BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

OPENING POST-HEARING BRIEF OF WESTERN WIRELESS CORPORATION AND T-MOBILE USA, INC.

Come now Western Wireless Corporation ("Western Wireless") and T-Mobile USA, Inc. ("T-Mobile"), and for their post-hearing brief in this proceeding, state the following:

INTRODUCTION

1. This complaint proceeding was initiated by a group of rural local exchange carriers (collectively referred to as "the Complainants"), claiming that several wireless carriers have failed to pay appropriate compensation for the completion of traffic originated by their customers and terminated to the Complainants' landline customers.

The specific issue in dispute is what charges, if any, local exchange carriers may impose on wireless carriers for completion of wireless to wireline intraMTA (Major Trading Area) traffic. In the absence an interconnection agreement between the parties or a wireless termination tariff, either of which would set forth the appropriate compensation, the Complainants argue that they may impose charges roughly

equivalent to their intrastate access tariffs. The wireless Respondents counter that access charges may not be charged and that the existing bill-and-keep system is an appropriate compensation scheme.[1]

FACTUAL DISCUSSION

2. The Respondents provide wireless telecommunications services in Missouri under licenses granted by the Federal Communications Commission. T-Mobile USA, Inc. (formerly VoiceStream Wireless) and Aerial Communications, which T-Mobile has acquired, are PCS providers throughout most of the state, while Western Wireless Corporation is a cellular provider with an FCC license to provide service in Rural Service Area Missouri 9, which consists of Bates, Vernon, Henry, St. Clair, and Cedar Counties in southwest Missouri.

The Complainants are small local exchange carriers which principally provide service in rural parts of the state. For customers of T-Mobile, Western Wireless, and the other wireless Respondents to make calls to landline customers of the Complainants, the Complainants must use their networks to complete the calls. All of the Respondents utilize their connection with Southwestern Bell Telephone Company ("SWBT") to carry this traffic, and in turn SWBT uses its connection with the Complainants to transit the call to the Complainants' networks. The function which SWBT performs in the completion of this traffic is called "transiting service."

[1] The issue as to whether a local exchange carrier may propose, and a state regulatory commission approve, a wireless termination tariff, is presently on appeal to the Missouri Court of Appeals in State of Missouri ex rel. Southwestern Bell Wireless LLC v. Public Service Commission, Case No. WD 60928, which was argued on October 2, 2002, and has been presented to the Federal Communications Commission in a Petition for Declaratory Ruling filed on September 6, 2002, in In the Matter of Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs, CC Docket Nos. 01-92, 95-185, and 96-98.

3. The connection between the wireless companies' and rural LECs' networks is indirect, that is, their networks do not meet directly, rather, the companies' connections with SWBT allow SWBT to function as an intermediary in transiting the traffic. The function which SWBT performs includes switching and transport. In their Complaints, the Complainants seek to hold SWBT derivatively liable for the charges which they also claim from the wireless companies.

4. Prior to February, 1998, SWBT was treated as an interexchange carrier for purposes of sending traffic from wireless carriers to incumbent LECs such as the Complainants. Effective February 5, 1998, however, as a result of the Commission's order in Case No. 97-524, SWBT altered its relationship with the LECs to that of a transport service provider. Since February, 1998, SWBT has delivered traffic between the wireless carriers and the LECs as a transport service. (Direct Testimony of David Jones, Ex. 1, p. 7; Rebuttal Testimony of Michael Scheperle, Ex. 11, p. 4). Three of the seven Complainants (Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial Inc.) subsequently filed wireless termination tariffs, which the Commission approved and made effective in February, 2001. The other four Complainants (Modern Telecommunications Company, Northeast Rural Telephone Company, Chariton Valley Telephone Corporation, and Mid-Missouri Telephone Company) have never filed wireless termination tariffs.

