

ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.

ATTORNEYS AT LAW

700 EAST CAPITOL AVENUE

COL. DARWIN MARMADUKE HOUSE

P.O. BOX 1438

JEFFERSON CITY, MISSOURI 65102-1438

TELEPHONE 573-634-3422

FAX 573-634-7822

EUGENE E. ANDERECK

TERRY M. EVANS

ERWIN L. MILNE

JACK PEACE

CRAIG S. JOHNSON

RODRIC A. WIDGER

GEORGE M. JOHNSON

BEVERLY J. FIGG

WILLIAM S. LEWIS

VICTOR S. SCOTT

COREY K. HERRON

LANETTE R. GOOCH

SHAWN BATTAGLER

ROB TROWBRIDGE

JOSEPH M. PAGE

LISA C. CHASE

DEIDRE D. JEWEL

JUDITH E. KOEHLER

ANDREW J. SPORLEDER

OF COUNSEL

MARVIN J. SHARP

PATRICK A. BAUMHOER

GREGORY C. STOCKARD (1904-1993)

PHIL HAUCK (1924-1991)

February 11, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Administrative Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

FEB 11 2002

Re: TT-99-428, et al.

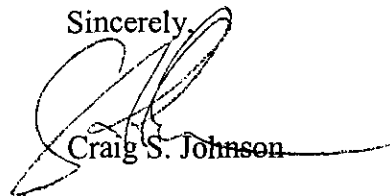
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed please find an original and eight (8) copies of the MITG's Response to the Commission's February 5 Order Directing Filing. Please excuse the handwritten changes to certain portions of this document. Due to a computer problem, the saved document became lost, and rather than completely retype it, I have made some minor changes to the last printed version I had of the document before I lost it.

A copy of this letter and copy of the enclosures have been served upon all counsel of record. Thank you for seeing this filed.

Sincerely,



Craig S. Johnson

CSJ:tr

Enc.

cc: MITG Managers
Office of Public Counsel
PSC General Counsel
Paul S. DeFord
Jeanne A. Fischer
James A. Fischer
Charles W. McKee
W. R. England, III
Leo Bub

FILED³

FEB 11 2002

BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

Missouri Public
Service Commission

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

Case Nos. TT-99-428
TT-99-429
TT-99-430
TT-99-431
TT-99-432
TT-99-433
(consolidated)

MITG Response to February 5, 2002 Order Directing Filing

Comes now the MITG and makes the following response to the Order Directing Filing. It is the intent of this response to clarify that the MITG is not filing a motion to disqualify the existing RLJ on traditional "for cause" grounds, rather that a new judge is required by statute. This response is also to ask that more time be given in which to attempt to develop a stipulated set of facts, and to further explain why a procedural schedule providing for supplemental hearing, proposed findings and conclusions, and briefing, is justified.

New Regulatory Law Judge

1. The MITG did not request "disqualification" of the RLJ. The MITG has no "grounds", such as bias or interest, for which to seek disqualification under 4 CSR 240-2.120(2). However, pursuant to § 536.083 RSMo, the purpose of the prior Joint Motion was to place the Commission on notice of the requirements of that statute. This statute simply directs that no hearing officer that conducted the first administrative hearing shall conduct any subsequent rehearing or appeal involving the same issues and same parties.

2. This case is on remand from the Court of Appeals. Due to the fact that there are three new Commissioners, and due to the fact that much has transpired since the original hearing, the MITG requested rehearing. If this request were granted, the original RLJ could not conduct the rehearing. The Cole County Circuit Court reversed and remanded the Commission's initial decision in this case. Section 386.510 RSMo 2000 explains that the Circuit Court "shall enter *judgment either affirming or setting aside the order* of the commission under review. . . . The court may, in its discretion, *remand any cause which is reversed* by it to the commission for further action." (emphasis added) Under Section 386.540.4, the appeals of Commission decisions to Missouri's Court of Appeals cannot conflict with the provisions of Chapter 386. Although the Court of Appeals stated that it was "remanding" the Commission's decision, these two provisions make clear that reviewing courts must "reverse" or "set aside" Commission decisions as a prerequisite to remanding them.

