 of the Act.

This brief is organized to follow the Issues List submitted by the parties in this case. It will also include several additional issues that the Administrative Law Judge requested to be included. All facts cited in the Brief will be accompanied by citations to the record.

TRAFFIC SUBJECT TO A WIRELESS TERMINATION TARIFF

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

With respect to Sprint PCS, Petitioners have not established that Sprint PCS owes any amounts for the traffic delivered after the effective date of any of the Wireless Termination Service Tariffs. First, Sprint witness Mr. Pruitt testified under oath that Sprint PCS has paid all amounts billed for services rendered under the Wireless Termination Service Tariffs.[6] Second, each Petitioner with a Wireless Termination Service Tariff conceded in cross-examination that Sprint PCS had paid all amounts due.[7]

[6] Tr. (Vol. 7) at 1048, Ex. 17 Pruitt Rebuttal, p. 4, l. 1-13.

[7] Mr. Stowell, the witness for both MoKan and Choctaw conceded that no amounts were due and owing from Sprint PCS to MoKan or Choctaw at Tr. (Vol. 5) at p. 522 l.16 and p. 523 l.7. Mr. Glasco makes the same concession on at Tr. p. 614, l. 24 – P. 615, l. 12. See also, Tr. (Vol. 5) at p. 497, Ex. 8, Stowell Surrebuttal at p. 6, l. 12-15 wherein no amounts are due and owing from Sprint PCS to Choctaw and Exhibit 53 containing MoKan's invoices sent to Sprint PCS for the period subject to this claim, all of which are marked paid.

Therefore, there is no claim against Sprint PCS for any amounts due under a Wireless Termination Service Tariff.

TRAFFIC NOT SUBJECT TO A WIRELESS TERMINATION TARIFF

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

It is unlawful to impose access charges on intraMTA traffic. First, the FCC has stated in several orders that traffic between a wireless provider and an incumbent LEC that originates and terminates within the same MTA is subject to transport and termination rates under § 251(b)(5) rather than intrastate access charges. Second, every state commission (including this Commission) that has decided this issue, has correctly held that they are bound by the FCC ruling and refused to apply access charges to intraMTA traffic.

The FCC's *First Report and Order* holds that wireless calls that originate and terminate in the same MTA are local calls, to which only transport and termination rates specified in § 251(b)(5) apply:

> Because wireless license territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e. MTA) serves as the most appropriate definition for local service for CMRS traffic for the purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. *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.* First Report and Order at ¶ 1036. (Emphasis Added).

The FCC reiterated this same point later in its Order:

> CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange

> service areas that state commissions have established for incumbent LECs' local service areas. *We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.*[8]

This ruling was placed into the FCC's regulations at 47 C.F.R. § 51.701(b)(2) that reads in relevant part:

> § 51.701 Scope of transport and termination pricing rules.
>
> (b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
>
> (2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

Finally, in April in 2001, the FCC reiterated that access charges do not apply to intraMTA traffic when it stated:

> The Commission went on to conclude that section 251(b)(5) obligations extend to traffic transmitted between LECs and CMRS providers, because the latter are telecommunications carriers.... *The Commission also held that reciprocal compensation, rather than interstate or intrastate access charges, applies to LEC-CMRS traffic that originates and terminates within the same Major Trading Area (MTA).* (Emphasis added)[9]

There is no ambiguity in the above orders and rules - intrastate access charges do not apply to intraMTA traffic.

This Commission followed the FCC and ruled that intraMTA traffic is not subject to access rates. First, in a December 1997 Report and Order, the Commission recognized that:

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[8] First Report and Order ¶ 1043 (Emphasis added).

> The FCC held that traffic to and from a CMRS network that originates and terminates within the same Major Trading Area is local traffic and is subject to transport and termination rates under Section 251(b)(5), rather than interstate and intrastate access charges.[10]

Then in January 2000, in the *Alma Case,* the Commission explicitly ruled that access charges do not apply to intraMTA traffic. In the *Alma Case*, several rural carriers (many of which are Petitioners in this case) sought to modify their intrastate switched access tariffs to make them applicable to the wireless traffic that originated from a wireless carrier, transited SWBT's network, and terminated in a rural exchange. This is the very same traffic subject to this Complaint. In refusing to apply access charges, the Commission held that "the FCC made it abundantly clear that access charges do not apply to local traffic exchanged between LECs and CMRS providers. The FCC held Traffic to or from a CMRS provider's network, that originates and terminates in the same MTA, is subject to transport and termination rates under the Act."[11] The Commission affirmed this decision in April of this year. The Iowa and Oklahoma Commissions have reached the same conclusions applying the same reasoning.[12]

While Petitioners may spend a lot of time discussing other Commission decisions that they believe may support applying access charges to local traffic, or applied to traffic delivered before the FCC's decisions cited above, nothing they can argue overrides the

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[9] Intercarrier Compensation for ISP Bound Traffic, Order on Remand, FCC 01-131, 16 FCC Rcd 9151, ¶ 47. (Released April 27, 2001), *ISP Remand Order;* Remanded by *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. May 3, 2002).

[10] Tr. (Vol.4) at p. 328, Ex. 45, Report and Order, Case No. TT-97-524, issued December 23, 1997.

[11] See Tr. (Vol. 5), Ex 52, Report and Order, Case No TT-99-428, January 27, 2000 at page 14,

[12] *Order Affirming Proposed Decision and Order, In Re Exchange of Transit Traffic*, Docket No SPU-00-7, TF-00-275 Before the State of Iowa Department of Commerce Utilities Board (March 18, 2002); *Interlocutory Order, In the Matter of the Application of Southwestern Bell Wireless LLC for Arbitration under the Telecommunications Act of 1996*, et al, Cause No. PUD 2002-149 et al. , Before the Corporation Commission of the State of Oklahoma, August 9, 2002.

FCC's decision on this point. The FCC sets the local calling areas for wireless carriers and determines the appropriate compensation for this traffic.

Further, Petitioners attempt to override their clear obligation to offer reciprocal compensation by relying on the FCC's alleged safe harbor rule for access is equally unavailing. Petitioners' witness, Mr. Jones, argues that 47 C.F.R. § 51.717(a) exempts the Petitioners from their obligation to offer reciprocal compensation in the absence of an interconnection and/or reciprocal compensation agreement. 47 C.F.R § 51.717(a) reads as follows:

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

This rule does not provide a safe harbor to allow ILECs to assess access charges. To the contrary, the rule gives CMRS providers in business before August 8, 1996 the ability to cancel contracts with ILECs that included non-reciprocal compensation arrangements. Moreover, Mr. Jones' argument is flawed because Petitioners failed to establish that Sprint PCS had an arrangement with any of the Petitioners before August 8, 1996, that provided non-reciprocal compensation. Indeed, Sprint PCS could not have had such an arrangement, as Sprint PCS did not enter the Missouri market until the end of

1997.[13] Further, there is no evidence in the record that the Petitioners have paid Sprint PCS any compensation to terminate the intraMTA calls that originate on their networks and terminate to Sprint PCS, despite the fact that Sprint PCS initially requested reciprocal compensation in 1997.[14] Petitioners' claim that Rule 51.717 applies here to relieve them of implementing reciprocal compensation arrangements for intraMTA traffic is erroneous. Sprint PCS did not provide service in Missouri on the trigger date for the rule, and the rule only provides a safe harbor for CMRS providers, not ILECs, to cancel non-reciprocal compensation arrangements existing on the rule's trigger date.

