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April 18, 2002

FILED

APR 18 2002

Missouri Public
Service Commission

Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

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

Dear Mr. Roberts:

Enclosed for filing in above referenced matter, please find an original and eight copies of the MITG's and STCG's Joint Application for Rehearing.

Please see that this filing is brought to the attention of the appropriate Commission personnel. If there are any questions regarding this matter, please direct them to me at the above number. Thank you in advance for your attention to and cooperation in this matter.

Sincerely,

Brian T. McCartney

Brian T. McCartney

BTM/da
Enclosures
cc: Parties of Record

FILED

APR 18 2002

Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Mid-Missouri Group's Filing to Revise its Access Services Tariff, P.S.C. Mo. No. 2.	)))	CASE NO. TT-99-428 et al.

THE MITG'S AND STCG'S
JOINT APPLICATION FOR REHEARING

Come now the MITG and the STCG, pursuant to § 386.500 RSMo 2000, and for their Application for Rehearing of the Commission's April 9, 2002, *"Amended Report and Order"* state as follows:

SUMMARY

The Commission's "*Amended Report and Order*" should be reconsidered and set for additional hearing and supplemental briefing because: (1) it is the product of unlawful procedure upon remand from the Circuit Court and Court of Appeals; (2) it again fails to provide sufficient findings of fact, conclusions of law, or rationale to support the Commission's decision; and (3) it is unlawful, unreasonable, and unsupported by record evidence.

INTRODUCTION

The tariffs at issue in this case were filed because SWBT and the wireless carriers delivered terminating wireless traffic in the absence of an interconnection agreement and in violation of Commission order. This was the sole reason for filing the tariffs. After three years of litigation there is still no explanation from the Commission as to why the small companies cannot apply access tariffs in the absence of an interconnection agreement.

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The Commission's initial decision failed to explain why small companies cannot apply access tariffs. The lack of explanation renders the Commission decision suspect, as its prior decisions allow the application of access tariffs, and the uncontradicted record in this case demonstrates that access charges are being applied to the traffic in question.

The Court of Appeals remanded this case for the Commission to provide adequate findings and conclusions as to why the tariffs could not apply in the absence of an interconnection agreement. The Commission's prior decisions are confusing and inconsistent in this regard, and the Commission's initial decision in this case failed to provide sufficient findings of fact upon which it could be reviewed. The remand was intended to provide the Commission with an opportunity to explain, in its decision, why access tariffs could not be applied in the absence of an interconnection agreement.

Unfortunately, the Commission's April 9, 2002 "*Amended Report and Order*" does absolutely nothing to answer the basic issue raised by this case. If not now corrected, the "*Amended Report and Order*" will likely result in another Circuit Court reversal, another appeal, and another remand from the Court of Appeals instructing the Commission to provide adequate findings and conclusions. Thus, it is possible we will be here two years from now in exactly the same position we are in today.

The Commission should now affirmatively and clearly decide this issue. It appears the Commission believes that one simple legal conclusion – "access tariffs cannot be applied to intra-MTA wireless traffic" – provides an adequate basis for its decision. Unfortunately, it does not. The Commission should think about the logical

"disconnects" that its original *Order* created for the Courts and the small companies. Perhaps when viewed in this light the Commission can see why its original *Order* was defective, and why its "*Amended Order*" does nothing to cure the original defect. Before sending this case back through the courts, the Commission should consider these questions:

1. Didn't the Telecommunications Act of 1996 require an interconnection agreement before reciprocal compensation rates would apply instead of existing tariff rates?

2. Is there something contained in the 1996 Act that automatically replaced the applicability of access tariffs to intra-MTA traffic?

3. If there is such an "automatic" mechanism, how can the small companies apply it to receive compensation for wireless traffic that has been and continues to be delivered to their exchanges in the absence of either an interconnection agreement or an approved state wireless termination tariff?

4. If there is such an "automatic" mechanism, why was it necessary for the Commission to approve dozens of wireless interconnection agreements since the Act?

