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November 21, 2002

VIA UPS OVERNIGHT DELIVERY

Secretary
Missouri Public Service Commission
Data Center – 1st Floor
200 Madison Street
Jefferson City, Missouri 65102

FILED[4]
NOV 22 2002
Missouri Public
Service Commission

RE: TC-2002-57, et al.

Dear Judge Roberts:

Enclosed please find an original and nine (9) copies of the Initial Brief of Ameritech Mobile Communications, Inc., CMT Partners, Ameritech Cellular and Verizon Wireless (collectively "Verizon Wireless") regarding the above-referenced proceeding. Please file this Brief in your usual manner and return the extra enclosed copy with the date of filing stamped thereon directly to the undersigned in the enclosed, self-addressed stamped envelope.

If you have any questions with respect to this filing, please contact me. Thank you for your attention to and assistance with this matter.

Very truly yours,

Thomas E. Pulliam

Thomas E. Pulliam

TEP\wh
Enclosures

cc: Charon Harris, Esq. (w/enclosure)
John Clampitt (w/enclosure)
Counsel of Record (w/enclosure)

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BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

REPLY BRIEF OF AMERITECH MOBILE COMMUNICATIONS, INC., CMT PARTNERS, AMERITECH CELLULAR, AND VERIZON WIRELESS

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I. INTRODUCTION

Verizon Wireless[1] submits that the substantial and competent evidence in the record established by the Respondent wireless carriers (collectively "Respondents") demonstrates beyond serious question that the complaints of the petitioning independent local exchange companies ("Petitioners") must fail, and that the Missouri Public Service Commission ("Commission") must deny all relief sought by Petitioners in this case. Petitioners have failed to satisfy the burden of proof imposed upon them in these complaint cases regarding the elements necessary to establish their claims. They have failed to establish the minutes of usage transited by Southwestern Bell Telephone Company ("SWBT"), the actual rate to be imposed upon the traffic, and whether such traffic is interMTA or intraMTA in nature. As the Initial Briefs of the Respondents establish, traffic exchanged between LECs and CMRS providers that originates and terminates within the same MTA is not subject to access charges. Given that access rates cannot apply, there is no lawful rate that exists for traffic transited prior to the date of this order for those Petitioners without wireless termination service tariffs.

In compliance with directives of this Commission, Respondents have made numerous attempts at establishing interconnection agreements with Petitioners and have paid rates under tariffs whose very legality remains very much at issue. On the other hand, Petitioners have steadfastly refused to avail themselves of their remedies under the Act and have refused to either negotiate at all (there is no evidence that Petitioners ever initiated any negotiations) or have negotiated in bad faith. This posture is not surprising in light of Petitioners' primary goal of preserving, in the face of the passage of the Telecommunications Act of 1996 (sometimes herein, the "Act"), the right to impose their access charges upon as much telecommunications traffic as

[1] "Verizon Wireless" consists of Ameritech Mobile Communications, Inc., CMT Partners, Ameritech Cellular, and Verizon Wireless.

possible[2]. They are fully aware that arbitrated rates in an interconnection agreement with Respondents would likely be materially lower than the access rates they want to charge Respondents for this traffic, and that they would be forced to recognize Respondents' rights to interconnect on an indirect basis.

This proceeding represents nothing more than a calculated gamble by Petitioners that the Commission will bless their prior and on-going violation of state and federal law and reward them with the right to charge access rates for local, wireless traffic transited to their networks by SWBT, contrary to state and federal law.[3] The substantial and competent evidence in the record leaves no doubt that Petitioners have failed to meet their burden of proof, and that this Commission must issue an order denying all relief sought by Petitioners. Then, and only then, will the Petitioners have the incentive to comply with the obligations imposed upon them by state and federal law, and perhaps bring closure to the issues which have plagued this Commission for so many years.

Verizon Wireless will utilize this Reply Brief to address certain positions taken by the Petitioners, *amicus,* and Staff that are wholly unsubstantiated, unsupportable, and/or complete misstatements of the record. Failure to address a particular point or position raised by Petitioners, *amicus* or Staff should not be taken as an acquiescence in such a position, but should rather be seen as Verizon Wireless' belief that such point has been adequately addressed in its Initial Brief and/or the Initial or Reply Briefs filed by the other Respondents.