5. All seven of the Complainants seek to recover compensation from the wireless carriers equivalent to access charges for some period of time. For the three companies which have wireless termination tariffs, recovery is sought for three years (February, 1998, to February, 2001), while for the remaining four companies, recovery

is sought for the entire period from February, 1998, to the present. The access charges for those companies are based on embedded costs, not forward-looking costs. (Tr. 365 l. 18-24; Tr. 428 l. 18-20; Tr. 576 l. 17-21). In addition, the access charge levels which the Complainants wish to impose were, in many cases, determined long before the advent of any telecommunications competition and the federal law which fostered competition, the Telecommunications Act of 1996. For example, William Biere of Chariton Valley stated "the access tariff was in effect when the '96 Telecommunications Act was passed..." and that the 9.23 cents per minute level was determined in the 1970's. (Testimony of William Biere, Tr. 455 l. 2-3, 456 l. 9-17). Mr. Stowell of MoKan Dial and Choctaw Telephone testified that MoKan's access tariff of 9 cents per minute was approved by the Commission in 1988 and was lowered to 5.83 cents in 2001. (Tr. 576 l. 4-16; Exhibit 60, first page). Mid-Missouri chose not to file a wireless termination tariff because the Commission was approving charges in wireless termination tariffs filed by other LECs which were lower than Mid-Missouri's access charge. As Mr. Jones testified: "...there was a huge rate disparity between what the wireless tariffs were being approved at and what our access tariffs were. And we felt like it was too big of a hit for Mid-Missouri." (Tr. 320 l. 19-22). Mid-Missouri reached that conclusion, even though the Commission had approved a two cents per minute addition for the wireless termination tariffs, to cover the cost of the local loop. (Tr. 320 l. 23-24).

6. None of the Respondents has negotiated an interconnection agreement with any of the Complainants. An interconnection agreement would typically include, inter alia, a provision concerning reciprocal compensation for the mutual delivery of traffic between the parties. However, none of the Complainants has even attempted to negotiate an interconnection agreement with T-Mobile or Western Wireless. For

example, neither T-Mobile nor Western Wireless has received from any Complainant a request to enter into negotiations under Section 251 of the Telecommunications Act. (Rebuttal Testimony of Gregory Tedesco, Ex. 21, p. 3, 5). Similarly, neither T-Mobile nor Western Wireless has initiated interconnection negotiations because, as Mr. Tedesco noted, "the volumes of traffic weren't there to justify" the time and expense required to negotiate an interconnection agreement. (Tr. 791 l. 17-18).

7. The general complaint from the wireless carriers is that the Complainants have conditioned negotiation on a concession that the wireless carriers would directly connect to the Complainants' networks. This method of negotiation is inconsistent with the governing provisions of the Telecommunications Act of 1996. As Sprint witness John Idoux pointed out, if all wireless carriers directly connected their networks to LEC networks throughout the state, over 4,900 direct connections would be established. (Rebuttal Testimony of John Idoux, Ex. 14, p. 10-11). The cost of each such facility would be several thousand dollars, and would never yield revenue sufficient to justify its existence. Mr. Tedesco testified that T-Mobile and Western Wireless stand ready to engage in substantive negotiations, but he does note that the connection with LEC networks would in all likelihood be indirect, as it is not economical for T-Mobile or Western Wireless to incur the cost of construction direct connections. (Tedesco Rebuttal, p. 6). The LECs have also requested payments for termination of wireless-originated traffic which the wireless companies believe far exceed any amount justifiable under controlling law.[2]

[2] The relevant law on such issues as appropriate reciprocal compensation charges and LEC insistence on direct network connections is discussed in the Argument section below.

8. None of the Complainants or Respondents has sought Commission arbitration arising out of the negotiation for an interconnection agreement. The negotiations have not been productive because, according to the Respondents' witnesses, the Complainants have insisted on positions which the wireless carriers consider unlawful under controlling federal law and FCC orders.

9. The three LECs which filed wireless termination tariffs are seeking recovery of compensation under those tariffs from the date they became effective, in February, 2001, to the present. As noted by Staff witness Scheperle, these tariffs apply to the intraMTA, wireless to wireline traffic where the parties have not negotiated an interconnection agreement and are indirectly connected. (Rebuttal Testimony of Michael Scheperle, Ex. 11, p. 11). In approving these tariffs in Case No. TT-2001-139, the Commission expressly stated that any Commission-approved interconnection agreement would supersede the tariff.

