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December 9, 1999

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

FILED²

DEC 10 1999

Missouri Public
Service Commission

Re: Case No. TT-99-428, et al.

Dear Judge Roberts:

Enclosed for filing with the Missouri Public Service Commission in the above-referenced case is an original and 14 copies of Southwestern Bell Wireless's Initial Brief. Please stamp "Filed" on the extra copy and return the copy to me in the enclosed self-addressed, stamped envelope.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

A handwritten signature in cursive script that reads "Jeanne Fischer".

Jeanne A. Fischer

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

DEC 1 0 1999

In the Matter of Alma Telephone Company's)
Filing to Revise its Access Service Tariff,)
PSC Mo. No. 2)

Missouri Public
Service Commission
Case No. TT-49-428, et al.

INITIAL BRIEF OF SOUTHWESTERN BELL WIRELESS, INC.

Southwestern Bell Wireless, Inc. (SWBW) respectfully submits this initial brief to the Missouri Public Service Commission, opposing Commission approval of access service tariff revisions filed on March 11, 1999 by several telephone companies known as the Mid-Missouri Group (MMG).¹

INTRODUCTION AND BACKGROUND

The MMG proposes to add the following language to their access service tariffs: "The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended." One effect of this tariff revision would be to apply access charges for an indefinite period of time to all traffic exchanged between the MMG companies and wireless carriers in Missouri.

Not one MMG company has requested negotiation of or entered with a wireless carrier an "agreement approved pursuant to the provisions of 47 U.S.C. 252." (MMG, Stowell Tr. pp. 115-116) Furthermore, the likelihood of the tariff being superseded by negotiated agreements is slim. The MMG companies refuse to enter such agreements with wireless carriers, contending that the MMG companies are required to enter

¹ The companies filing the tariff revisions are Alma Telephone Company, MoKan Dial, Inc., Mid-Missouri Telephone Company, Choctaw Telephone Company, Chariton Valley Telephone Company, and Peace Valley Telephone Company.

interconnection agreements only if MMG's facilities and the wireless carrier's facilities interconnect directly. (MMG, Stowell Tr. pp. 113-114; Sprint Spectrum, Propst Rebuttal, pp. 2-3 and Schedules J.P.6, J.P.8; SWBW, Dreon Rebuttal, p. 2 and Dreon Schedule 2; Exhibit Nos. 13, 14, 15) The MMG companies and wireless carriers interconnect indirectly; an intermediary, transiting carrier transports calls between the customers of the MMG companies and wireless carriers. (MMG, Stowell Surrebuttal, p. 22)

The parties to this case agree that it raises two issues. The first issue is: "Is the tariff proposed by the MMG lawful as applied to wireless or CLEC traffic?" The answer to this question is no. To apply access charges to local traffic exchanged with wireless carriers would violate the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Federal Communications Commission (FCC) rules and orders, as well as orders issued by this Commission and the Cole County Circuit Court. The negative answer to the first question renders the second question moot.² The Commission must reject the tariff revisions filed by MMG.

ISSUES TO BE DETERMINED

Issue 1: Is the tariff proposed by the MMG lawful as applied to wireless or CLEC traffic?

The Application of Access Charges to Local Traffic Exchanged
Between LECs and Wireless Carriers Is Impermissible Under The
Telecommunications Act of 1996 and the FCC's Interconnection Order

As stated above, the answer to Issue 1 is no. The Telecommunications Act of 1996 (the Act) requires telecommunications carriers (such as the MMG telephone companies and wireless carriers) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" and requires local exchange carriers (LECs) "to establish reciprocal compensation arrangements for the transport and

² The second agreed-upon issue is: "If lawful, should the tariff proposed by the MMG be approved?"

termination of telecommunications.”³ The Act imposes on incumbent LECs “the duty to negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements” for reciprocal compensation and interconnection.⁴ Each of these statutory requirements applies to the MMG companies, as incumbent LECs.

In its Order implementing the interconnection requirements of the Act, as they pertain to LECs and wireless carriers [referred to as Commercial Mobile Radio Service (CMRS) providers], the FCC explicitly determined that “LECs’ reciprocal compensation obligations under section 251(b)(5) apply to all local traffic transmitted between LECs and CMRS providers.”⁵ Clarifying what traffic is considered “local,” the FCC decided “that the largest FCC-authorized wireless license territory (*i.e.*, [Major Trading Area or] MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5)”⁶

The FCC apparently wanted to make abundantly clear that access charges do not apply to local traffic exchanged between LECs and CMRS providers. It states that “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.”⁷ To assure that this is understood, the FCC “reiterate[s] 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

³ 47 U.S.C. Section 251(a)(1), (b)(5).