5. If there is such an "automatic" mechanism, then why did the Commission approve the small companies' wireless termination tariffs last year in Case No. TT-2001-139 instead of referring to that mechanism?

6. Didn't the Commission decide that, after February 5, 1998, wireless traffic should not be delivered for termination to the small companies in the absence of an interconnection agreement?

7. Didn't wireless traffic continue to terminate in contravention of this Commission Order?

8. Why can't small company access tariffs apply to traffic the Commission directed not be sent in the absence of an agreement?

9. Didn't the Commission in other decisions approve the application of access tariffs to wireless traffic terminated after enactment of the Telecommunications Act of 1996?

10. If wireless termination tariffs approved in Case No. TT-2001-139, which are not reciprocal compensation mechanisms, can be applied after the Act, then why can't a state access tariff, which likewise is not a reciprocal compensation mechanism, also be applied after the Act?

11. What incentive do wireless carriers have to pay for service rendered prior to the approval of a compensation or interconnection agreement or the approval of a wireless termination tariff?

The Commission should take this opportunity to rehear this matter and enter an *Order* that will decide these issues, rather than simply avoiding them.

Point One: Unlawful Procedure

The Commission engaged in an unlawful procedure when it issued its "*Amended Report and Order*" in these respects:

A. <u>The Commission's procedure in this case unlawfully put the cart before the horse</u>.

Missouri law prohibits the Commission from putting the cart before the horse by preparing belated findings of fact to support an earlier decision.[1] When this case was remanded, the Commission simply solicited findings to support its earlier decision and incorporated those findings into its prior *Report and Order*. Thus, the Commission's

[1] *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, 499 S.W.2d 798, 804[9] (Mo. 1973); *Meadowbrook Country Club v. State Tax Comm'n*, 538 S.W.2d 310 (Mo. banc 1976); *Brown v. Alberda*, 579 S.W.2d 718, 721[4] (Mo. Ct. App. ED 1979); *Hughes v. Board of Education*, 599 S.W.2d 254 (Mo. Ct. App. SD 1980).

procedure violates longstanding Missouri law which prohibits an agency from putting the cart before the horse by preparing belated findings of fact to support an earlier decision.[2]

In this case, the Commission issued a decision without proper findings of fact or conclusions of law. Both the Circuit Court and the Court of Appeals found that the Commission's findings were inadequate. The Commission cannot now place the cart before the horse by preparing belated findings of fact to support its earlier decision. In *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, the Missouri Supreme Court explained:

> An agency's determination of findings is not a separate function from its decision in a case. The agency's findings of fact and conclusions of law are an essential part of and are the basis for its decision. ***The two cannot be separated, nor can the agency put the cart before the horse, as was done in this case, by making a decision and then later making findings of fact and conclusions of law which will support that decision.***[3]

Likewise, in *Brown v. Alberda*, the Court of Appeals stated:

> In conclusion, we again note that ***findings of fact and conclusions of law should be prepared at the time the administrative agency makes its decision, not at some later time when prompted by a petition for review.***[4]

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[2] *Id.*

[3] *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, 499 S.W.2d 798, 804[9] (Mo 1973)(emphasis added).

[4] *Brown v. Alberda*, 579 S.W.2d 718, 721[4] (Mo. Ct. App. ED 1979)(emphasis added).

In *Meadowbrook Country Club v. State Tax Comm'n*,[5] the State Tax Commission conceded that it had failed to make proper findings of fact and conclusions of law concurrently with its decision. Just as the Commission has done in this case, the Tax Commission sought to amend its order by simply entering post-remand findings of fact to support the prior decision, but Missouri Supreme Court ***rejected*** the Commission's request to simply "have the case remanded to the Commission so that it could hand down findings of fact and conclusions of law as required by Section 536.090."[6] The *Meadowbrook* court held that under the *Stephen* case, ***a remand for failure to issue findings of fact and conclusions of law in conjunction with a decision required the Commission to consider all relevant factors in the record.***[7]

In *Hughes v. Board of Education*,[8] the Court of Appeals held that the board's failure to make findings of fact and conclusions of law to support its decision required reversal and remand. The *Hughes* court advised:

> Since the case must be reversed and remanded, ***we remind that the board may not put the cart before the horse by making belated findings of fact and conclusions of law to support its earlier decision.***[9]

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[5] *Meadowbrook Country Club v. State Tax Comm'n*, 538 S.W.2d 310 (Mo. banc 1976).