Finally, the fact that there is no written interconnection agreement between the Wireless Respondents and Petitioners does not relieve Petitioners of the requirement to offer reciprocal compensation. The United States Circuit Court of Appeals in *Qwest Corporation v. FCC*[15] held that an FCC rule dealing with a LEC's obligation to provide reciprocal compensation and to not assess charges to other providers for traffic originated on the LEC's network is validly grounded in 47 U.S.C. § 332 and is wholly independent of the interconnection agreement provisions, §§ 251 and 252, of the Act.[16]

In sum, Petitioners are again requesting that the Commission ignore applicable federal law that governs wireless carriers and establishes local calling areas for wireless calls. As the Federal Act places regulations of wireless carriers under the FCC's authority,[17] and as Missouri law removes the authority of the Commission to generally

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[13] See Tr. (Vol. 7) at p. 1215, l. 6-15 and at p. 1048, Pruitt Rebuttal at Schedule E (announcing PCS entry into market in November of 1997); Tr. (Vol. 6) at p. 709, Ex. 66 (November 12, 1997 Memo from Sprint PCS to Missouri Independent Local Exchange carriers announcing Sprint PCS' entry into Missouri market).

[14] Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule E.

[15] *Qwest Corp. v. FCC,* 252 F.3d 462 (D.C. Cir. 2001).

[16] 252 F.3d at 463-464.

[17] 47 U.S.C. § 332(c).

regulate wireless carriers,[18] the Commission has correctly and consistently determined it cannot grant the relief sought by Petitioners. The FCC has ruled that access charges do not apply to intraMTA traffic and this Commission has correctly and consistently followed that ruling. Petitioners' arguments should again be rejected by this Commission.

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

With respect to Sprint PCS, the record supports a finding that the traffic in dispute is primarily intraMTA traffic. As Mr. Pruitt testified, when a Sprint PCS call originates from a cell site within a given MTA and is terminated within the same MTA, the call is routed from the Mobile Switching Center (MSC) to the appropriate LEC switch for delivery to the end-user or to a third party LEC within the same MTA.[19] Mr. Pruitt's ability to testify about the nature of the traffic is based on his knowledge of where Sprint cell sites reside vis-à-vis Petitioners' central office locations, as well as his knowledge of wireless calling patterns.[20] As stated under oath by Mr. Pruitt:

> Q. (By Mrs. Creighton Hendricks) In your testimony you have provided an opinion that primarily this traffic is intra-MTA traffic; is that correct?
>
> A. (By Mr. Pruitt) Yes.
>
> Q. Could you tell me what the basis of that opinion is?
>
> A. It's based upon my experience and knowledge. Sprint PCS started providing service in Missouri at the end of 1997, and since that time we have tried to obviously maximize our usage on the network by putting our cell sites in communities of interest. And what that means is that we put our cell phones where we think people are going to use them,

[18] Section 386.020(53)(c) RSMo.
[19] Tr. (Vol. 7) at p. 1048, Ex. 17, Pruitt Rebuttal at p. 9, l.1-18 and Schedules C and D.
[20] Tr. (Vol. 7) at p. 1215, l. 6- p. 1216, l. 25.

and there is a relationship between cell sites and end offices. So that's the kind of analysis that I did. And simply looking at just the percentage of minutes that are being discussed in this case for each company, I could determine that it was primarily intra-MTA. As an example, the MITG company with the largest percentage of traffic billed under this case is MoKan. MoKan represents 76 percent of the traffic. Based on my knowledge about the cell sites and MTAs and end office location, I believe that essentially all of that traffic is going to be determined to be intra-MTA. So that gives you, you know, 76 percent.

The second largest company is Mid-Missouri, which is roughly 10 percent of the traffic, and for Mid-Missouri we have a significant number of cell sites in the Kansas City MTA where most of the end offices for Mid-Missouri also are located, based on the testimony that's been provided, so that -- you know, that takes you – and I'm going to get lost without a calculator here, I think, but that puts you roughly 86 percent. If you go to the next largest company, which is Chariton Valley, which represents roughly 5 percent of the traffic, we know based on the testimony that most of their offices are actually in the St. Louis MTA. I know that all of our cell sites in the Chariton Valley area are in the St. Louis MTA. So what you have is our customers using their phones to call home, to call the doctor, and all those other things they do on a local basis. So, I mean, that's 91 percent of the traffic. We can make a similar analysis probably for the remaining companies. So that's really my basis for saying it's primarily intra-MTA.

Q. When you say 91 percent of the traffic, you're talking about the traffic billed to Sprint PCS?

A. Yes. It's -- I base that exclusively on Sprint PCS minutes under dispute in this complaint.[21]

Nowhere in the record have Petitioners come forth with any substantive evidence that refutes Sprint's testimony that the overwhelming majority of traffic is intraMTA traffic. Indeed, Petitioners cannot refute Sprint's testimony because, by their own admission, there is no current mechanism available to them that will definitively disprove

[21] Tr. (Vol. 7) at p. 1215, l. 6- p. 1216, l. 25.