⁴ 47 U.S.C. Section 251 (c)(1), (2).

⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, released August 8, 1996 (the Interconnection Order), para. 1041.

⁶ Id., para. 1036.

⁷ Id.

⁸ Id., para. 1042.

By their proposed tariff revision, the MMG companies would apply access charges to traffic they exchange with CMRS providers within an MTA. This directly violates the Act and the FCC Interconnection Order. This Commission simply must reject the tariff as unlawful.

The MMG companies contend that the duty to negotiate rates for transport and termination of local traffic exchanged with CMRS providers does not apply unless the LEC and CMRS provider interconnect directly. (MMG, Stowell Tr. pp. 113-114; Exhibit Nos. 13, 14, 15) The Small Telephone Company Group (STCG), an organization of LECs in Missouri that intervened in this case, also takes the position that the Act's reciprocal compensation requirements do not apply to "indirect" interconnection. (STCG, Schoonmaker, Tr. p. 162) Inasmuch as these LECs and wireless carriers in Missouri interconnect indirectly—using a third party carrier to transport traffic exchanged by their customers—the LECs maintain that they are not required to negotiate reciprocal compensation rates, but rather can apply access charges.

The MMG and STCG point to no exceptions to the FCC's Interconnection Order, quoted above. Nowhere does the FCC limit or restrict its clear, broad conclusion that access charges do not apply to the exchange of local (intraMTA) traffic between a wireless carrier and incumbent LEC. Nowhere does the FCC state that intraMTA traffic exchanged between a wireless carrier and incumbent LEC is subject to transport and termination rates under section 251(b)(5) *so long as* the wireless carrier and incumbent LEC interconnect directly.

The MMG and STCG cite language in the Interconnection Order distinguishing local from long-distance traffic to support their argument that access charges properly apply to traffic "indirectly" exchanged with wireless carriers. (MMG, Stowell Surrebuttal, p. 14; STCG, Schoonmaker Surrebuttal, p. 10) The FCC describes a long distance call as typically involving the collaboration of three carriers to complete—the originating LEC,

the intermediate interexchange carrier (IXC), and the terminating LEC—and states that access charges apply to long distance traffic.⁹ By contrast, reciprocal compensation for transport and termination of calls applies to local traffic; the example of local traffic offered by the FCC in this paragraph is the collaboration of two carriers to complete a local call.¹⁰

The FCC does not address the situation in which three carriers collaborate to complete a local call. The FCC does make extremely clear, however, that access charges do not apply to the exchange of local traffic, regardless of the number of carriers involved. The FCC's determining factor on what charges apply—access charges or negotiated reciprocal compensation rates for transport and termination—is whether the traffic is local or long distance, not the number of carriers involved in completion of the call.

The Missouri Commission Requires Reciprocal Compensation
For Local Traffic Exchanged between Wireless Carriers and LECs

This Commission has considered the proper compensation structure for incumbent LECs, such as the MMG companies, on local calls that originate on a wireless carrier's network, transit the network of Southwestern Bell Telephone Company (SWBT) and terminate in the network of the LEC. In Case No. TT-97-524, the Commission determined that "wireless carriers are primarily liable to the third-party LECs for reciprocal compensation for the termination of wireless-originating traffic in the exchanges of third-party LECs, and third-party LECs will be required to bill the wireless carriers and make good-faith efforts to collect."¹¹

⁹ Interconnection Order, para. 1034.

¹⁰ Id.

¹¹ In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff, P.S.C. Mo.-No. 40, Case No. TT-97-524, Report and Order, Issued December 23, 1997, p. 21 (Report and Order).

The Commission approved a compensation arrangement consistent with the Act and FCC Orders, finding that the "FCC expressly contemplates the use of reciprocal compensation arrangements for the transport and termination of local traffic between wireless carriers and LECs." (Report and Order, p.16) Recognizing that the FCC has not specifically addressed the situation in which three carriers are used to transport and terminate local traffic exchanged between an LEC and a wireless carrier (Id.), the Commission adhered to the FCC mandate that reciprocal compensation applies to the transport and termination of such traffic, regardless of the number of carriers involved.