[6] *Id.* at p. 311[1].

[7] *Id.*

[8] *Hughes v. Board of Education*, 599 S.W.2d 254 (Mo. Ct. App. SD 1980).

[9] *Id.* at 256[3] (emphasis added).

Accordingly, the *Hughes* court instructed the board to "make findings of fact and conclusions of law supporting ***any subsequent decision*** that the board may make in this case."[10] These cases demonstrate that the Commission should have issued a procedural schedule for supplemental hearing, additional briefing, and proposed findings of fact and conclusions of law.

B. Failure to grant MITG and STCG request for mandatory hearing.

When a party files a non-unanimous stipulation, the Commission's rules entitle non-signatory parties such as the MITG and STCG to a hearing. 4 CSR 240-2.115 provides:

> (1) A nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all parties and where one (1) or more parties requests a hearing of one (1) or more issues. If no party requests a hearing, the commission may treat the stipulation and agreement as a unanimous stipulation and agreement.
>
> (2) ***If a hearing is requested, the commission shall grant the request.*** (emphasis added)

Staff and the wireless carriers filed a non-unanimous stipulation of facts on March 29, 2002, and the MITG and STCG filed their request for a hearing pursuant to 4 CSR 240-2.115 on April 3, 2002. This request triggered the Commission's own rule which required a hearing on the non-unanimous stipulation. ("[T]he Commission shall grant the request.") Rather than hold the required hearing, however, the Commission: (a) simply adopted the non-unanimous stipulation of facts, (b) incorporated them into its

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[10] *Id.* (emphasis added).

"*Amended Report and Order*," (c) ignored the MITG and STCG's proposed findings of fact; and (d) ignored the MITG and STCG's request for a hearing. This procedure was unlawful and unreasonable in that it violated due process as well as the Commission's own rules of procedure.

The Commission's wholesale adoption of the wireless carriers' non-unanimous stipulation of facts violates Missouri law. In *State ex rel. Monsanto v. Missouri Public Service Comm'n*,[11] the Missouri Supreme Court affirmed the Circuit Court's decision that the Commission erred by adopting a non-unanimous stipulation:

> The Commission must make findings of fact in support of its determinations, even when the Commission is adopting the proposals set forth in a non-unanimous Stipulation. ***The Commission may not simply adopt the Stipulation***.

Yet this is exactly what the Commission has done in this case – adopt a non-unanimous stipulation without allowing the other parties a chance to respond. In effect, this is no different than an order which recites each parties' position and then declares one the winner. The "*Amended Report and Order*" has still failed to make independent, lawful, or sufficient findings of fact.

C. <u>Three new Commissioners</u>.

Missouri law allows Commissioners to vote on an *Order* even though they were not present at the hearing. However, the new Commissioners must certify that they have either: (a) "read the full record including all of the evidence," or (b) "personally

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[11] *State ex rel. Monsanto v. Missouri Public Service Comm'n*, 716 S.W.2d 791, 795[2] (Mo. banc 1986).

consider[ed] the portions of the record cited or referred to in the arguments or briefs."[12] Although the "*Amended Report and Order*" states that the Commissioners have certified compliance with Section 536.080 RSMo 2000, the "*Amended Report and Order*" fails to cite, discuss, or even address "the portions of the record cited or referred to" in the MITG's and STCG's proposed findings of fact and post-remand pleadings.