Mr. Pruitt's testimony that the traffic is primarily intraMTA.[22] The record further reflects that in dealing with their own wireless affiliates delivering traffic, Petitioners have estimated that the same type of traffic that is subject to this complaint is considered to be 100% intraMTA.[23] Moreover, when the Wireless Respondents and SWBT negotiated interconnection agreements under which SWBT transits traffic for termination in Petitioners' territories, Wireless Respondents and SWBT negotiated percentages of interMTA/intraMTA traffic that are generally very close to the zero percent assumed by Petitioners for their own wireless affiliate.[24]

Finally, despite how Petitioners treat their own wireless affiliates, despite low percentages of interMTA traffic factors that appear in the interconnection agreements with SWBT in the record, and despite the sworn testimony provided by Sprint PCS that establishes that the traffic in dispute is primarily intraMTA, some of the Petitioners argue that since they have exchanges in the Kansas City LATA that are in the St. Louis MTA, the traffic delivered by SWBT must be interMTA. This argument is based on the belief that all traffic delivered by SWBT must originate within the Kansas City LATA, the majority of which is not in the St. Louis MTA. This argument fails for several reasons. First, LATA boundaries are not relevant for either the routing or rating of wireless calls. For example, a wireless call originated and terminated in the St. Louis MTA is intraMTA even if it is transited by SWBT at the Kansas City tandem and terminates in the Kansas

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[22] Tr. (Vol. 6) at p. 664, l. 8-18.
[23] Tr. (Vol. 6) p. 664, l. 3-22).
[24] *See e.g.* Late Filed Exhibit 33, Interconnection Agreement between SWBT and Aerial containing a 2% interMTA factor; Ex. late Filed 36. Interconnection Agreement between SWBT and Western Wireless containing a 0% interMTA factor. It should be noted that several interconnection agreements between Sprint Missouri, Inc., and some of the Wireless Respondents have also been entered into the record. However, as established through MoKan's witness, Mr. Stowell, all of the traffic in dispute is being delivered to SWBT by Wireless providers, not Sprint Missouri Inc. Therefore, the percentages of inter versus intra MTA traffic in the Sprint agreements is not relevant to this dispute.

City LATA.[25] Petitioners admit that this is intraMTA traffic.[26] Second, as testified by Mr. Pruitt, most wireless users make calls within their community of interest.[27] Thus, it is highly likely that the calls terminated in the St. Louis MTA are originated in the St Louis MTA.

Therefore, Petitioners have failed to meet their burden to establish that the traffic in dispute is interMTA. Further, Sprint PCS has submitted substantial evidence demonstrating that the Sprint PCS traffic in dispute is primarily intraMTA traffic.

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

The traffic that is subject to this complaint is subject to reciprocal compensation pursuant to 47 U.S.C § 251(b)(5) and 47 C.F.R. § 51.705 and the only compensation that can be applied are TELRIC-based rates, bill-and-keep, or negotiated rates. Absent an interconnection or other agreement with a state established TELRIC-based rate or a negotiated rate, the only option under the Federal Act and the FCC rules is to have a bill-and-keep arrangement.

47 C.F.R. § 51.705 defines the only rates that are appropriate for transport and termination in a reciprocal compensation regime. This rule requires that each incumbent LEC must exchange traffic at one of the following types of rates:

> § 51.705 Incumbent LECs' rates for transport and termination.
>
> (a) An Incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:

[25] Tr. (Vol. 5) at p.420, l. 19 - p. 422, l2.
[26] Tr. (Vol. 5) at p.420, l. 19 - p. 422, l2.
[27] Tr. (Vol.7) at p. 1215 l. 2 - p. 1216 l. 25.

(1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511of this part;
(2) Default proxies, as provided in § 51.707 of this part[28];or
(3) A bill-and-keep arrangement, as provided in § 51.713 of this part.

Petitioners are also free to negotiate a mutually acceptable rate with each wireless company. Absent a state-ordered rate based on a TELRIC cost study, or a negotiated rate, the FCC rules allow the Commission to impose a bill-and-keep reciprocal compensation arrangement in this case. While no money is passed between the parties, bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates in the other carrier's network.[29] 47 C.F.R. § 51.713 further provides in relevant part:

> §51.713 Bill-and-keep arrangements for reciprocal compensation.
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

In this case, Petitioners have not rebutted the roughly equal traffic flow presumption and this Commission can conclude that a bill-and-keep arrangement is acceptable in the absence of negotiated or arbitrated rates. Petitioners admit that intraMTA traffic originates on their networks and is terminated on the Wireless Respondents' networks.[30] While Petitioners claim the traffic is not theirs because they hand it off to an interexchange carrier, such an argument does not rebut the presumption. As this Commission ruled in the *Alma Case:*

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[28] The Eighth Circuit vacated the proxy rates in *Iowa Utilities Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000), but left the remainder of this rule intact.
[29] 47 C.F.R. § 51.713(a).

> The Commission finds that CMRS traffic to and from a wireless network that originates and terminates within the same MTA is local traffic, regardless of the number of carriers involved. [31]

Under this decision, the fact that Petitioners hand off intraMTA traffic to an IXC does not affect the balance of traffic as it is still local traffic. Further, Petitioners did not perform any traffic studies or offer any substantive evidence upon which this Commission could conclude that the presumption of a balance of traffic has been rebutted. Therefore, the Commission, consistent with the applicable federal rules, should find that the parties are operating under a bill-and-keep arrangement.

This is the very same conclusion reached by the Oklahoma Commission based upon similar facts.[32] In the Oklahoma Case, just like this case, several small rural providers claimed that they were entitled to access or access-like compensation for the termination of wireless traffic transited by SWBT. In the Oklahoma Case, just like this case, the small rural providers did not provide a valid traffic study, yet they stated that there was no balance of traffic since their traffic was delivered to an IXC. In the Oklahoma case, the Oklahoma Commission ruled that access did not apply to traffic transited by SWBT. Thus, under the FCC's applicable rules for reciprocal compensation the Oklahoma Commission presumed a balance of traffic and imposed a bill-and-keep arrangement until such time as the rural providers can rebut the presumption of a balance.[33] In this case, the facts are virtually the same and support the same ruling by this Commission. All the wireless traffic terminated by Petitioners has been covered by a bill-and-keep arrangement. Therefore, no additional compensation is required until such

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[30] See Tr. (Vol. 4) at p. 313, l. 1-7.
[31] See Tr. (Vol. 5), at p. 510, Ex 52, Report and Order, Case No TT-99-428, January 27, 2000 at page 14.
[32] *Interlocutory Order, In the Matter of the Application of Southwestern Bell Wireless LLC for Arbitration under the Telecommunications Act of 1996*, et al, Cause No. PUD 200200149 et al., Before the Corporation Commission of the State of Oklahoma, August 9, 2002. ("Oklahoma Case")
[33] *Id* at Exhibit B, Issues 1 and 2.

time as Petitioners either rebut the presumption of balanced traffic or negotiate a different reciprocal compensation rate.

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

As demonstrated in response to Question 4, the only compensation that the Commission can presume is bill-and-keep and additional compensation is not warranted. Moreover, any additional compensation for traffic delivered before the effective date of an order cannot be granted as that would represent retroactive rate making. This is particularly true in this case as the Commission has explicitly ruled that the precise tariff that Petitioners suggest should be applied is not applicable to the traffic in dispute. Thus, any attempt at this point in time to establish a rate would be in violation of Missouri law.

Missouri law holds that the Commission can only determine rates *to be charged*, not rates that *should have been charged*. *Utility Consumers Council of Missouri v. PSC*, 585 S.W. 2d 41 (Mo. 1979). Any decision that retroactively determines a rate that should have been paid will deprive either the utility or its customers of their property without due process of the law. *Id.* Therefore, the Commission does not have the option to create a rate at this time that is applicable to the traffic in dispute delivered prior to the date of an order by the Commission in this case.