Affirming the Commission's Report and Order, the Cole County Circuit Court found that Section 251(1)(1) of the Act "gives the wireless carriers the right to indirectly interconnect with [LECs'] networks through the direct interconnection the wireless carriers have established with Southwestern Bell."¹² The Court found that reciprocal compensation clearly applies to intraMTA, or local, traffic exchanged between LECs and wireless carriers, and rejected as without merit Relators' claim that "when three carriers collaborate to complete a call, reciprocal compensation does not apply." (Circuit Court Order, p. 9) The Court noted with approval "that the PSC acknowledged the appropriateness of applying access charges to non-local (i.e. inter-MTA) traffic" and that the "PSC did not foreclose Relators from applying their existing inter- or intrastate access tariffs as appropriate on inter-MTA wireless traffic." (Circuit Court Order, p. 8)

The compensation arrangement ordered by the Commission in Case No. TT-97-524 has not yet been fully implemented. The transcript of this case contains ample discussion of the legal issue of whether LECs can request and compel wireless carriers to enter interconnection agreements. (MMG, Stowell Tr. pp. 114-116; STCG,

¹² State of Missouri, ex rel. Alma Telephone Company et al. v. Public Service Commission of Missouri, Case No. CV198-178CC, Findings of Fact, Conclusions of Law, and Judgment, February 23, 1999, p. 5 (Circuit Court Order).

Schoonmaker Tr. pp. 162-164; OPC, Meisenheimer Tr. pp. 205-206, 210; AT&T Wireless, Maass Tr. p. 259; Sprint Spectrum L.P., Propst Tr. pp. 328-329; SWBT, Hollingsworth Tr. p. 374; SWBW, Dreon Tr. p. 431) This debate is largely irrelevant and hypothetical because the wireless carriers have approached the LECs, requesting that the parties commence negotiation of interconnection agreements. (Sprint Spectrum, Propst Rebuttal, pp. 1-3 and Schedules J.P.1, J.P.4, J.P.5; SWBW, Dreon Rebuttal, pp. 1-2 and Dreon Schedule 1) The LECs, however, have soundly rebuffed the wireless carriers' efforts. (Sprint Spectrum, Propst Rebuttal, pp. 2-3 and Schedules J.P.6, J.P.8; SWBW, Dreon Rebuttal, p. 2 and Dreon Schedule 2; Exhibits Nos. 13, 14, 15)

Examples of the LECs' responses include MoKan Dial's letter to Aerial, a wireless carrier, in which MoKan Dial states that "MoKan agrees that the federal law requires us to negotiate a direct physical interconnection with Aerial for the reciprocal exchange of intra-MTA traffic. However the law, FCC rules and FCC Orders are clear that a direct physical interconnection is required." (Exhibit No. 13) Chariton Valley Telephone Corporation takes a similar approach, responding to SWBW that "[w]e are willing to negotiate a reciprocal compensation agreement with your company for the termination of your cellular traffic in our local exchanges. This will of course require a direct physical interconnection between us." (Exhibit No. 15) The LECs' responses somewhat magically create FCC requirements and directly contradict this Commission's Report and Order, as well as the Circuit Court Order affirming the Report and Order.

Also amply discussed at the hearing in this case were various possible scenarios for calls exchanged between a wireless carrier and a LEC. (MMG, Stowell Tr. pp. 137-142; STCG, Schoonmaker Tr. pp. 168-169, 177-180; OPC, Meisenheimer Tr. pp. 183-192, 203-204; AT&T Wireless, Maass Tr. pp. 236-259; Sprint Spectrum, Propst Tr. pp. 331-356; SWBT, Hollingsworth Tr. pp. 385-389; SWBW, Dreon Tr. pp. 413-421) These scenarios included intraMTA and interMTA wireless-originated calls, terminating in a

LEC exchange, as well as intraMTA and interMTA landline- (or LEC-) originated calls, terminating to a wireless carrier. A chief issue concerns the appropriate compensation for an intraMTA call originated by the LEC's customer, transported by an intermediary transiting carrier, and terminated to the wireless carrier. (Sprint Spectrum, Propst Tr. pp. 329-330) When this call is a toll call, and the LEC's customer dials 1+ to place the call, which carrier—the originating LEC or the transiting carrier—is responsible for compensating the wireless carrier for the termination of this call?

If the wireless carrier is receiving compensation from the transiting carrier for terminating this call, the originating LEC and wireless carrier can take such compensation into account when negotiating a reciprocal compensation agreement. The wireless carriers indicate they will not seek double recovery for the termination of calls. (Sprint Spectrum, Propst Tr. pp. 330, 332-334, 338-339; SWBW, Dreon Tr. pp. 435-436) If the parties have difficulty reaching agreement on compensation issues, Section 252 of the Act sets forth the procedures for state commission mediation and/or arbitration if such becomes necessary.