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[2] The evidence establishes that Petitioners have voluntarily crafted their tariffs to require their own customers to pay long-distance charges for landline-to-wireless calls, even if the wireless party called by their customer is across the street! (Tr. 318; 695; 810-812; 1003-1004).

[3] Although, the amount in controversy is material, the evidence establishes that the amount being sought by Petitioners (assuming all minutes of usage transited by SWBT can be charged at Petitioners' access rates), equals less than one-half of one percent (.005) of Petitioners net revenues for the period in question, as reported to the Commission (*See and compare* Ex. 1, Schedule 2 *with* Tr. 450, Ex. 61 and those portions of the Annual Reports of Mid-Missouri Telephone Company and Chariton Valley Telephone Company filed in this proceeding on August 16, 2002 (Tr. 625).).

II. MISSOURI INDEPENDENT TELEPHONE GROUP (MITG) BRIEF

To prevail on their claims, the Petitioners must satisfy the burden of proof resting solely upon them. Petitioners must establish with substantial and competent evidence in the record each and every element necessary to provide a basis for the Commission to rule in their favor.[4] Nowhere in Petitioners' Initial Brief do Petitioners point to any substantial and competent evidence establishing: (1) the minutes of usage upon which their claims are based; (2) the exact rate (expressed in dollars or cents) used to calculate the alleged amount due and owing for the traffic transited by SWBT to the networks of the Petitioners; and (3) how much, if any, of such traffic is interMTA and how much is intraMTA in nature.[4] Instead, Petitioners simply repeat their now-familiar refrain, arguing why they should not be bound by the obligations and responsibilities imposed upon independent local exchange companies under the Act and why they are entitled to be paid access for local traffic in contravention of Missouri and federal law. Inexplicably, they also ask the Commission to retreat from their legally sound holding issued *In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No.* 2, TT-99-428, et al., Amended Report and Order (April 9, 2002) that prohibits Petitioners from charging their access rates for the termination of intraMTA traffic, even though this decision is currently the subject of separate appellate proceedings. The Commission has previously rejected many of

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[4] *Amicus* Small Telephone Company Group ("STCG") appears confused regarding which parties possess the burden of proof in this proceeding. In its *amicus* brief, STCG claim that Respondents have the burden of proof in establishing the nature of the traffic at issue (interMTA vs. intraMTA) (STCG *Amicus* Brief, p. 9). However, as the moving parties in this proceeding, Petitioners bear the burden of proof in establishing how much of the traffic in issue is interMTA in nature and how much is intraMTA in nature. Citing no legal authority, the justification for STCG's unwarranted (and legally unfounded) burden-shifting is a mystery, and deserves no credence by the Commission.

[4] Prior to the hearing, Staff advocated assuming all traffic is interMTA in nature (Ex. 11, p. 16). In its Initial Brief, Staff has modified this recommendation, stating "it may be inappropriate for the Commission to find that all the traffic is interMTA" based on evidence adduced at the hearing. (Staff Initial Brief, p. 23).

Petitioners' arguments, and Petitioners' Initial Briefs provide no basis for the Commission to issue an order granting Petitioners the relief they seek.

A. The "Filed-Tariff" Doctrine is Inapplicable to the Traffic in Question.

Both Petitioners and *amicus* STCG allege that the "filed tariff" doctrine stands as mandatory authority for Petitioners to charge access rates for the Respondents' traffic transited by SWBT to the networks of the Petitioners. (MITG Initial Brief, pp. 12-13; STCG Initial Brief, pp. 3-4). Although Missouri does recognize the "filed tariff" doctrine, the doctrine has no relevance to the issues presented to the Commission for determination in this proceeding. Under the "filed tariff" doctrine, a tariff filed with and approved by a regulating agency forms an exclusive source of the terms and conditions governing the provision of service of a carrier to its customers. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3rd 1166, 1170 (9th Cir. 2002). However, in this case, Petitioners have no Commission-approved tariff on file that deals with the rates, terms, and conditions for termination of local, wireless traffic transited by another carrier. For the "filed tariff" doctrine to apply, there must be a filed tariff. Without a filed tariff addressing this particular service, the filed tariff doctrine has no relevance.