Recognizing the limitations on the Commission's ability to determine rates retroactively, Petitioners' requests that their existing intrastate access tariffs be applied to the traffic in dispute have no merit. As demonstrated in response to Question 2, the Commission already has ruled it unlawful to apply intrastate access tariffs to the traffic in dispute.

In *the Alma Case,* Petitioners sought to modify their intrastate access tariffs with the following language:

> Applicability of this Tariff:
> The provisions of this tariff apply to all traffic regardless of the type or origin, transmitted to or from the facilities of the telephone Company, by another carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to the provision of 47 U.S.C. § 252, as may be amended.

In rejecting the above modification, the Commission ruled:

> The Commission finds that local traffic is not subject to switched access charges.
>
> The Commission finds that CMRS traffic to and from a wireless network that originates and terminates within the same MTA is local traffic, regardless of the number of carriers involved.
>
> The Commission finds that the proposed tariffs are not lawful and must be rejected because they would allow Applicants to charge switched access rates for local traffic.[34]

Therefore, any attempt by this Commission to apply the intrastate access rates, or any parts thereof would be retroactive ratemaking in violation of Missouri law.

Further, Staff's proposal also violates the prohibition on retroactive ratemaking. Staff's witness, Mr. Scheperle, recommends that the Commission allow retroactive compensation by acting as if they had approved a Wireless Termination Service Tariff in 1998. Staff's rationale is that this is acceptable, as such a methodology was approved by the Commission when it approved Wireless Termination Service Tariffs in 2001. Despite sponsoring this recommendation, Staff admits that such a recommendation cannot be accepted by the Commission as the Missouri statutes do not authorize the Commission to make tariffs effective retroactively.[35] As Mr. Scheperle states: "[a] Wireless

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[34] Ex. 52, *In the Matter of Alma Telephone Co.,* Case No. TT-428 issued January 27, 2000, p. 14.
[35] Tr. (Vol. 6) at p. 844, Ex.11, Scheperle Rebuttal at p. 20, l.3-4 and Ex. 12, Scheperle Surrebuttal at p. 10, l. 8-11.

Termination tariff is only effective going forward or when established."[36] Recognizing that the Commission cannot legally follow their recommendation, Staff attempts to salvage its recommendation by suggesting that at least two rate elements in its recommendation are the same as what appears in Petitioners' Intrastate Access tariffs that were effective during the relevant period.[37] These tariffs, however, are the very tariffs that the FCC and this Commission ruled were unlawful to apply to the traffic in dispute. Therefore, the Commission cannot accept Staff's proposal.

Over and above the legal prohibition that prevents this Commission from granting retroactive compensation is the fact that the Petitioners, in effect, have been compensated because the parties operate under a bill-and-keep arrangement. As contemplated by the FCC, neither interconnecting carrier has paid to terminate calls originated by its customers. Further, Sprint PCS has provided Petitioners several opportunities to move to a rate-based reciprocal compensation arrangement. Sprint requested that Petitioners enter into negotiations for reciprocal compensation in 1997,[38] in 1998,[39] in 1999,[40] in 2000,[41] in 2001[42] and most recently again this year.[43] Petitioners refused to negotiate even though they knew by their own admissions that absent an interconnection agreement, there is no rate that they can legally contend applies to the traffic in dispute.[44] Therefore, the Commission should not reward Petitioners for their refusal to accept reciprocal compensation arrangements by allowing retroactive compensation.

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[36] Tr. (Vol. 6) at p. 844, Ex.11, Scheperle Rebuttal at p. 20, l. 3-4.
[37] Tr. (Vol. 6) at p. 844, Ex.11, Scheperle Rebuttal at p. 20, l.22- p. 21 7.
[38] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule E (announcing PCS entry into market in November of 1997). (Vol. 6) at p. 709, Ex. 66 (November 12, 1997 Memo from Sprint PCS to Missouri Independent Local Exchange carriers announcing Sprint PCS' entry into Missouri market).
[39] Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-5.
[40] Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule G.
[41] Tr. (Vol. 4) at p. 294, Ex. 43.
[42] Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-17.
[43] Tr. (Vol. 7) at p. 1070, l. 8-13.

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

(See answer to Question 3).

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

As demonstrated in Sprint's response to Question 3, the record does not support a finding that any of the traffic in dispute is interMTA traffic. Further, the Commission has already ruled in *the Alma Case* that the traffic transited over SWBT's network for termination in Petitioners' service area is intraMTA traffic. Therefore, any attempt to apply Petitioners' intrastate access charges to this traffic at this time would be retroactive rate-making.

On a prospective basis, Sprint PCS is more than willing to negotiate an inter/intraMTA factor based on where Sprint PCS maintains its cell sites and the central office locations of Petitioners.[45] The record here though does not allow the Commission to determine a percentage of interMTA traffic for the Sprint PCS traffic delivered to Petitioners.

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

It is not appropriate to impose secondary liability on the LECs named in this complaint. SWBT and Sprint Missouri Inc. are obligated pursuant to Federal law (47 U.S.C. § 251(a)(1)) to interconnect with other telecommunications carriers and to offer the use of their networks. In fulfilling this obligation, there is no benefit going to the transiting LEC as it only charges for the transiting function and receives no compensation

[44] See Tr. (Vol. 4) at p. 330, l. 10- p. 331, l. 14.

for termination. The transiting carriers have no contractual or other legal obligation to compensate Petitioners for calls originated by wireless carriers and terminated to Petitioners.

Further, Sprint Missouri has only been named by MoKan in this case. MoKan traffic transits the Sprint Missouri network because Sprint offers *MoKan an indirect connection* between it and SWBT.[46] In other words, MoKan has chosen not to be directly connected to SWBT and instead, sends (as well as receives) traffic through an indirect connection provided by Sprint over its common trunks. Therefore, MoKan's decision to indirectly connect to the largest local exchange carrier in the state through Sprint Missouri is no different than the Wireless Respondents' decision to indirectly connect to the smaller carriers in the state through SWBT. Yet MoKan seeks to punish Sprint Missouri for offering it the benefit of an indirect connection even though Sprint Missouri would be similarly situated to MoKan in that Sprint would have to rely on the Cellular Terminating Usage Summary Reports ("CTUSRs") from SWBT to bill a carrier with whom Sprint may or may not have an agreement.[47] Clearly, there is no contractual or other legal standard that makes Sprint secondarily liable for the payment of terminating traffic which transits Sprint Missouri's network solely as a result of MoKan's decision to indirectly connect with SWBT.[48] Further, the record reflects that other Petitioners have also selected to indirectly connect to SWBT,[49] and thus any decision establishing secondary liability would have an unjust and unfair state-wide impact on the very carriers that make it more economical for Petitioners to operate.