In other words, compensation need not always be reciprocal on every call. For an intraMTA wireless-originated call, carried by an intermediary transiting carrier and terminating to a LEC, the wireless carrier may pay the LEC a negotiated rate for termination, consistent with the Commission's Report and Order. This negotiated termination rate may apply reciprocally to an intraMTA LEC-originated call that terminates to the wireless carrier and is a local call for the LEC's customer (i.e., no intermediary carrier compensates the wireless carrier for the call termination). If the latter call is structured as a toll call, however, for which the wireless carrier is receiving

compensation from a transiting carrier, the LEC and wireless carrier can take this into account in their negotiation of an interconnection agreement.¹³

The access tariff revision proposed by the MMG telephone companies would apply access charges to the exchange of intraMTA traffic between the LECs and wireless carriers. The tariff revisions violate the Act, FCC orders, this Commission's Report and Order, and the Circuit Court Order. Further, permitting the MMG companies to charge access charges to such traffic on an "interim" basis, until Commission approval of negotiated interconnection agreements, would remove any incentive for the LECs to negotiate agreements. The Commission should reject the tariffs filed by the MMG companies.

The FCC Has Primary Jurisdiction to Interpret the Requirements of the Act

The question of whether the tariff revision proposed by the MMG is lawful is first and foremost an issue of federal law. MMG company MoKan Dial acknowledged this when it stated that "MoKan agrees that the federal law requires us to negotiate a direct physical interconnection with Aerial for the reciprocal exchange of intra-MTA traffic. However the law, FCC rules and FCC Orders are clear that a direct physical interconnection is required." (Exhibit No. 13) SWBW maintains that the law, FCC rules and FCC Orders in no way require direct physical interconnection before requiring negotiation of an agreement for reciprocal compensation. This Commission should defer to the jurisdiction of the FCC and reject tariffs that would apply access charges in direct violation of the FCC's Interconnection Order.

Recognizing the FCC's jurisdiction in this regard, this Commission stated:

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

¹³ Obstacles such as the inability to distinguish the various types of calls that are terminating to the LEC cannot prevent the parties from complying with the legal requirement of entering an interconnection agreement. Factors can be used to approximate closely the actual traffic exchanged. (Sprint Spectrum, Propst Tr. pp. 355-356; SWBW, Dreon Tr. pp. 425-426)

third-party LEC, and consequently three carriers are needed to terminate the traffic is an open question. The parties have not cited to any FCC order or rule which addresses the question, nor have the parties provided the Commission with legal support for the proposition that it has jurisdiction to initially decide the issue in the absence of an FCC directive on the matter. (Report and Order, p. 16)

In the absence of FCC direction on the precise issue of the appropriate compensation when three carriers collaborate to complete a local call exchanged between a wireless carrier and LEC, the Commission in Case No. TT-97-524 properly complied with the FCC's overall requirement in this regard. That is, reciprocal compensation obligations—not access charges—apply to local traffic exchanged between LECs and wireless carriers.

The issue of proper compensation for intraMTA traffic exchanged between a wireless carrier and a LEC through an intermediary, transiting carrier is presently before the FCC in the Informal Complaint submitted by Sprint Spectrum against the STCG telephone companies. (Sprint Spectrum, Propst Rebuttal, p. 4; STCG, Schoonmaker Surrebuttal, pp. 9-10; Sprint Spectrum, Propst Tr. pp. 323-324, 369) This Commission should await further FCC directive on this matter and, in the meantime, should reject the MMG's proposed tariff revisions as unlawful.

Issue 2: If lawful, should the tariff proposed by the MMG be approved?

Issue 2 is moot. The tariff proposed by the MMG is not lawful and, therefore, must not be approved.

Conclusion

The tariff revisions proposed by the MMG violate federal law because they would apply access charges to local traffic exchanged between LECs and wireless carriers. The tariff also violates the Commission's Report and Order in Case No. TT-97-524 and the Circuit Court Order affirming the Commission's Report and Order. Wireless carriers are willing to negotiate reciprocal compensation agreements with the LECs in Missouri but, apparently, the LECs will not participate unless forced to do so. The problems and

concerns raised by the LECs concerning a reciprocal compensation arrangement can be handled in the negotiating process; they cannot be used as an excuse for noncompliance with the law. The Commission must reject the tariff revisions proposed by the MMG telephone companies.

Respectfully submitted,

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