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Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

FILED

JAN 4 2000

**Missouri Public
Service Commission**

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


Dear Judge Roberts:

Attached for filing with the Commission is the original and fifteen (15) copies of AT&T Communications of the Southwest, Inc.'s and AT&T Wireless Services, Inc.'s Reply Brief in the above referenced matter.

I thank you in advance for your cooperation in bringing this to the attention of the Commission.

Very truly yours,

LATHROP & GAGE, L.C.

By: 
Paul S. DeFord

Attachment

cc: All Parties of Record

FILED

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

JAN 4 2000

Missouri Public
Service Commission

In the Matter of Alma Telephone)
Company's Filing to Revise its Access) Case TT-99-428, et al.
Service Tariff, P.S.C. Mo. No. 2)

**REPLY BRIEF OF
AT&T WIRELESS SERVICES, INC. AND AT&T COMMUNICATIONS OF THE
SOUTHWEST, INC.**

COMES NOW AT&T Wireless Services, Inc. and AT&T Communications of the Southwest, Inc. (collectively "AT&T") and for their Reply Brief in the above-captioned matter state as follows:

INTRODUCTION

AT&T submits this Reply Brief for the purpose of responding to portions of the Initial Briefs of various other parties; its failure to specifically address any argument should not be construed as acquiescence or concession on any issue. AT&T incorporates its Initial Brief herein.

DISCUSSION

The essence of the argument advanced by the MMG and STCG is that the 1996 Act and FCC rules and orders govern pricing only when two telecommunications carriers (and only two carriers) happen to have an existing direct physical interconnection. The MMG and STCG therefore must engage in a tortured analysis of selected statutory and regulatory language and ignore uncontroverted authority that the character of any particular call (i.e., local or toll), and the corresponding intercompany compensation, is determined by where the call originates and terminates, not the number of carriers involved in completing the call.

The MMG also levels an assault on the business ethics of wireless providers for sending traffic to its members without first entering into interconnection agreements. Contrary to the MMG's assertions, the record in this case is replete with evidence that wireless providers have attempted to engage in negotiations with the MMG members and other independent LECs but have been repeatedly rebuffed. Ex. 9 at pp2-3, Ex. 12 at p2, Ex 13, Ex 14 and Ex 15. The MMG asks the Commission to approve its proposed tariff to address the absence of a reciprocal compensation agreement when the MMG's refusal to negotiate such an agreement has created the vacuum that now exists.

Instead of negotiating lawful reciprocal compensation agreements, the MMG and STCG seek to impose charges that are twelve (12) to twenty-four (24) times higher than would be allowable under the FCC default proxy rates, Tr. at p151, or any other reasonable measure of costs. Although the MMG suggests that its proposed tariff will "continue the standard compensation practice," MMG Initial Brief, p.2, the MMG acknowledged that it was unaware of any jurisdiction that has applied access charges to local traffic as sought in the proposed tariff. Tr. at p129. The MMG and STCG persist in seeking to impose a tariff that ignores the historical context and express language of the 1996 Act and FCC rules and orders, which mandate cost-based pricing for local calls and prohibit access charges for intra-MTA CMRS calls.

1. The FCC Has Exercised Its Jurisdiction Over Pricing For Intra-MTA CMRS Traffic To Address ILEC Overreaching.

Since the mid-1980's, the FCC has been concerned with exactly the kind of ILEC abuse of the interconnection process with CMRS providers that is represented by the MMG tariff. See, e.g., In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 1996 FCC LEXIS 3878, Appendix

B, ¶ 5 (Mar. 5, 1986). Addressing this abuse again in the mid-1990's, the FCC in fact considered mandating bill and keep for LEC-CMRS carrier interconnection—thus avoiding the opportunities for mischief such as that now engaged in by the MMG and STCG.