ARGUMENT

10. The key issue in this case is whether LECs can charge access charges for intraMTA traffic generated by wireless carriers. The FCC has held that wireless calls originating and terminating in the same MTA are considered local. As these calls are local in nature, any compensation flowing between the companies must be contained in an interconnection agreement. Absent an agreement as to the appropriate formula for reciprocal compensation, the simple bill-and-keep mechanism should be utilized, under which each carrier bills, collects, and retains the revenues from its own customers for services performed in completing calls to customers of other telecommunications companies.

11. The preferred method for resolving questions concerning charges to wireless companies is the interconnection agreement, submitted to and approved by the Commission under Section 252 of the Telecommunications Act. During the hearing, RLJ Thompson raised several questions which he asked the parties to address in their post-hearing briefs. Those questions can be collapsed into a single question: can the Commission order the parties to negotiate and consummate an interconnection agreement? (Tr. 754 l. 22-25).

A. The Commission Cannot Order Wireless Carriers and LECs to Negotiate Interconnection Agreements.

12. Section 251 of the Telecommunications Act outlines the various duties and responsibilities telecommunications carriers have to provide access to their networks and to negotiate in good faith concerning the relationship created when one company needs access to another company's network. Once negotiations have begun, both parties have an obligation to negotiate in good faith. However, nothing in Section 251 requires either party to initiate negotiations, nor does there appear to be any power granted to the Commission to order companies to initiate negotiations or bring pending negotiations to a close. Mr. Tedesco articulated this interpretation of the legal constructs in response to questions from Commissioner Lumpe and Judge Thompson. (Tr. 776 l. 22 - 777 l. 9; 787 l. 16-21).

13. The Commission may not have the power to force the parties to negotiate, but Staff's recommendation appears to be aimed at precisely that goal. Even though Staff acknowledges that the FCC has held that access charges may not be charged for wireless-originated intraMTA calls, which are to be considered local calls (see Rebuttal of Michael Scheperle, Ex. 12, p. 10), Staff recommends a facially-unlawful solution

whose real goal is to force the wireless carriers to negotiate interconnection agreements, which is an expensive and time-consuming process, and from an extremely disadvantageous position. Staff recommends that each LEC file a wireless termination tariff in which the per minute charge would be "...based on a single per minute charge, consisting of the current intrastate, intraLATA access rate for switching and transport, plus a two-cent per minute adder to contribute to the cost of the local loop facilities." (Rebuttal Testimony of Michael Scheperle, Ex. 11, p. 14 l. 17-22). According to Mr. Scheperle, this scheme would provide the LECs "...a compensation mechanism for wireless traffic, whether traffic is interMTA or intraMTA, absent an interconnection agreement..." (Scheperle Rebuttal, Ex. 11, p. 14-15).

14. If the Commission were to adopt Staff's recommendation (which, as demonstrated below, is fundamentally flawed legally), the wireless carriers would have little choice but to enter into negotiations for interconnection agreements. But the Commission cannot do by indirection what it cannot do by direction. There is nothing in the Telecommunications Act which empowers the Commission to compel carriers to enter into and/or consummate negotiations for an interconnection agreement. However, once negotiations have begun, the parties have a legal obligation to negotiate in good faith. 47 U.S.C. § 251(c)(1). As such, no party to negotiations may insist on unlawful preconditions or refuse to execute an agreement unless it contains provisions which are unlawful. That is the case with the LEC insistence on direct connections between the wireless and LEC networks. Under the law, the wireless carriers may elect to connect directly or indirectly, and the LECs may not condition their consent to an agreement on direct connections. Under Section 251(a)(1), the LECs have a duty to "interconnection directly or indirectly" with the wireless carriers.