By ignoring this evidence and the MITG and STCG's proposed findings of fact and post-remand pleadings, the *"Amended Report and Order"* fails to comply with Missouri law. The evidence in this case is not "undisputed," and the MITG and the STCG have never entered into a stipulation of facts in this case. The Commission's *"Amended Report and Order"* has not addressed the MITG's and STCG's uncontradicted evidence that access rates can apply, do apply, and are currently being applied. Apart from incorporating the wireless carriers' proposed findings, the *"Amended Report and Order"* is identical to the one that the Commission issued over two years ago. For example, the lengthy "Procedural History" that makes up the majority of the Commission's *"Amended Report and Order"* fails to acknowledge anything that happened in this case after January 4, 2000 -- well over two years ago.

The *"Amended Report and Order"* fails to discuss any of the motions and pleadings that were filed after the Western District Court of Appeals' remand. Likewise, the *"Amended Report and Order"* fails to discuss or address the Cole County

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[12] Section 536.080 RSMo 2000; *State ex rel. Jackson County v. Missouri Public Service Commission*, 532 S.W.2d 20, 30[8] (Mo. banc 1975)("[W]e do emphasize that it is a basic and fundamental rule of law that one making a decision be aware by some means of what he is deciding.") In *Jackson County*, the Missouri Supreme Court gave a new Commissioner ten days to certify that he had complied with the statute.

Circuit Court's reversal and remand on the merits. Thus, the *"Amended Report and Order"* is unsupported by competent and substantial evidence upon the whole record. Finally, because the Commission has again failed to address the record evidence demonstrating that access rates can and do apply, the *Report and Order* is unlawful and contrary to the weight of the evidence.

D. **New Judge**. Under Section 536.083 RSMo 2000, "no person who acted as a hearing officer or who otherwise conducted the first administrative hearing involving any single issue shall conduct any subsequent administrative rehearing or appeal involving the same issue and the same parties." Because this provision appears to apply to the circumstances in this case, the MITG and the STCG filed a request on February 4, 2002 for the Commission to assign this case to a new law judge. The MITG and STCG renewed this request in a February 11, 2002 filing, and the STCG again renewed the request in a February 20, 2002 filing. The *"Amended Report and Order"* did not address the MITG's and STCG's repeated requests for a new law judge. Thus, the Commission's *"Amended Report and Order"* is unlawful and unreasonable because the same hearing officer conducted subsequent proceedings in a case involving the same issues and the same parties after the first decision was reversed and remanded by both the Cole County Circuit Court and the Western District Court of Appeals.

POINT TWO: INSUFFICIENT FINDINGS AND RATIONALE

The Commission's "*Amended Report and Order*" still lacks sufficient findings and rationale in that it is inconsistent with (and in fact contrary to) prior and subsequent Commission orders, it mixes findings of fact with conclusions of law, and it fails to resolve the issues raised in the case.

A. **Insufficient Findings of Fact and Conclusions of Law**. The Commission's *"Amended Report and Order"* fails to make sufficient findings of fact and conclusions of law. In a contested case, the Commission is required to make findings of fact and conclusions of law.[13] The Commission's *"Amended Report and Order"* mixes findings of fact with conclusions of law, but the Missouri Court of Appeals specifically requires that "findings of fact shall be stated separately from the conclusions of law."[14] Many of the *Report and Order's* purported "findings" are actually conclusions of law. For example, the Commission's "findings of fact" include the following statement:

> The Federal Telecommunications Act of 1996 prohibits the imposition of access charges for the termination of local traffic, because 47 U.S.C. 251(b)(5) states that all local exchange carriers have "[t]he duty to establish...reciprocal compensation arrangements for the transport and...termination of telecommunications [services]."

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[13] *AT&T v. Missouri Public Service Comm'n*, 62 S.W.3d 545, 547 (Mo. App. WD 2001); *Noranda Aluminum v. Missouri Public Service Comm'n*, 24 S.W.3d 243, 244-45 (Mo. App. WD 2000); *Deaconess Manor v. Missouri Public Service Comm'n*, 994 S.W.2d 602, 612 (Mo. App. WD 1999).

[14] *AT&T v. Missouri Public Service Comm'n*, 62 S.W.3d 545, 547 (Mo. App. WD 2001).