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[45] Tr. (Vol. 7) at p. 1053, l. 2-10: Tr. (Vol. 7) at p. 1065, l. 7-22.
[46] Tr. (Vol. 7) at p. 1016, l. 15 - p. 1017, l. 6.
[47] Tr. (Vol. 7) at p. 1016, l. 15 - p. 1019. l. 11.
[48] Tr. (Vol. 7) at p. 1016, l. 15 - p. 1019. l. 11.
[49] Tr. (Vol. 5) at p. 591, l. 21- p. 592, l. 1.

Finally, this is not a case where SWBT has accepted traffic and transited to the Petitioners without identifying it for Petitioners. SWBT provides Petitioners with CTUSR reports that were reviewed and approved by the Commission in December of 1997 in *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff P.S.C. No. 40.*[50] With this information, Petitioners have billed for the wireless traffic terminated on their networks. Petitioners, however, have billed at a rate that they knew was unlawful - access rates. Therefore, there is no reason to reward Petitioners by imposing secondary liability upon the transiting carriers when Petitioners have every tool and every opportunity to receive compensation from the originating carriers under the applicable rules.

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

Petitioners have waived any right to additional compensation by repeatedly refusing to negotiate for rates consistent with the Federal Act, FCC rules and this Commission's prior ruling. A waiver occurs when a party knowingly relinquishes a right. *Wall Investments Company v. Schumacher*, 125 SW 2d 838 (Mo. 1939) Waiver can be either expressed or implied from the actions of Petitioners. *Id.* In this case, Petitioners have knowingly refused to negotiate for compensation for the Sprint PCS traffic terminated on their network. Therefore, they should be barred from recovery.

Waiver in this case is based on Petitioners' actions since Sprint PCS entered the Missouri market. In 1997, the year Sprint PCS entered the market, the Commission

[50] Tr. (Vol.4) at p. 328, Ex. 45, Report and Order, Case No. TT-97-524, issued December 23, 1997.

allowed SWBT to modify its Wireless Carrier Interconnection Service Tariff. At that time, the Commission found the following:

> The [Federal] Act requires all telecommunication carriers to interconnect directly or indirectly with the facilities of other telecommunication carriers.
>
> All LECS have an additional duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.
>
> The Commission also finds that the FCC expressly contemplates the use of reciprocal compensation arrangements for the transport and termination of local traffic between wireless carriers and LECs.
>
> The FCC held that traffic to and from a CMRS network that originates and terminates within the same Major Trading Area is local traffic and is subject to transport and termination rates under Section 251(b)(5), rather than interstate and intrastate access charges. [51]

In making the above findings, the Commission realized that the 1996 Act had changed the landscape for the providers and recognized that the ultimate resolution will require cooperation between SWBT, the third party LECs and the wireless carriers.

As Sprint PCS entered the market, it notified Petitioners that it would be providing service in Missouri and that some of its traffic may be terminating in Petitioners' service area under Sprint PCS' interconnection agreement with SWBT.[52] Sprint PCS offered to negotiate for reciprocal compensation with each Petitioner separately or to enter the same agreement for all of Petitioners.[53] Petitioners refused to

[51] Tr. (Vol. 4) at p. 328, Ex. 45, Report and Order, Case No. TT-97-524, December 23, 1997.
[52] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule E (announcing PCS entry into market in November of 1997). (Vol. 6) at p. 709, Ex. 66 (November 12, 1997 Memo from Sprint PCS to Missouri Independent Local Exchange carriers announcing Sprint PCS' entry into Missouri market).
[53] *Id.*

negotiate contending that reciprocal compensation did not apply to any of the traffic transited by SWBT as it was subject to access charges.[54] Further, Petitioners responded:

> Unless Sprint wants to establish a direct physical connection with Mid-Missouri, there will be no basis upon which to establish reciprocal compensation. Should Sprint desire to establish a direct physical interconnection, please let me know.[55]

This response ignored the holding of the Commission in its December 1997 Order as specifically contemplated that Petitioners would enter into reciprocal compensation arrangements to cover the traffic transited by SWBT. Further, it was contrary to the FCC's rulings. Despite this, Sprint PCS continued its efforts to negotiate a reciprocal compensation agreement in 1998.[56] In its requests, Sprint PCS reiterated the FCC's ruling that clearly stated that intraMTA traffic was subject to reciprocal compensation.[57] Petitioners again responded that access applies to any traffic transited by SWBT regardless if the traffic was inter or intraMTA.[58] In 1999, Sprint PCS again requested that Petitioners enter into negotiations for reciprocal compensations or an interconnection agreement.[59] Petitioners again refused to negotiate reciprocal compensation or an interconnection agreement covering any of the traffic transited by SWBT.[60]

In January of 2000, the Commission issued its order in the *Alma Case* denying Petitioners the ability to apply access to the traffic transited by SWBT and specifically holding:

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[54] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule F.
[55] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule F.
[56] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-5.
[57] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-5.
[58] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-6
[59] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule G.
[60] See Tr. (Vol. 7) at p. 1089, Pruitt Rebuttal at Schedule H.

> The Commission finds that CMRS traffic to and from a wireless network that originates and terminates within the same MTA is local traffic, ***regardless of the number of carriers involved.***[61]

Immediately after this decision became effective, Sprint PCS renewed its requests for Petitioners to enter into negotiations for a reciprocal compensation arrangement or an interconnection agreement.[62] In making its requests, Sprint PCS specifically cited to the Commission's decision in the *Alma Case* holding that access does not apply to the traffic transited by SWBT.[63] This time, Petitioners replied that they would not negotiate a reciprocal compensation arrangement, nor would they negotiate an interconnection agreement. Instead, they would discuss a "CMRS Terminating Compensation Agreement" as long as Sprint PCS met the requirement to provide Petitioners with billing information only deliverable through a direct connection and paid rates that were up to 100% greater than access rates.[64] Sprint PCS responded reiterating the FCC's rulings and Petitioners' affirmative obligation to offer reciprocal compensation.[65] Further, Sprint PCS requested a subsequent meeting in Kansas City to discuss the issue between the parties.[66] Petitioners could not recall if they responded to the invitation and the issues were never resolved.[67] Yet, Petitioners continued to bill Sprint PCS under their access tariff despite the fact that they knew that the Commission had ruled that it was unlawful to do so.[68] Further, Petitioners knew that there was no applicable rate for the traffic as they stated in March of 2000 that "[u]ntil the decision in TT 99-428 is finally reviewed or until interconnection agreements containing rates approved by this Commission are in