15. In response to questions from Judge Thompson, John Clampitt of Verizon Wireless testified that the Commission should instruct the LECs not to demand direct connections:

> Q. But what I've heard over the past four days is that, in these cases, negotiations have simply been brought to a standstill because the wireless carriers have been told direct or nothing?
>
> A. I believe that's been the case, yes.
>
> Q. So that aspect could perhaps be solved, in your opinion, by telling them you can't say that?
>
> A. I believe that's true, yes, because we would be willing to live with being able to terminate traffic as local interconnection for the wireless to landline direction...

(Tr. 1101 l. 18 - 1102 l. 1).

16. Although the Commission cannot force parties to enter into negotiations, there would be nothing wrong with the Commission insisting that parties comply with the law in the conduct of negotiations. Thus, it would be within the Commission's powers to state in the Order which results from this proceeding that no party may insist on terms which are unlawful, which could include the imposition of access charges on intraMTA traffic transited by carriers other than interexchange carriers,[3] or the requirement that the wireless carriers directly connect with the LECs.

[3] Although Staff recommends the imposition of access charges, with an adder for local loop compensation, on intraMTA traffic, Mr. Scheperle admits that access charges are appropriate for intraMTA traffic only if that traffic is carried by an interexchange carrier. (Scheperle Rebuttal, Ex. 11, p. 13). And Mr. Scheperle conceded that SWBT is not acting as an IXC in transiting wireless-originated traffic to the LECs. (Tr. 899 l. 6-10).

B. The Present System of Bill-and-Keep Properly Compensates the Wireless Carriers and the LECs for the Exchange of IntraMTA Traffic between their Networks.

17. In the absence of an interconnection agreement or a wireless termination tariff setting forth amounts to be paid for compensation, carriers exchanging traffic practice "bill-and-keep," that is, they bill their customers and retain those revenues. That is the present situation between the wireless carriers and LECs, where there is no interconnection agreement and the LEC has no wireless termination tariff. As Mr. Tedesco put it, "[the carriers are] presently in a de facto bill and keep mode, whereas we're not rendering bills, and we would expect the other carriers to do the same." (Tr. 777 l. 14-17).

18. Bill-and-keep is an appropriate method of compensation. It allows carriers to retain revenues to build and maintain their networks as they see fit. It does not appear that the absence of an explicit system of reciprocal compensation has caused the LECs to curtail spending or service. None of the Complainants introduced any evidence that they have had to cut capital spending or maintenance budgets, or have considered seeking rate relief from the Commission, because of the absence of compensation from wireless carriers. Regardless of their articulated concern about revenues foregone, there is no evidence that the LECs have been affected to any significant degree.

19. Staff recommends that the Commission adopt a plan which would force the wireless carriers to negotiate interconnection agreements on disadvantageous terms. Staff witness Scheperle outlines a plan under which the wireless carriers would pay access-like charges to the LECs for the completion of intraMTA traffic, and that to the extent the wireless carriers fail to distinguish between interMTA traffic (on which

they already pay access charges) and intraMTA traffic, all traffic would be considered interMTA. (Scheperle Rebuttal, Ex. 11, p. 16).

20. Knowing that the wireless carriers cannot distinguish between interMTA and intraMTA traffic, Staff still wishes to force wireless carriers to the negotiating table (something the Commission cannot do explicitly) by having such an onerous compensation scheme imposed on them that they have no choice. Staff concedes that access charges are inappropriate for intraMTA traffic,[4] and that the wireless carriers deliver intraMTA traffic to the LECs. (Tr. 902 l. 16-20). Mr. Scheperle conceded at the hearing that Staff's recommendation that all traffic be considered interMTA pending wireless carrier studies on jurisdictional splits is based on Staff's belief that these studies should be done. (Tr. 903 l. 3-9). He acknowledged that until the wireless carriers complete those studies, they will be paying full access charges on all traffic delivered to the LECs, regardless of the geographic origin of the calls. (Tr. 903 l. 18-21).