But this statement is not a "fact." Rather, it is an erroneous legal conclusion that was copied directly from the wireless carriers' proposed findings of fact. (Perhaps this is why the statement is repeated verbatim in the "*Amended Report and Order's*" "conclusions of law" section.) Thus, the "*Amended Report and Order*" is unlawful in that it erroneously mixes conclusions of law with findings of fact.

Additionally, the Commission's findings of fact completely fail to address the evidence in the record which demonstrates that access rates can and do apply in the absence of an interconnection agreement. For example,

(1) When AT&T wireless delivers intra-MTA traffic over the facilities of AT&T Long Distance, access compensation is paid to the LECs.[15] When Sprint PSC delivers intra-MTA traffic over the facilities of other carriers, access compensation is paid to the LECs.[16]

(2) SWBT's wireless interconnection tariff contains access-based rates that were initially based upon, and are now actually higher than, SWBT's access rates.[17]

(3) The Commission's Appellate Brief before the Western District admits that access does apply to intra-MTA wireless traffic delivered by an interexchange carrier (IXC). The Commission's Appellate Brief stated, "***If the intervening carrier is an IXC, the [small companies] are paid for terminating access***."[18]

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[15] AT&T pays access. The evidence in this case demonstrates that AT&T pays access compensation on intra-MTA traffic delivered to the small companies. (Tr. 245)

[16] (Tr. 345)

[17] SWBT has access-based rates. The evidence in this case demonstrates that SWBT receives access-based compensation on intra-MTA wireless traffic under its wireless interconnection tariff. (Tr. 377; 381-82; 391-92; *see also* Ex. 16)

[18] Missouri Public Service Commission's Initial Appellate Brief before the Western District, p. 10 (emphasis added).

Rather than address any of this evidence cited in the MITG's and STCG's proposed findings of fact and post-remand pleadings, however, the Commission simply adopted the wireless carriers' two-page, non-unanimous stipulation of facts to summarize the more than 1,500 pages of transcripts, pleadings, and other documents that make up the record in this case. As a result, the Commission's findings of fact still do not support the Commission's decision in this case. Rather, they create a circular legal argument that is unsupported by sufficient findings of fact.

B. **Conflicting Commission Decisions**. The Commission's "*Amended Report and Order*" contradicts both earlier and subsequent Commission decisions:[19]

(1) Previous Commission Decisions:

(a) **Case No. TT-97-524**[20] held that the issue of whether access tariffs applied when three carriers collaborated to complete an intra-MTA wireless call was an ***open question of federal law which the Commission had no jurisdiction to declare***. Yet in this case, the Commission simply concluded that it would be unlawful to allow a small LEC to charge switched access rates for this traffic. The Commission fails to explain this change in position.

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[19] *In the Matter of United Telephone Company*, Case No. TC-96-112, *Report and Order*, issued April 11, 1997; *Chariton Valley and Mid-Missouri's Complaint against SWBT for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-240, *Report and Order*, issued June 10, 1999; *Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001.

[20] *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff, PSC Mo. No. 40*, Case No. TT-97-254, *Report and Order*, issued Dec. 23, 1997, pp. 12-16. (This case also stated that the wireless carriers were not to send traffic to the small companies' exchanges without first obtaining an agreement with the small companies to do so.)

(b) Case No. TC-96-112[21] held, "***In the absence of some other consensual method of payment, termination of this traffic must be paid for under United's access tariff***, Mo. P.S.C. No. 26."[22] The Commission concluded that SWBT had delivered wireless-originated traffic to United's exchanges without compensating United, and the Commission stated, "SWBT should have compensated United ***in accordance with its access tariff.***"[23]

(c) Case Nos. TC-98-251 and TC-98-340 held that access rates apply to wireless-originated traffic delivered to other companies by SWBT in the absence of an agreement. The *Chariton Valley* case, which was decided in 1999, held that wireless-originated traffic terminated to small companies in the absence of a compensation agreement was "***subject to the terminating access rates prescribed by the approved tariff adopted by each of those companies***."[25]

(2) Subsequent Commission Decision:

(a) Case No. TT-2001-139 approved small company wireless termination tariffs that were based upon a composite of the traffic-sensitive elements of the companies' intraLATA access rates.[26] The Commission concluded that the proposed tariffs and rates "meet the requirements of Missouri law and should be approved."[27] The Commission explained that the tariff rates "***are based upon the [small companies'] terminating access rates which, in the***

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[21] *In the Matter of United Telephone Company*, Case No. TC-96-112, *Report and Order*, issued April 11, 1997.