It is indisputable that Petitioners have no tariff on file regarding this traffic. Moreover, the Commission rejected various Petitioners' attempts to apply their access tariffs to this traffic in question in *In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2*, TT-99-428, et al., Amended Report and Order, p. 16 (April 9, 2002). Why would Petitioners have filed those tariffs if the traffic in question in this proceeding was already governed by a filed tariff? In addition, the "filed tariff" doctrine only permits collection of a "lawful rate" by the regulated utility. This Commission, the Federal Communications Commission ("FCC"), and other state commissions have previously held that access charges for

the local traffic that is the subject of this proceeding are illegal and unlawful.[5] Thus, Petitioners and STCG's reliance upon the "filed tariff" doctrine as support for their plan to charge access rates for local wireless traffic transited by SWBT is misplaced.

B. Petitioners Have Failed to Negotiate.

Although irrelevant to a decision on the merits, Petitioners complain that the Respondents sent traffic to SWBT to be transited to the networks of Petitioners without interconnection agreements in place. (MITG Initial Brief, p. 50). The evidence in the record in this proceeding establishes beyond question, however, that negotiation breakdowns were solely and completely the responsibility of the Petitioners, and that the failure to have any agreements in place lies solely with Petitioners. There is no evidence in the record that Petitioners ever initiated any attempts to negotiate interconnection agreements, which is why Petitioners cite to none in their Initial Brief. The record is replete with evidence of Respondents' attempts to initiate, time and time again, a dialogue with Petitioners in the hope of establishing interconnection agreements. (Ex. 17, Schedules E, F, G, H, I; Ex. 19, Schedule 1; Tr. 335, 1055).

The record also establishes that it was the Petitioners, and not Respondents, who placed preconditions upon their negotiations by demanding direct interconnection (Ex. 19, Schedule 1), despite Petitioners' obligation to provide indirect interconnection under 47 U.S.C. §251(a)(1) and pursuant to this Commission's order in Case No. TT-97-524 (Ex. 45, p. 20, Tr. 328). Petitioners also demanded that Respondents pay Petitioners' access charges for traffic terminated prior to the

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[5] *See In Re Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC No. 96-325, 11 FCC Rcd 15499 (1996), ¶1036; See also *In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2*, TT-99-428, et al., Amended Report and Order, p. 16 (April 9, 2002); *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.

commencement of an agreement (*Id.*; Ex. 15, p. 13; Tr. 508) in violation of this Commission's prior orders and those of the FCC.[6] It was Petitioners who, after representing to the Commission that they would need to negotiate as a group, then demanded individual negotiations in correspondence with Respondents. (*See and compare* Ex. 45, p. 3 *with* Ex. 19, Schedule 1, p. 2; Tr. 285-286; 1186-1187).

Petitioners base their claim for direct connection on the desire to be treated like SWBT (MITG Initial Brief, p. 46). Petitioners are not like SWBT because the volume of minutes carried by SWBT far exceeds the volume of minutes going to Petitioners. The record establishes that because of the relative small amount of traffic going to Petitioners from the Respondents, a direct connection makes no economic sense from the Respondents' point of view. (*See* Initial Brief of Sprint Missouri, Inc. and Sprint PCS, footnotes 80-85). Petitioners claim that their access rates are "not excessive." (MITG Initial Brief, p. 46). Yet the level of Petitioners' rates is not directly at issue in this case. Respondents' objection to Petitioners' rates is based upon the undeniable fact that Petitioners seek to impose their access rates for this traffic, which, regardless of their actual level, is unlawful as declared by this Commission, the FCC, and other state commissions. (*See* footnote 6, *supra*).

Petitioners claim that Respondents "should have arbitrated the interconnection request and prove their case as part of obtaining an agreement." (MITG Initial Brief, p. 46). When addressing the ability to invoke the arbitration procedures on the Telecommunications Act of 1996, Petitioners attempt to mislead the Commission into believing that only Respondents are able to avail themselves of the arbitration remedies under the Telecommunications Act of 1996. (MITG Initial Brief, p. 50).

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[6] *See* cases cited in footnote 6, *supra.*

Nowhere in their Initial Brief do Petitioners acknowledge that once negotiations have commenced, either Petitioners or Respondents have the right and ability to compel arbitration. 47 U.S.C. § 252(b)(1). What Petitioners fail to point out, and what Petitioners themselves have admitted (Tr. 271-272; 758-759), is that once the negotiation process commences, according to 47 U.S.C. § 252(b)(1), *Petitioners have the absolute right to commence arbitration of the interconnection agreement!* In reality, given the unrefuted evidence that Petitioners received numerous requests for negotiation which would start the clock on the arbitration's timing (Ex. 17, Schedules E, F, G, H, I; Ex. 19, Schedule 1; Tr. 335, 1055), no doubt should rest in the mind of the Commission that Petitioners had every opportunity to resolve these issues through arbitration that, for the reasons explained above, they chose not to pursue.