When Congress enacted the Telecommunications Act of 1996, the FCC adopted the requirement under the Act that all reciprocal compensation arrangements between ILECs and CMRS carriers were to be governed by cost-based rates within the CMRS local calling area (i.e., intra-MTA). Access charges such as those applicable to IXCs could be charged only outside the MTA. In reviewing the FCC's jurisdiction to establish pricing rules under the 1996 Act, the Eighth Circuit confirmed that the FCC has plenary jurisdiction over rates and other matters specific to CMRS providers. See Iowa Utilities Board v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997), aff'd in part, rev'd in part, 525 U.S. 366 (1999) (reversing conclusion that the FCC did not have jurisdiction to establish pricing rules even for landline carriers).

The MMG seeks in its proposed tariff to impose access charges on all intra-MTA CMRS traffic in direct violation of the FCC's mandate concerning rates applicable to the exchange of local CMRS traffic with ILECs.

2. The 1996 Act and the FCC's First Report and Order Prohibit Access Charges for Intra-MTA CMRS Traffic.

In connection with the 1996 Act's mandate of reciprocal compensation for the transport and termination of telecommunications traffic, the FCC established the MTA as the local calling area for CMRS traffic, emphasizing that reciprocal compensation rates apply to intra-MTA traffic and access charges do not apply to intra-MTA CMRS traffic. “[T]raffic 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.”

FCC First Report and Order, ¶1036. The FCC's ruling depends only on whether traffic originates or terminates on a CMRS network and is in no way affected by the presence of an intermediate carrier. Consistent with the FCC's long-held position that access charges do not apply to local wireless traffic, the FCC's First Report and Order allows access charges only in the context of non-local calls. See, e.g., FCC First Report and Order, ¶1034. See also Iowa Utilities Board v. FCC, 120 F.3d 753, 799 n.20 (8th Cir. 1997) (discussing access charges in the context of non-local calls applied to IXC's); Access Charge Reform Order, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997) (access charges discussed in relation to non-local traffic), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998); In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68 (Feb. 25, 1999) (access charges discussed in context of non-local traffic).

Contrary to the MMG's position, the FCC did not leave open any possibility of access charges applying to local CMRS traffic. Instead, the FCC noted that the 1996 Act "preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." FCC First Report and Order, ¶1033. Although the FCC acknowledged that state commissions may generally determine what geographic areas should be considered local areas for reciprocal compensation purposes, the FCC expressly held that states may not define the local calling area for traffic to or from a CMRS network. FCC First Report and Order, ¶1035. The MMG and STCG cannot collaterally attack in this proceeding the FCC's determination of the MTA as the local calling area for CMRS traffic or the FCC's prohibition on access charges for intra-MTA CMRS traffic. Under

the Hobbs Act, final orders of the FCC may be challenged only before the federal courts of appeals. See US WEST Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1120 (9th Cir. 1999) (citing 28 U.S.C. §2342 and 47 U.S.C. §402(a)).

Despite the FCC's explicit prohibition on imposing access charges for any intra-MTA CMRS traffic, the MMG attempts to circumvent the FCC's rules through a strained reading of the FCC's First Report and Order. The MMG focuses on isolated words without regard to the statutory and regulatory scheme as a whole and the historical concerns addressed by that scheme. According to the MMG's argument, one set of rules (and one definition of the local calling area) would apply to CMRS providers who directly connect with a LEC while a different set of rules (and a smaller local calling area) would apply to CMRS providers who do not directly connect with that LEC. The FCC declined to adopt such a non-uniform approach, however. The FCC established a single set of rules and a single definition of local calling area for all CMRS providers.

Because wireless licensed 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 area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers.

FCC First Report and Order, ¶1036.

3. Reciprocal Compensation Applies to Intra-MTA CMRS Traffic Between the MMG and CMRS Providers Regardless of How That Traffic is Routed or How the Interconnection is Labeled.

In addition to being patently contrary to the Act and FCC rules, MMG makes a misleading argument that access charges should apply to intra-MTA CMRS traffic depending on how that traffic is delivered between the ILEC and the CMRS carrier.