[22] *United*, Case No. TC-96-112 (1997 Mo. P.S.C. LEXIS 52 at *16) .

[23] *Id.* at *17 (emphasis added).

[2] *Chariton Valley and Mid-Missouri's Complaint against SWBT for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-240, *Report and Order*, issued June 10, 1999 (emphasis added).

[26] *Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001.

[27] *Id.* at p. 42.

United Case and its progeny, were held appropriate for this traffic."[28] Thus, nearly one year ago (and over one year ***after*** the Commission's decision in this case), the Commission held that the small companies' access rates are appropriate for this traffic.

The Commission's decision in Case No. TT-2001-139 was affirmed by the Cole County Circuit Court on November 26, 2001, and it is presently on appeal at the Western District Court of Appeals.

When administrative agencies depart from their prior holdings, they must provide some rationale for doing so.[29] The Commission's "*Amended Report and Order*" fails to even mention any of these prior (and subsequent) Commission cases that are completely contrary to the Commission's decision in this case.

C. **Failure to Address or Resolve Issues Raised**. The Commission's "*Amended Report and Order*" fails to address all of the issues that were raised by the tariff filings. For example, the "*Amended Report and Order*" states that the proposed tariff "is not lawful as applied to either wireless or CLEC traffic."[30] However, the Commission makes no finding whatsoever regarding traffic originated by CLECs, and

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[28] *Id.* (citing *United Telephone*, Case No. TC-96-112) (emphasis added).

[29] *Atchison, T. & S. F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 93 S. Ct. 2367 (1973) (Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case); *Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 852 (D.C. Cir.), cert. denied, 403 U.S. 923 (1971) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

[30] Case No. TT-99-428, "*Amended Report and Order*," issued, April 9, 2002, page 13.

the parties generally agreed that CLEC traffic outside of a local calling scope is subject to access rates. Thus, at the very least the proposed tariff revision is lawful as it applies to CLEC traffic. The Commission's "*Amended Report and Order*" also fails to offer any explanation of what CLEC traffic should be considered local. Likewise, the "*Amended Report and Order*" fails to address the issue of uncompensated interMTA traffic that is being delivered to the small companies. Finally, as explained above, the "*Amended Report and Order*" fails to address or rule upon the MITG's and STCG's requests for a hearing and requests for a new law judge.

POINT THREE: THE COMMISSION'S DECISION IS UNLAWFUL, UNREASONABLE, AND UNSUPPORTED BY RECORD EVIDENCE.

A. The *Report and Order* Erroneously Interprets Federal Law. The Telecommunications Act of 1996 requires carriers to allow both direct and indirect interconnection to their networks, and it requires all local exchange carriers to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." However, the Act also makes it quite clear that interconnections should occur ***pursuant to compensation and interconnection agreements between the involved carriers***. Nowhere does the Act allow for wireless carriers to use the small companies' facilities without paying for that use. The Commission's *Report and Order* erroneously attempts to apply the FCC's pricing principles for interconnection agreements to a situation where no interconnection agreements exist.

The Act, the FCC's Rules, and the FCC's *First Interconnection Order*[31] set forth the terms for negotiated (or arbitrated) agreements under the Act, but they do not displace the existing access regime.[32] As a result of the Commission's erroneous interpretation of federal law, the wireless carriers will continue to use the small companies' facilities without payment and without entering into appropriate compensation or interconnection agreements. Apparently, the Commission believes that the small companies must allow wireless carriers use the small companies' facilities for free.