On the surface, Petitioners' failure to commence arbitration is inexplicable because it is the approved process by which the relief they are seeking from the Respondents could have been promptly adjudicated with final and binding arbitration. However, digging deeper, the fact that Petitioners have steadfastly refused to avail themselves of their rights of arbitration under the Telecommunications Act of 1996 is not surprising because: (1) Petitioners have repeatedly refused to follow the federal law in this area; and (2) Petitioners are no doubt aware that Respondents' ability to obtain indirect interconnection at rates far below Petitioners' access rates (thus resulting in a loss of revenue to Petitioners) would likely result from such an arbitration.[7] Petitioners' admonishment of Respondents for failing to avail themselves of the arbitration

[7] *See* Ex. 19, Schedule 2; Ex. 17, pp. 13-14 for rates obtained in negotiated agreements between wireless carriers and independent local exchange companies similar to Petitioners.

process should thus ring hollow with the Commission because Petitioners had the very same opportunities to so proceed.[8]

C. Petitioners Need Commission-Imposed Incentive to Respond Appropriately.

Petitioners claim it is the Respondents that need the incentive of an adverse Commission order to respond to Petitioners' claims (MITG Initial Brief, pp. 3, 49). A closer look at the evidence establishes that it is Petitioners that need the proper incentive to act in accordance with their legal duties and obligations.

In its attempt to provide some resolution to these issues, the Commission approved a tariffing process in the *Mark Twain* case (Ex. 62).[9] Despite this, over half of the Petitioners in this proceeding failed to avail themselves of this Commission-approved remedy. Moreover, the evidence shows that the Petitioners ignored the express directives of the Commission in its Report and Order issued in Case No. TT-97-524, which required Petitioners to allow indirect interconnection with wireless carriers like Respondents (Tr. 328; Ex. 45, p. 20). The record also establishes that Respondents have successfully negotiated and entered into interconnection agreements with carriers all over the country (*See* footnote 8), while Petitioners stand alone in their steadfast refusal to negotiate agreements of a similar nature. The record also establishes that Petitioners repeatedly rejected efforts of Respondents to mediate the issues subject to these complaints in an effort to bring a quick resolution to the issues to be determined by the Commission[10].

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[8] Verizon Wireless notes that Petitioners' "history of Missouri interconnection" found at footnote 86 of Petitioners' Initial Brief does not provide a single cite to the record to substantiate any statement made therein. In addition to being of questionable content, it certainly provides the Commission no legal basis to decide any issue in this proceeding and is completely irrelevant to establishing Petitioners' burden of proof in this proceeding.

[9] This case is currently on appeal at the Missouri Western District Court of Appeals.

[10] *See* Response to Order Directing Filing Regarding Mediation filed October 23, 2001 by Northeast Rural Telephone Company and Modern Telecommunications Company; Reply to Request for Voluntary Mediation filed

Based on these facts, it is clear that Petitioners, and not Respondents, need incentives to carry out their duties and obligations under state and federal law. Only an order of the Commission explicitly denying Petitioners the right to charge their access rates for the termination of local wireless traffic transited by SWBT and directing Petitioners to permit indirect interconnection will create such an incentive.

D. Inapplicable Alleged Precedent.

Petitioners cite a number of cases to support their claims for access charges for the local traffic transited by SWBT. However, when viewed in the proper context, these cases provide no guidance or precedent to the Commission on the issues presented herein.

Petitioners allege that three prior Commission decisions authorizing the payment of access charges for wireless traffic terminated to the networks of independent local exchange companies mandate a similar finding in the instant case.[11] Close scrutiny of the decisions issued by the Commission in these cases reveals that they were decided without reference to the principles enunciated by the FCC in its First Report and Order[12] and in an environment strikingly different from the environment that exists regarding the traffic at issue in these proceedings.