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[61] See Tr. (Vol. 5), at p. 510, Ex 52, Report and Order, Case No TT-99-428, January 27, 2000, at p. 14.
[62] See Tr. (Vol. 4) at p. 294, Ex. 43.
[63] See Tr. (Vol. 4) at p. 294, Ex. 43.
[64] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-12 and I-16.
[65] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-15.
[66] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-19.
[67] See Tr. (Vol. 5) at p. 605, l. 9-17.
[68] See Tr. (Vol. 5) at p. 510, l. 7-12.

effect, there is now no rate which Complainants can contend in this proceeding applied to the traffic in question." [69]

In 2001, Sprint PCS made another request for interconnection and reciprocal compensation arrangements. [70] This time, not only did Petitioners raise their familiar argument that all traffic transited by SWBT was subject to access, they also raised the rural exemption under the Federal Telecommunications Act and argued that the Commission's decision creating the Metropolitan Calling Area Plan precluded them from offering reciprocal compensation.[71] Petitioners are only exempt from the reciprocal compensation obligation if they are eligible to petition the Commission for such an exemption and the exemption is granted.[72] The Commission has not yet provided Petitioners such an exemption. Further, nothing in the Commission's approved MCA plan can override the Federal mandate for Petitioners to offer reciprocal compensation. Finally, despite Petitioners repeated refusal to negotiate, Sprint PCS has again this year made a request for Petitioners to negotiate a reciprocal compensation arrangement or an interconnection agreement.[73] Sprint continues to hope that Petitioners will join the other Missouri rural carriers that Sprint PCS indirectly interconnects with and with whom Sprint PCS has secured reciprocal compensation arrangements at rates substantially lower than access.[74]

Clearly, Petitioners have had numerous opportunities to negotiate and/or arbitrate a rate different than bill-and-keep. In response to each opportunity, Petitioners have failed to cooperate and knowingly walked away, choosing instead to continue in their

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[69] See Tr. (Vol. 4) at p. 330, l. 10- p. 331, l. 10-14.
[70] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at Schedule I-17.
[71] See Tr. (Vol. 7) at p. 10489, Pruitt Rebuttal at Schedule I-18 and Tr. (Vol. 5) at 615, Ex 63.
[72] 47 U.S.C § 251 (f)(1)(2).
[73] Tr. (Vol. 7) at p. 1070, l. 8-13.
[74] See Tr. (Vol. 7) at p. 1049, Pruitt Rebuttal at p. 13, l. 18 – p. 14, l. 16.

efforts to apply an unlawful access rates. Petitioners knowingly have relinquished their rights and thus have legally waived their rights to seek additional compensation for the Sprint PCS traffic delivered by SWBT.

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

The Federal Act and the FCC rules place an obligation on Petitioners to negotiate interconnection agreements for both direct and indirect interconnections. Further, the Federal Act and FCC rules require that the parties must pay each other reciprocal compensation for all intraMTA traffic whether the parties are directly or indirectly connected. These obligations arise under 47 U.S.C § 251 and 47 U.S.C. § 332 and the FCC rules implementing these provisions.

First, the Act places a duty on all carriers to interconnect directly or indirectly.[75] Pursuant to this statute, the FCC has expressly ruled that telecommunications carriers can interconnect directly or indirectly. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers.*[76] This decision is embodied in 47 C.F.R. § 51.100 that reads in relevant part:

> § 51.100 General duty.
>
> Each telecommunications carrier has the duty:
>
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;

[75] 47 U.S.C. § 251(a)(1)
[76] FCC No. 96-325, 11 FCC Rcd 15499, ¶ 997 (rel. Aug. 1, 1996).

Wireless Carriers are included within the definition of Telecommunications carriers.[77] Therefore, wireless carriers are entitled to indirect connections.

Further Petitioners' duty to offer reciprocal compensation is not dependent on a carrier's decision to interconnect directly or indirectly. Section 251(b)(5) of the Federal Act and FCC Rule § 51.703 mandates that local exchange carriers must establish reciprocal compensation arrangements for the transport and termination of "telecommunications traffic." FCC Rule § 51.701(b) defines "telecommunications traffic" between a local exchange carrier and a wireless provider to be traffic that "at the beginning of the call, originates and terminates within the same Major Trading Area as defined in § 24.202 of this chapter." Therefore, intraMTA traffic is telecommunications traffic that is subject to reciprocal compensation. Further, rural carriers are not exempt from the duty to offer reciprocal compensation arrangements **unless** the rural company is eligible and specifically petitions a state commission for such an exemption and the exemption is granted.[78] The Petitioners in this case have not filed any such petitions.

When Sprint PCS chooses to use indirect interconnection for intraMTA traffic, the same reciprocal compensation rules apply to this traffic as directly connected traffic. Recognizing their legal duties, other rural ILEC providers in Missouri have entered into reciprocal compensation arrangements with Sprint PCS for traffic delivered through indirect connection.[79] Simply put, the Petitioners are legally required under Section 251(a) of the Telecommunications Act to indirectly interconnect with Sprint PCS.

Finally, the record reflects that it would be economically disastrous to require direct interconnections between wireless providers and LECs in the state. Sprint

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[77] *Id* at ¶ 993.
[78] 47 U.S.C. § 251(f)(1)(2)
[79] See Tr. (Vol. 7) at p. 1048, Pruitt Rebuttal at p. 13, l. 18 – p. 14, l.16.

Missouri alone has 80 exchanges in Missouri; however, Sprint Missouri does not have a direct connection with every wireless carrier in every exchange.[80] To establish a direct network connection with just the seven wireless carrier parties to this complaint, would require 560 interconnections.[81] To take this one step further, there are approximately 700 ILEC exchanges in Missouri that would require more than 4,900 direct interconnections for the seven wireless carriers in this complaint if direct interconnection with every exchange were the only viable option.[82] As the record reflects, any one of these connections would require at a minimum, in excess of $6,000 per month just to cover the distance charges associated with a direct connection.[83] Given that the majority of the Petitioners allege that Sprint PCS owe them amounts below $2000 for all the traffic delivered over a four year period,[84] it would be grossly inefficient and cost-prohibitive to require such a network configuration. Indeed, even Petitioners themselves admit that they cannot imagine that a wireless carrier would ever directly interconnect.[85]

The FCC has ruled that intraMTA traffic will be subject to reciprocal compensation. 47 C.F.R. § 51.701 has no exception to reciprocal compensation based on whether or not a connection is indirect or direct. Therefore, reciprocal compensation is required for all intraMTA traffic whether the parties are directly or indirectly connected.

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[80] Tr. (Vol. 7) at P. 1009, Ex. 14, Idoux Rebuttal at p. 10, l. 13-l.24.
[81] *Id.*
[82] *Id.*
[83] Tr. (Vol. 6) at p. 667, l. 11- p. 669. l. 17.
[84] See Tr. (Vol. 4) at p. 240, Ex. 1, Jones Direct at Schedule 2.
[85] Tr. (Vol. 6) at p. 669, l. 21-25.