Contrary to the Commission's "*Amended Report and Order*," the FCC never stated that access rates could not apply to intra-MTA traffic that is delivered to the small companies in the absence of an interconnection agreement. Rather, the Telecommunications Act and recent FCC decisions indicate that the existing access regime should remain in place until it is replaced by an approved compensation or interconnection agreement. Indeed, the Commission's *Report and Order* in Case No. TT-2001-139 stated:

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[31] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, Aug. 8, 1996.

[32] See Section 251(g) ("***Continued Enforcement of Exchange Access and Interconnection Requirements***. — On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (***including receipt of compensation***) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 . . .") (emphasis added)

> [I]t is apparent from the Act that reciprocal compensation arrangements are a mandatory feature of agreements between the CMRS carriers and the small ILECs. However, the record shows that at present there are no such agreements between the parties to this case. ***The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs.***[33]

Thus, the "*Amended Report and Order*" contradicts federal law as well as the Commission's prior decision in Case No. TT-2001-139.

The Commission's "*Amended Report and Order*" cites an August 8, 1996 FCC decision in CC Docket 96-98 that is over five years old, but the FCC has issued a number of decisions since that time. For example, the FCC's April 18, 2001 *Order on Remand and Report and Order* in that same case (CC Docket 96-98) explained:

> We conclude that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in subsection (g) from the reciprocal compensation requirements of subsection (b)(5). Thus, ***the statute does not mandate reciprocal compensation for "exchange access, information access, and exchange services for such access"*** provided to IXCs and information service providers. Because we interpret subsection (g) as a carve-out provision, the focus of our inquiry is on the universe of traffic that falls within subsection (g) and *not* the universe of traffic that falls within subsection (b)(5). This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection (b)(5) as all "local" traffic. We also refrain from describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g).[34]

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[33] *Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001, pp. 29-30.

[34] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Order on Remand and Report and Order*, issued April 18, 2001, ¶ 34 (emphasis added).

* * *

> Before Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points – both interstate and intrastate – beyond the local exchange. In turn, both the Commission and the states had in place regimes applicable to this traffic, which they have continued to modify over time. ***It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5).***[35]

The *"Amended Report and Order's"* failure to cite or discuss recent federal decisions is yet another indication that the Commission has erroneously interpreted federal law.

B. Contrary to the Weight of the Evidence. The Commission's *"Amended Report and Order"* is unreasonable because it contradicts the "undisputed" evidence that access rates can and do apply to intraMTA traffic in Missouri that is delivered in the absence of a compensation or interconnection agreement. For example, the MITG and STCG have provided three examples in the record in this case where it is established that access rates apply to intraMTA traffic:

> (1) When AT&T wireless delivers intra-MTA traffic over the facilities of AT&T Long Distance, access compensation is paid to the LECs.[36] When Sprint PSC delivers intra-MTA traffic over the facilities of other carriers, access compensation is paid to the LECs.[37]

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[35] *Id.* at ¶ 37 (emphasis added).

[36] AT&T pays access. The evidence in this case demonstrates that AT&T pays access compensation on intra-MTA traffic delivered to the small companies. (Tr. 245)

[37] (Tr. 345)

(2) SWBT's wireless interconnection tariff contains access-based rates that were initially based upon, and are now actually higher than, SWBT's access rates.[38]

(3) The Commission's Appellate Brief before the Western District admits that access does apply to intra-MTA wireless traffic delivered by an interexchange carrier (IXC). The Commission's Appellate Brief stated, "***If the intervening carrier is an IXC, the [small companies] are paid for terminating access.***"[39]

Moreover, the MITG's and STCG's pleadings cite three prior cases where the Commission has held that access does apply to intra-MTA traffic delivered in the absence of an approved compensation or interconnection agreement. Thus, the "*Amended Report and Order's*" conclusion that access cannot apply to intra-MTA traffic in the absence of an agreement simply ignores the record evidence in this case which shows that access rates can and do apply to intra-MTA traffic that is delivered in the absence of a compensation or interconnection agreement.[40]

C. **New Legal Developments**. In addition to the recent FCC decision mentioned in Point III(A) above, there have been a number of new legal developments since the Commission issued its initial decision in this case. For example, Sprint PCS sued AT&T Long Distance in Missouri state court, alleging that Sprint PCS was entitled

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[38] SWBT has access-based rates. The evidence in this case demonstrates that SWBT receives access-based compensation on intra-MTA wireless traffic under its wireless interconnection tariff. (Tr. 377; 381-82; 391-92; *see also* Ex. 16)

[39] Missouri Public Service Commission's Initial Brief, p. 10 (emphasis added).