November 21, 2001 by MoKan Dial, Inc.; Reply to Requests for Voluntary Mediation filed November 13, 2001 by Chariton Valley Telephone Corporation; Reply to Requests for Voluntary Mediation filed November 13, 2001 by Mid-Missouri Telephone Company; Reply to Request for Voluntary Mediation filed December 10, 2001 by Alma Telephone Company.

[11] *In the Matter of United Telephone Company of Missouri's Complaint against Southwestern Bell Telephone Company for Failure to Pay United Its Terminating Access for Cellular Originated Calls Which Are Terminated in United's Territory*, 6 Mo. P.S.C. 3d 224 (April 11, 1997) ("United Telephone"); *In the Matter of Chariton Valley Telephone Corporation's Complaint against Southwestern Bell Telephone Company for Terminating Cellular Compensation & In the Matter of Mid-Missouri Telephone Company's Complaint against Southwestern Bell Telephone Company for Terminating Cellular Compensation,* 8 Mo. P.S.C. 3d 205 (June 10, 1999).

[12] *In Re Implementation of the Local Competition Provisions in The Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC No. 96-325, 11 FCC Rcd 15499 (1996).

In the *United Telephone* proceeding, all of the traffic was delivered end-to-end by SWBT prior to the date of the enactment of the Telecommunications Act of 1996 and prior to the time that the Commission authorized SWBT to become a transiting carrier by approving an amendment to SWBT's Wireless Interconnection Tariff in Case No. TT-97-524. Thus, the Commission decided the *United Telephone* case without addressing the effect and impact of the Telecommunications Act of 1996. The Commission's analysis in *United Telephone* is therefore completely irrelevant to this proceeding. The Commission found that the Chariton Valley and Mid-Missouri complaints were based on facts identical to those in the *United Telephone* case, and the Commission, therefore, did not engage in any new analysis concerning the payment of access charges for traffic terminated by SWBT to Chariton Valley and Mid-Missouri.[13] The *United Telephone* case is of no benefit to the Commission in deciding this case, and the Commission should likewise conclude that its decisions on the *Chariton Valley* and *Mid-Missouri* complaints are similarly beside the point.

In another attempt to introduce irrelevant authority in the proceeding, Petitioners claim that a Kansas arbitration involving SWBT has some bearing on whether Petitioners have fulfilled their burden of proof in this proceeding. (MITG Initial Brief, pp. 42-43). However, a close reading of the case reveals that it is irrelevant. As noted by SWBT's counsel during opening statements in this proceeding:

> The Kansas TCG arbitration concerned local land line traffic. And what TCG proposed in Kansas was an exclusive transiting service that TCG wanted to force upon us [SWBT] under which we would only be able to send and receive traffic to other CLECs through that TCG transit service.
>
> Now, it's true we objected to that proposed arrangement because we believed that we had the right to establish our own direct

[13] 8 Mo. P.S.C. 3d 205, 207.

> trunking to third parties if we thought that traffic volumes warranted it. But that's not the situation here.
>
> First, the Kansas TCG arbitration did not involve wireless traffic. Second, neither Southwestern Bell nor any other party in this case is saying that Mid-Missouri cannot bring its own trunks and directly connect with the wireless carriers. And third, the Commission's well aware that Southwestern Bell in Missouri accepts and terminates incoming transit traffic from other carriers and has done so for years.
>
> These facts should show that the Kansas TCG arbitration has no application here.

(Tr. 189).

The overwhelming legal precedent supports the positions taken by Respondents in this case. The repeated rejection by state commissions and courts throughout the country of claims like Petitioners' shows that there is very little, if any, support for the positions advanced by Petitioners.

E. Miscellaneous Misstatements, Mischaracterizations or Unsupported Allegations.

Petitioners' Initial Brief is replete with factual inaccuracies, misleading statements, and statements with no record support whatsoever. A sample of these types of allegations is described below.

Petitioners allege that the Respondents have purchased SWBT transiting services through SWBT's Wireless Interconnection Service Tariff. (MITG Initial Brief, p. 7). The evidence in the record of this case establishes that none of the traffic at issue was transited by SWBT pursuant to their Wireless Interconnection Tariff. (Ex. 13, p. 16). Moreover, Petitioners appear to contradict themselves by acknowledging that all parties in this proceeding (including Petitioners) agree that none of the traffic in issue was transited pursuant to SWBT's Wireless Interconnection Tariff. (MITG Initial Brief, p. 17).