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

As there are no wireless carriers who are delivering traffic pursuant to Southwestern Bell Telephone Company's Wireless Interconnection Tariff, it has no direct relevance.[86] Given that in connection with approving the tariff, the Commission clearly contemplated that the MITG companies would enter into interconnection agreements on an indirect basis, it is, however, relevant to the Commission's determination of Question 10.

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

All parties in this case agree that for intraMTA traffic, the originating carrier is responsible for any compensation due. As demonstrated in response to Question 4, bill-and-keep is the appropriate compensation. Further, as demonstrated in response to Question 5, any additional compensation would be retroactive ratemaking in violation of Missouri law.

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

SWBT should not block uncompensated wireless traffic for which it serves as a transiting carrier. First, the record reflects that Petitioners are being compensated either through a bill-and-keep arrangement or under a Wireless Termination Service Tariff. Second, all of the alleged "uncompensated" traffic has been billed at switched access, an unlawful rate that Petitioners knew was not applicable. Therefore, Petitioners should not

[86] Tr. (Vol. 7 at p. 932, Ex.13, Hughes Rebuttal at p. 16, l. 8-10.

be rewarded for their failure to abide by the FCC's and this Commission's decision. Further, as stated above, the transiting carriers have an obligation under the Act to allow other telecommunications carriers to interconnect and use their networks. Finally, blocking traffic is not good public policy.

14. Does the Commission have authority to force the parties to this complaint to negotiate interconnection/reciprocal compensation arrangements?

Based on a legal review of the State and Federal Telecommunications Acts, it does not appear that the Commission has authority to order the parties to negotiate interconnection/reciprocal compensation arrangements. First, the State Telecommunications Act is silent on any requirement to negotiate. Further, the Missouri statutes (and the federal Telecommunications Act) do not give the Commission the authority to regulate wireless carriers. *See* Section 386.020 (51) and (53) and 47 U.S.C. § 332. Finally, the Federal Telecommunications Act provides that negotiations can only be initiated by carriers. *See* 47 U.S.C. § 252(a)(1). This Commission has strictly construed this provision of the Act to limit its jurisdiction to only those disputes brought before it during the 135th day to the 160th day time period.[87] Consistent with this interpretation, the Commission would not have the expanded authority over the parties prior to the 135th day after negotiations were initiated.

It is not necessary for the Commission to order the parties to negotiate. As established in response to Question 9, Sprint PCS has requested negotiations six separate times. Each time, Petitioners rejected the opportunity to negotiate, maintaining that until Sprint PCS made the uneconomic decision to establish a direct connection, negotiation

[87] In the Matter of TCG St. Louis for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Case No. TO-98-14 (Order Regarding Jurisdiction and Status of Case, September 4, 1997).

was not possible. Therefore, if this Commission wants to encourage negotiations, it can decide Question 10, by ruling that Petitioners cannot avoid their obligation under Federal law to offer reciprocal compensation based on the requesting carriers' economic choice to indirectly connect their facilities. This would allow the parties to proceed with negotiations and bring to the Commission, if necessary, a more defined set of issues for arbitration.

15. Does the Commission have authority to force the parties to this complaint to arbitrate disputes surrounding an interconnection/reciprocal compensation agreement?

The Commission does not have authority to force the parties to arbitrate under either state or federal law. First, Missouri law only provides the Commission with authority to arbitrate claims submitted to them by public utilities, not to initiate arbitration itself. *See* Section 386.230 RSMo. Furthermore, the Missouri statutes exempt wireless carriers from the definition of public utilities. *See* Section 386.020 (42), (51) and (53). Therefore, even if Missouri law allowed the Commission to order arbitration, the Commission could not order wireless carriers to arbitrate.

Further, the Federal Telecommunications Act does not give the Commission the authority to order arbitration. The Federal Act provides only that parties may themselves decide to seek arbitration in front of a state commission. Section 252(b)(1) provides:

> Arbitration - During the period from the 135th day to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, *the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.*
> 47 U.S.C. § 252(b)(1) (Emphasis added).

Indeed, as mentioned above, this Commission has strictly construed this provision to mean that unless a party requests arbitration within the 135th day to the 160th day time

period, the Commission has no jurisdiction to hear arbitrations.[88] Therefore, the Federal Act does not grant this Commission the right to order arbitration.

But this does not mean that the Commission will not be asked to arbitrate the dispute raised in this case. As testified by Sprint PCS, it recently has initiated negotiations with several of the Petitioners. Therefore, either Sprint PCS or the Petitioners may bring this matter for arbitration in the very near future.

Further, the Commission could make some decisions in this case that will enhance the likelihood that either the Wireless Respondents or the Petitioners will ultimately file for arbitration. First, as mentioned above, the Commission can decide Question 10 in Respondents' favor and order Petitioners to offer reciprocal compensation for intraMTA local traffic when a carrier is indirectly connected to their networks. Further, the Commission could indicate that it would entertain a consolidated arbitration wherein the parties would only have to participate in one arbitration.[89] Given that the amounts allegedly due for the past four years by many of the Wireless Respondent to any single Petitioner are generally in the several thousand dollar range (as measured by Petitioners' access charges), a consolidated arbitration is more economically justifiable. Further, there are common issues between the Petitioners and the Wireless Respondents - e.g., Petitioners require that each Wireless Respondent establish a direct connection, not just Sprint PCS. Therefore, while the Commission does not have authority to order arbitration, it does have the ability to affect whether the parties will seek arbitration. Sprint recommends that the Commission resolve the main cause of the failure of the

[88] *Id.*

[89] Case No. PUD 200200150 (consolidated), Order No. 466613 (Aug. 9, 2002 Okla. Corp. Comm.). There the small LECs and the wireless carriers agreed to participate in a consolidated arbitration.

parties to negotiate, the Petitioners' requirement for a direct connection. Further, the Commission should indicate that it will entertain a consolidated arbitration.

16. Does the Commission have authority to force Petitioners to file a Wireless Termination Service tariff?

The law does not permit this Commission to impose a Wireless Termination Service tariff as proposed by Staff. First, the Missouri statutes do not contain a provision authorizing the Commission to impose a specific tariff on a company. Second, the proposal for tariffs is in violation of applicable federal law.