[40] *See also* Paragraphs eight (8) through eleven (11) the MITG's and STCG's Proposed Findings of Fact filed on March 29, 2002 (containing examples and citations which demonstrate that access rates can and do apply in the absence of a compensation or interconnection agreement).

to receive access compensation for traffic that AT&T terminates to Sprint PCS. On July 24, 2001, the United States District Court for the Western District of Missouri, Western Division (Laughrey, J.) referred two questions to the FCC:

(1) Whether Sprint may charge access fees to AT&T for access to the Sprint PCS wireless network; and

(2) If so, whether Sprint's charges for such service are reasonable.[41]

The FCC accepted the case, established a pleading cycle, and accepted initial comments on November 30, 2001 and reply comments on December 12, 2001.[42] The Commission should compare: (a) Sprint PCS' insistence on access-based compensation for terminating traffic (including intra-MTA traffic) before the FCC and the Missouri federal district court; and (b) Sprint PCS' claim that access-based compensation is inappropriate for Missouri's small ILECs in the absence of an agreement to the contrary. Apparently, Sprint PCS seeks to avoid paying access-based compensation to the small companies in this case and other cases before the Commission, yet at the same time Sprint PCS seeks to receive access-based compensation for intra-MTA traffic in its cases before the FCC and Missouri U.S. District Court. If access is not appropriate, then how can Sprint PCS claim it is entitled to be paid access on this traffic?

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[41] *Sprint Spectrum L.P. v. AT&T Corporation*, U.S. Dist Ct. MO - WD, Case No. 00-0973-CV-W-5, *Order*, issued July 24, 2001.

[42] *In the Matter of Sprint PCS and AT&T's Petitions for Declaratory Ruling on CMRS Access Charge Issues*, WT Docket No. 01-316,

D. Unjust and Unreasonable Takings. Under Section 392.200.1 RSMo 2000, the Commission is authorized to ensure that the rates of Missouri's telephone companies are just and reasonable. The Commission's *Report and Order* recognizes that inter-MTA wireless traffic is subject to access and that inter-MTA wireless traffic is being delivered (along with intra-MTA traffic) to the small companies. However, the Commission's *Report and Order* prevents the small companies from being compensated for either the intra-MTA or inter-MTA traffic that is delivered to the small companies' exchanges in the absence of a compensation or interconnection agreement. Thus, the "*Amended Report and Order*" provides no incentive for the wireless carries and the CLECs to begin compensating the small companies for any of the traffic that they are presently delivering to the small company exchanges, nor does it provide any incentive for the CLECs or wireless carriers to enter into compensation or interconnection agreements pursuant to the Telecommunications Act.

The Commission's "*Amended Report and Order*" continues this unreasonable situation to the benefit of the wireless carriers and CLECs and at the expense of the small companies. The Commission's repeated failure to allow the small companies to receive compensation for inter-MTA and intra-MTA wireless traffic simply does not make sense.[43] Thus, the Commission's "*Amended Report and Order*" is arbitrary, capricious, unreasonable, and an abuse of discretion.

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[43] *See State ex rel. Capital City Water v. Missouri Public Service Comm'n*, 850 S.W.2d 903, 914 (Mo. App. WD 1993) ("We may not approve an order on faith in the Commission's expertise. The Commission's quantification of the contract in this case ***simply does not make sense***.")(emphasis added)

WHEREFORE, the MITG and the STCG respectfully request that the Commission issue an *Order* granting rehearing in this case and for such other orders as are reasonable in the circumstances.

RESPECTFULLY SUBMITTED,

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