Petitioners mistakenly characterize Respondents' position as "pin[ning] their case on the conclusion that the MITG companies have not negotiated reciprocal compensation arrangements with them in good faith." (MITG Initial Brief, p. 45). While the evidence establishes that Petitioners have failed to negotiate interconnection agreements in good faith, this issue is merely a red herring designed to distract the Commission from the fact that the Petitioners have failed to satisfy their burden of proof with substantial and competent evidence. Regardless of whether Petitioners negotiated in good faith, this does not change the fact that: (1) Petitioners are prohibited by state and federal law from charging access rates for termination of intraMTA traffic transited by SWBT to the networks of the Petitioners; (2) Petitioners have failed to establish how much, if any, of the traffic in issue is interMTA versus intraMTA; and (3) Petitioners have failed to establish the amount of traffic in controversy. Petitioners' absolute and total failure to establish by substantial and competent evidence any of these necessary elements, combined with the fact that Petitioners seek relief from the Commission which the Commission (by law)[14] cannot grant, and the fact that Petitioners seek to charge an illegal rate for the termination of local traffic in violation of state and federal law forms the basis for Respondents' position.

These are just a few of the examples which should cause the Commission to check closely all alleged "support" for positions advanced by Petitioners in their Initial Brief.

F. Compensation in the Absence of any Interconnection Agreements.

Petitioners advance an unsupported theory as to the appropriate compensation in the absence of interconnection agreements. (MITG Initial Brief, pp. 23-27) In formulating their theory, Petitioners have ignored FCC Rule 20.11, which governs relationships between the wireless carriers and local exchange carriers like Petitioners in the absence of interconnection

[14] Under Missouri law, the Commission has no power to award money damages, which is the relief sought by Petitioners hereunder. *See* Initial Brief of Verizon Wireless, p. 5.

agreements. According to 47 C.F.R. § 20.11(b), reciprocal compensation must be bilateral and rates must be reasonable. Access rates, or tariff interconnection rates that are based on access elements, are not reasonable or reciprocal, and they are therefore unlawful pursuant to this section.

III. INITIAL BRIEF OF THE STAFF

The Commission's Staff readily concurs with the Respondents that existing case law and FCC orders prohibit Petitioners from charging their access rates for the termination of intraMTA traffic transited by SWBT, and that SWBT is not an interexchange carrier ("IXC") when it carries this traffic as a transiting carrier. However, there are a few instances where Staff's positions are not supported by the record evidence or are contrary to existing law.

A. Staff Supports Solutions That Constitute Retroactive Ratemaking.

Staff admits that there is no rate on file with the Commission in any of the Petitioners' tariffs "for termination of CMRS originated traffic that was sent through a transiting carriers [*sic*] network" (Staff Initial Brief, p. 16). Staff ignores the consequences of the absence of such a rate and urges the Commission to adopt another rate to compensate Petitioners for traffic already transited. Staff advocates choosing "a rate element here, a rate element there" to create a new rate to apply to this traffic. This ignores the fact that the Commission has never ruled on the justness and reasonableness of this rate as it relates to the traffic in controversy. Staff supplies no legal support for its unique approach to this issue and merely asserts that it would not require the Commission to engage in retroactive ratemaking because the Commission, at one time (though not stated when), in some docket or dockets (though not stated which one(s)), found these, and assumedly other rates, acceptable under then-existing circumstances. The record establishes that the access rates for Petitioners are over fifteen years old. (Tr. 450-451; 565-566). Furthermore, Staff's position is internally inconsistent because on the one hand Staff concedes that access rates

cannot apply to the termination of intraMTA traffic, but on the other hand it proposes to create a local rate by using access rates as a starting point.

Staff's unsupported attempt to argue that its position does not require the Commission to engage in illegal retroactive ratemaking must fail. Simply stated, application of any rates to the traffic previously transited by SWBT to Petitioners' networks is barred and prohibited under Missouri law as an exercise in retroactive ratemaking. Nothing found in the evidence in the record of this proceeding or in Staff's Initial Brief supports any conclusion to the contrary.

B. Mischaracterization of Negotiations between Petitioners and Respondents.

Though, as stated above, it is not necessary for the Commission to make a determination on this issue to deny all relief sought by Petitioners, Staff's erroneous characterization of the attempts at negotiations between Respondents and Petitioners cannot be left unchallenged.