In establishing the MTA as the local calling area and prohibiting access charges for intra-MTA CMRS traffic, the FCC did not distinguish how a CMRS provider's local traffic is carried to the terminating party. FCC Rule 51.703(a) expressly requires every LEC to establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier. Interpreting the Act, the FCC ruled that a LECs reciprocal compensation obligation applies to all local traffic transmitted between LECs and CMRS providers. FCC First Report and Order ¶1041. Nowhere does the FCC make these absolute obligations contingent upon how an intra-MTA CMRS call is routed to the terminating carrier.

Moreover, the FCC has recognized that when transport is provided among carriers through unbundled network elements, the transport is considered a part of the purchasing carrier's network. See, e.g., FCC First Report and Order ¶1039 ("Many alternative arrangements exist for the provision of transport between the two networks, [including] . . . unbundled network elements provided by incumbent LECs"); Report and Order in the Matter of Federal-state Joint Board on Universal Service, FCC 97-157, CC Docket No. 96-45, ¶128 (Mar. 8, 1997) (the "own facilities" requirement for universal service is satisfied by facilities obtained as UNEs under Section 251(c)(3)). The FCC has explained that

[c]arriers requesting use of unbundled elements within the incumbent LECs network seek in effect to purchase the right to obtain exclusive access to an entire facility, or use of some feature, function or capability of

that element. . . . Carriers seeking other elements, especially shared facilities such as common transport, are essentially purchasing access to a functionality of the incumbent's facilities on a minute-by-minute basis.

FCC's First Report and Order ¶258.

In Case No. TO-97-40, the Missouri Commission required to SWBT to make interoffice transmission facilities, including dedicated and common transport, available as unbundled network elements without restriction.¹ Further, the Commission recognized that providing intermediate transport² was identical to providing the underlying unbundled network elements when it required "the rates for intermediate transport must be based upon the unbundled network elements that perform the function."³

When a third party ILEC such as SWBT provides unbundled transport to a requesting carrier for the transport of local traffic, the transport UNE functions as a part of the requesting carrier's own network, constituting a direct connection to the terminating carrier over the requesting carrier's network. The same is true if the requesting carrier is a CMRS provider transiting intra-MTA traffic. When a CMRS provider purchases unbundled transport, either dedicated or common, from an ILEC such as SWBT for the transport of local traffic, that CMRS provider has exclusive use of that transport facility on a minute-by-minute basis constituting a direct connection.

¹ Case No. TO-97-40, In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, December 11, 1996, page 8.

² Intermediate transport was defined as "the carriage of calls originating on one LSP's network which transit through SWBT's network for termination to another LSP or independent LEC". *ibid.* page 41.

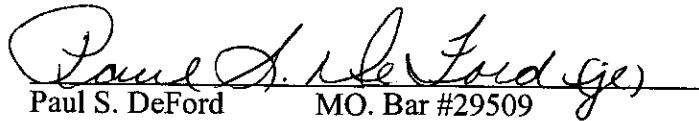
³ *Ibid.* page 42.

This approach reflects the reality that an ILECs network does not function any differently, nor does the ILEC incur any different costs, by transporting and terminating an intra-MTA mobile-to-land call when that call is transited over a third carrier instead of exchanged directly between two carriers or, for that matter, when that call is handled via a direct physical interconnection as opposed to a virtually direct interconnection through transport provided by a third carrier. MMG's proposed tariff would require a CMRS provider to pay more for the same intra-MTA call to a provider with whom it does not physically interconnect directly than it does to terminate calls to a provider with whom it does physically interconnect directly. This is in direct violation of the Act's requirement of cost-based rates and would not lead to reasonable compensation for the costs of transporting and terminating a call.

CONCLUSION

AT&T remains firmly convinced that the Commission must reject the proposed MMG tariff because application of access charges to all traffic that is transited to the MMG companies, whether directly or indirectly, would violate prior orders of this Commission, the 1996 Act and FCC rules and orders. Those authorities prohibit access charges for local CMRS traffic without exception. Traffic to and from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5), not access charges. Similarly local traffic originated by a CLEC can not be subject to access charges. The proposed tariff must therefore be rejected.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above pleading was served, by first class United States mail, postage prepaid, this 4th day of January, 2000, on the following counsel of record:

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