Missouri law does not permit the Commission to order a regulated company to file a Wirelesses Termination Service Tariff on the facts of this case. First, Missouri law prohibits the Commission from setting a new price for an existing service for Petitioners without considering operating expenses, revenues and utility rate of return. *State ex. rel. Office of Public Counsel v. PSC*, 858 S.W.2d 806, 812 (Mo. App W.D. 1993); *State ex rel. Utility Consumer Council of Mo., Inc. v. PSC*, 585 S.W. 2d 41, 49 (Mo. banc 1979). For Petitioners, ordering them to file Wireless Termination Tariffs without considering such factors constitutes unlawful 'single issue ratemaking." *Id.* Nowhere in the record is there evidence of operating expenses, revenues or Petitioner's rate of return.[90] Indeed, to the extent Wireless Respondents tried to challenge Petitioners' claims of financial impact, Petitioners' own attorney claimed that such information was irrelevant to this case as the only question is whether Petitioners are owed money.[91]

Additionally, neither the Missouri Statutes nor the record in front of the Commission allow the Commission to order the filing of the tariffs to cover a new service. Section 392.220(4) RSMo requires that any proposed price for a new service be

[90] Tr. (Vol. 4) at p. 346, l. 17 and p. 347, l. 18.
[91] Tr. (Vol. 4) at p. 337, l. 6-19 and p.339, l. 2-8.

accompanied by a justification for considering the offering a new service and must identify the service as noncompetitive, transitionally competitive or competitive. Nowhere in the record is there evidence to support this requirement being met. Indeed, the record reflects just the opposite. This is not a new service and Petitioners are already being compensated for the service through a bill-and-keep arrangement.

Further, as mentioned in response to Question 4 above, 47 C.F.R. § 51.705 defines the only rates that are appropriate for transport and termination in the reciprocal compensation regime that applies to the traffic in dispute in this case. This rule requires that each incumbent LEC must produce one of the following types of rates:

> § 51.705 Incumbent LECs' rates for transport and termination.
>
> (a) Local telecommunications traffic shall be established, at the election of the state commission, on the basis of:
> (1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511;
> (2) Default proxies, as provided in § 51.707[92];or
> (3) A bill-and-keep arrangement, as provided in § 51.713.

Each of the MITG companies is also free to negotiate a mutually acceptable rate with each wireless company. Absent a state-ordered rate based on a TELRIC cost study, or a negotiated rate, the only option under the FCC rules is to have a bill-and-keep arrangement. Staff's recommendation for a tariff does not comply with these standards. Staff readily admits that the rate is not based on a TELRIC standard.[93] A tariff is not a negotiated rate, nor is it a bill-and-keep arrangement. Further, the Staff's recommendation inappropriately includes non-traffic sensitive costs. Paragraph 1057 of the FCC's *First Report and Order* states that non-traffic sensitive costs, such as loops and line ports, should not be included in transport and termination rates:

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[92] The Eighth Circuit vacated the proxy rates in *Iowa Utilities Board v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000), but left the remainder of this rule intact.

> We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office and local loop. The costs of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over the facilities. We conclude that such non-traffic-sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier. For the purpose of setting rates under section 252(d)(2), only that portion of the forward-looking economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges.

Regardless of the methodology used by the Staff to derive a rate, the FCC Order forbids them from including non-traffic sensitive cost elements in the rate.

Therefore, Missouri statutes do not allow the Commission to order Wireless Termination Service Tariffs and, and the proposal in front of the Commission does not comply with the applicable federal requirements related to non-traffic sensitive rate elements.

17. Under what authority are Wireless carriers relieved of any obligation to file tariffs?

The FCC ruled that it will forbear from requiring or permitting tariffs for wireless interstate and access service. See *In the Matter of the Implementation of Section 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Service*, FCC 94-31, 9 FCC Rcd 1411 at Para 179, (rel. March 7, 1994).[94] Additionally, Section 332(c) of the Federal Telecommunications Act preempts state commissions from regulating rates charged by wireless carriers. Therefore, wireless carriers do not file tariffs for intrastate services. 47 U.S.C § 332(c).

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[93] Tr. (Vol.6) at p. 844, Ex.12, Scheperle Surrebuttal at p.10, 10-22; Tr. (Vol. 5) at p. 365, l. 11-24.

CONCLUSION

The Petitioners have failed to prove their claims. With respect to the Petitioners' wireless termination tariffs, Petitioners have not proved that Sprint PCS owes them any money for traffic delivered after the effective date of any Wireless Termination Service Tariffs. Sprint witness Pruitt testified that Sprint PCS has paid all amounts due and owing under these tariffs. Petitioners also conceded under cross-examination that Sprint PCS, indeed, has paid all amounts due and owing. Sprint PCS owes no money for traffic delivered to Petitioners after the date of their wireless termination tariffs.

Under federal and Missouri law, Sprint PCS also is not liable for any traffic delivered to Petitioners that is not subject to wireless termination tariffs. The Sprint PCS traffic primarily originates and terminates within the same MTA and, therefore, is subject to transport and termination rates specified in 47 U.S.C. § 251(b)(5). This Commission already decided this issue in the *Alma Case* by finding that traffic to and from a CMRS provider's network that originates and terminates in the same MTA is subject to transport and termination rates under the Act.

Since intraMTA traffic is subject to reciprocal compensation pursuant to 47 U.S.C. § 251(b)(5) and 47 C.F.R. § 51.705, the only rates that can be applied are TELRIC-based rates, bill-and-keep or negotiated rates. Petitioners have not submitted TELRIC-based rates or negotiated rates with Sprint PCS. Thus, bill-and-keep is the appropriate compensation arrangement between Sprint PCS and the Petitioners. Given that Missouri law forbids retroactive ratemaking, this is the only conclusion that the Commission can reach.

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[94] See also 47 C.F.R. 20.15 that prohibits the filing of tariffs for wireless interstate and access services.

Also, the Commission must reject all attempts to place liability on the LECs named in this Complaint, including Sprint Missouri, Inc. Petitioners have not proved that there are any contractual or other legal standards that would make Sprint secondarily liable for the payment of terminating traffic which transits it network as a result of Petitioners' decision to indirectly connect with SWBT.

The Commission should not reward the Petitioners for failing to negotiate interconnection compensation arrangements. Petitioners' negotiating position that they will establish reciprocal compensation arrangements only if direct connections are established between Petitioners and the wireless carriers is indefensible. The goals of the Act and Missouri law are not furthered by requiring inefficient and cost-prohibitive network configurations to satisfy the desires of the Petitioners. While the Commission cannot order the parties to arbitrate, it can encourage the parties to do so by deciding that Petitioners have a duty to establish indirect interconnections with Respondents. This will force the indirect connecting parties to either negotiate a rate or bring an arbitration to the Commission so it can determine that rate.

In sum, the Commission should reject Petitioners complaints against Sprint with respect to the traffic subject to wireless termination tariffs and the traffic not subject to those tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing document was served on each of the parties of record by U.S. Mail, electronic and or facsimile mail, on this 18th day of October, 2002.

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