Staff alleges that CMRS providers "contacted the MITG companies to discuss the *possibility* of negotiation." (Staff Initial Brief, p. 19 (emphasis added)). Staff's claim: (i) is not supported by citation to any evidence in the record, and (ii) completely ignores the unrefuted and volume of evidence that establishes the Respondents tried again, and again, and again, to negotiate agreements with the Petitioners only to be rebuffed and rejected at every single opportunity by the Petitioners. (Ex. 17, Schedules E, F, G, H, I; Ex. 19, Schedule 1; Tr. 335, 1055). Staff, with no citation to any authority, asserts that after the Petitioners took positions inconsistent with their state and federal law obligations, that Respondents "dropped the issue" (Staff Initial Brief, p. 19). The record evidence (*see above*) establishes the contrary. While Staff correctly asserts that "the CMRS providers could have pushed for an arbitrated interconnection agreement under the Act" (Staff Initial Brief, pp. 19-20), Staff fails to assert that once negotiations commence, Petitioners also could have also "pushed for an arbitrated interconnection agreement under the Act". 47

U.S.C. §252(b)(1)[15]. While Staff's assertion that Petitioners are "without power under the Act to force the CMRS provider to negotiate and interconnect" is accurate, it is irrelevant in this proceeding in light of the unrefuted evidence that Respondents repeatedly attempted negotiations with Petitioners, thus giving the Petitioners every opportunity to file for arbitration with the Commission. (Tr. 271-272; 758-759).

The evidence in this proceeding establishes without question that, time and time again, Respondents tried to negotiate interconnection agreements with the Petitioners. There is no evidence in the record (nor has Staff cited any in its Initial Brief) that shows Petitioners remotely interested in establishing interconnection agreements with Respondents except upon terms and conditions in violation of state and federal law. Staff's position on these negotiations as stated in its Initial Brief is unsupported by the evidence in the record and cannot withstand even a cursory review of the record.

C. Filing Tariffs by Order of the Commission.

Staff states that the Commission has the authority to order certain of the Petitioners to file wireless termination service tariffs in this proceeding (Staff Initial Brief, p. 25) and then lists all of the alleged benefits which would accompany such an order and filing. (*Id.*). The legality of such tariffs is not as settled as Staff perceives it to be, and such filings may cause more problems than they will solve. In addition to the fact that this Commission's order approving such tariff filings is currently being reviewed, in the last month alone, the Sixth Circuit Court of Appeals and the United States District Court for the Eastern District of Michigan have both held that the use of a state-filed tariff in the absence of an interconnection agreement is inconsistent with the

[15] 47 U.S.C. §252(b)(1) states: "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."

Telecommunications Act of 1996 as such actions contravene the clear guidelines for negotiating and reaching an interconnection agreement set forth under Section 252 thereof.

In *Verizon North, Inc. v. Coast to Coast Telecommunications, Inc.*, No. 00-CV-71442-DT (E.D. Mich. October 3, 2002) ("*Coast to Coast*"), a local exchange company (like Petitioners) attempted to establish charges for the termination of local telecommunications traffic through a state tariff filing. The District Court vacated the Michigan Public Service Commission's order approving the tariff, stating that "[t]he MPSC's decision to impose a tariff in the absence of an interconnection agreement is inconsistent with [the Act] as it contravenes the clear guidelines for negotiating and reaching an interconnection agreement set forth under [47 U.S.C.] §252" (Order, pp. 10-11). Moreover, the District Court found that the MPSC's order "operates as a bypass of §252 of the [Act] and thus is inconsistent with the [Act]." (Order, p. 9).

> Because the MPSC approved Coast to Coast's tariff without the parties satisfying the clear dictates of §252's negotiation/arbitration process, the MPSC acted contrary to the [Act]. Imposing the tariff results in a chilling, rather than an enhancement, of competition in contravention of the [Act]. As such, the tariff is unenforceable.

(Order, p. 11). This decision is currently on appeal to the Sixth Circuit.