21. The impracticality of Staff's recommendation is demonstrated by the fact that the LECs would have absolutely no incentive to cooperate with the wireless carriers in performing the traffic studies. Mr. Scheperle acknowledged that LEC cooperation with the studies would be important. (Tr. 907 l. 16-21). But if Staff's recommendation is adopted, the LECs would be receiving full access charges for all traffic, and the studies would only result in reductions of the revenues received from the wireless carriers (by the allocation of traffic to the intraMTA jurisdiction, which would end the stream of access charge revenues for that traffic). Mr. Scheperle conceded that the traffic studies

[4] As Mr. Scheperle puts it, "Staff still recommends that access charges are not lawful for terminating intraMTA wireless traffic..." (Scheperle Rebuttal, Ex. 11, p. 10).

he is recommending could result in substantial allocation of traffic to the intraMTA jurisdiction. (Tr. 906 l. 14-19). Thus, the LECs would have every incentive to interfere with and defeat the purpose of the studies and retain a substantial flow of access charge revenues, knowing full well that much of the traffic is in fact intraMTA in nature and under controlling FCC precedent is to be treated as local, not subject to access charges.

22. In short, the difficulty in tracking the jurisdictional nature of the wireless to LEC traffic, the absence of evidence that the LECs or their customers have suffered from the loss of revenues, and the practicality of bill-and-keep as an easily-administered compensation scheme, all argue for the continue application of bill-and-keep, at least until the individual wireless carriers and LECs have negotiated interconnection agreements.

C. Mobile and Western Wireless Stand Ready to Negotiate Appropriate Interconnection Agreements with the LECs.

23. The Commission should not get the impression that the wireless carriers have refused to enter into negotiations with the LECs. Far from it. Each of the wireless carriers indicated that it would willingly negotiate agreements, as long as they knew that the agreements would be negotiated on reasonable terms. The preconditions upon which the LECs have insisted have simply made negotiation of the terms and conditions of interconnection impossible for the wireless carriers. Adoption of Staff's recommendation concerning compensation, traffic studies, and jurisdictional defaults pending completion of the traffic studies, would only tilt the playing field more in the LECs' direction and further complicate negotiations.

24. Mr. Tedesco testified that T-Mobile and Western Wireless are unequivocally willing to "negotiate and enter into agreements with LECs." (Tedesco Rebuttal, Ex. 21, p. 6; Tr. 787 l. 16-23). Both companies have entered into interconnection agreements with rural LECs in other states. However, he did indicate that interconnection with LECs would likely be indirect, that is, through an intervening provider, such as SWBT. Several wireless carriers in this proceeding provided evidence that the LECs had insisted on direct connections as a precondition of negotiation. (See, e.g., Rebuttal Testimony of Bill Pruitt, Ex. 17, p. 12; Tr. 1101 l. 17-21). As noted above, Verizon witness Clampitt indicated that the Commission should inform the LECs that they cannot insist on direct connection as a condition for interconnection.

25. T-Mobile has engaged in substantive interconnection negotiations with other LECs in Missouri. For example, it has negotiated with Spectra Communications Group for several months. Although the parties has to date been unable to finalize their negotiations, and T-Mobile was compelled to file a petition for arbitration with the Commission because of the pending expiration of the arbitration period, T-Mobile is hopeful that it will be able to reach an agreement with Spectra.

26. T-Mobile and Western Wireless believe that negotiation of mutually acceptable interconnection agreements is in the interest of all concerned. It is ready to negotiate on level ground, which may require Commission intervention to ensure that LEC demands do not exceed lawful bounds.

CONCLUSION

27. T-Mobile and Western Wireless believe that the issue of compensation for the delivery of traffic between their networks and the LECs' networks should be resolved through the negotiation of interconnection agreements. However, attempts to negotiate those agreements will be fruitless as long as the LECs insist on direct connections and a one-way compensation scheme. The Commission should take this opportunity to preempt LEC behavior which will inevitably forestall the negotiation of interconnection agreements.

Respectfully submitted,

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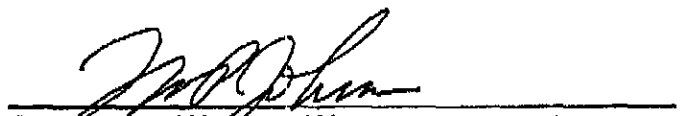
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by first class United States mail, postage prepaid, on all parties of record on this 18th day of October, 2002.



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