Moreover, in what is a likely preview of the Sixth Circuit's ruling in *Coast to Coast*, the Sixth Circuit Court of Appeals recently ruled in *Verizon North, Inc. v. John G. Strand, Chairman, et al.*, 2002 FED App 0388P (6th Cir. November 7, 2002) ("*Strand*") that an order by the Michigan Public Service Commission requiring incumbent local exchange carriers to offer network elements and services to competitors through published tariffs versus negotiated interconnection agreements is inconsistent with the provisions of the Telecommunications Act of 1996 and therefore invalid. In December, 1996, the Michigan Public Service Commission initiated state law proceedings against incumbent local exchange carriers in order to establish terms of interconnection to

Michigan local exchange networks generally. In connection with these general interconnection proceedings, the Michigan Public Service Commission required incumbent local exchange carriers to file tariffs with the Commission in which these carriers would offer to sell network elements and wholesale services to any interested party at rates predetermined by the Commission. The United States District Court of the Western District of Michigan held that this tariff requirement was invalid because it would allow competitors to circumvent the arbitration and negotiation process set out in §252 of the Telecommunications Act of 1996. (*Verizon North, Inc. v. Strand*, 140 F. Supp. 2d, 803, 809-10 (W.D. Mich. 2000)). In affirming the District Court, the Sixth Circuit Court of Appeals stated as follows:

> Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of the business relationships. *Id.* §§251(c)(1), 252. First, the Act explains that, '[u]pon receiving a request . . . an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier. . . .' *Id.* at §252(a)(1). In this regard, the [Act] places on incumbents the duty to 'negotiate in good faith the terms and conditions of such agreements.' *Id.* at §251(c)(1). However, either party to the negotiation may ask the relevant state commission to mediate any unresolved issues. *Id.* at §252(a)(2). If negotiation between the incumbent and the competitor does not produce an agreement, the [Act] provides that either party can, during a specific time period, ask the state commission to undertake binding arbitration of any open issues, and the [Act] provides specific guidelines for such arbitration. *Id.* at §252(b)-(d).
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> . . .
>
> The MPSC order at issue here establishes a different route . . . . The order requires Verizon to file tariffs with the state, 'set[ting] forth the rates, terms, and conditions' under which competitors might acquire network elements and services . . . In this way, the MPSC order permits competitors to purchase the services and elements directly off of the tariff menu, obviating the need to negotiate or arbitrate an interconnection agreement.

(*Strand,* pp. 5-7). The Sixth Circuit Court of Appeals agreed with the District Court's findings that a tariff filing,

> evades the exclusive process required by the 1996 Act, and effectively eliminates any incentives to engage in private negotiation, which is the centerpiece of the Act. Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the [Act].

(*Id.* p. 7). The Sixth Circuit Court of Appeals further notes that

> [T]he MPSC order completely bypasses and ignores the detailed process for interconnection set out by Congress in the [Act], . . . entering into private negotiation and arbitration and creating interconnection agreements that are then subject to state commission approval, FCC oversight and federal judicial review. This is 'inconsistent with the provisions of [the Act],'and therefore preempted.

(*Id.* p. 9). Ordering those Petitioners who still have not filed wireless termination service tariffs (even after their approval by this Commission in *Mark Twain*) to do so is not an action the Commission should seriously consider.

IV. CONCLUSION

Since receipt of requests for negotiations from the wireless carrier Respondents as far back as 5 years ago, Petitioners have had the right under the Telecommunications Act of 1996 to compel arbitration of any open issues that arose in the negotiations with Respondents. Had Petitioners availed themselves of their rights and remedies and filed for arbitration with this Commission, the issues presented in this proceeding would have been resolved long ago. But Petitioners selected a different course of action, one in which they intentionally ignored their duties and bypassed their rights under the Telecommunications Act of 1996. They tried to amend their tariffs to allow them to charge their access rates for the termination of local, wireless traffic. The Commission rejected this effort. Undaunted, Petitioners rejected additional requests for

negotiation from the Respondents by refusing the Respondents' requests for indirect interconnection, which is expressly permitted under the Act. They also conditioned negotiation on the payment of their access charges for all traffic terminated prior to the date of an agreement, even though federal law and Missouri law prohibit the imposition of access charges upon local, wireless traffic. Petitioners again refused to seek arbitration of their unresolved issues with Respondents before this Commission and, instead, sought to enforce their access charge scheme by filing complaints with this Commission, which complaints form the bases of this proceeding.

The substantial and competent evidence in the record leaves no doubt that Petitioners have failed to meet their burden of proof, and that this Commission must issue an order denying all relief sought by Petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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