3. The Commission's Order Directing Filing now appears to also contemplate a rehearing. The Order directs the parties to attempt to file a joint stipulation of facts. Such a stipulation of facts would be in addition to, or different than, or possibly supplant the record on appeal upon which the present mandate is based. If the Commission is indeed requiring a new or supplemented record upon which to base its decision, this would seem to constitute a new record based upon a "rehearing", requiring a different RLJ under § 536.083 RSMo.

Stipulation of Facts

4. The comments of counsel for ATT Wireless at a prehearing conference that "there are no facts in dispute" should not now be utilized to establish that there are not disputed facts. That comes a little late, and is not accurate. If there were no disputed facts, there would have been no prefiled testimony, no multiple days of hearing and cross examination, in which the

Commissioners participated. Now we have an extensive transcript and record, over 1,500 pages according to the Court of Appeals.

5. The MITG is concerned that the development and presentation of a stipulation will change the record. The MITG is also aware that a stipulation could be helpful in allowing a fully informed decision without resort to the prior record in place. The MITG will join with the other parties in attempting to prepare such a stipulation. However, the MITG believes that there are very practical obstacles to successfully developing such a stipulation. The MITG believes it is completely impractical to require such in 10 days.

6. Prior to proposing the procedural schedule for the original hearing, the parties discussed such a stipulation, but disregarded the discussion. At the time of hearing the disputes were such that a stipulated set of facts between multiple parties was impractical. Since the hearing more facts have developed that make such a stipulation more impractical. The following is an overview of the disputed facts which the MITG hopes will display the potential difficulties confronting such an attempted stipulation:

First, when the IC transporting wireless calls is not a former PTC, such as AT&T, MCI or Sprint, terminating access was and is being paid on this traffic. As former PTCs are now considered ICs insofar as the small companies are concerned, there is no apparent reason why access does not apply when SWBT, for example, is the transporting IC. A current development on this issue demonstrates. Respondent Sprint PCS, a wireless carrier, has sued AT&T, an ~~IC~~ IC in Missouri Court. For an intra-MTA call delivered by AT&T terminating to Sprint PCS, Sprint PCS is suing to collect *access* compensation on this call. This is the same result that should apply under the small companies' access tariff, in the absence of an interconnection agreement calling for reciprocal compensation.

Second, the Commission in complaint cases approved the application of access tariffs to this traffic.¹

Third, the Commission also approved a Wireless Interconnection Tariff of SWBT that applied access rate charges to this traffic.

Fourth, the Commission ruled in TT-97-524 that the application of access tariffs to this traffic was an **open question** of law which it had no jurisdiction to declare.²

Fifth, the Commission in that case also prohibited SWBT and the wireless carriers from sending such traffic to the small companies in the absence of an interconnection agreement. If the interconnection agreements (negotiated or arbitrated) had been approved before delivery, as the Commission contemplated, this tariff proceeding would not have been necessary.

Sixth, SWBT and the wireless carriers violated this requirement, and the traffic did in fact terminate when the *only* tariff applicable was the small company access tariff. There was no reciprocal compensation rate contained in an approved interconnection agreement for the small companies to apply.

Seventh, the CTUSRs provided by SWBT did not identify the traffic terminated as being inter-MTA or intra-MTA traffic. (If there had been interconnection agreements providing reciprocal compensation for intra-MTA traffic, the small companies could have negotiated for the controls necessary to differentiate the traffic and compensation). The wireless carriers simply assume that all CTUSR traffic is intra-MTA.

Eighth, when they were billed for primary or secondary liability under the only

¹ United v SWBT, TC-96-112; Chariton Valley and Mid-Missouri v SWBT, TC-98-251/340. In the Chariton Valley/Mid-Missouri Order the Commission ruled that wireless originated traffic terminated by SWBT to Chariton Valley and Mid-Missouri "was subject to the terminating access rates prescribed by the approved tariff adopted by each of these companies".

² This was inconsistent with the Report and Order in this case stating that access charges do not apply to local traffic exchanged between LECs and CMRS providers. That Order failed to analyze the legal citations presented by the small companies.

compensation authorization the small companies had—their access tariff—SWBT and the wireless carriers refused to pay, and likewise have opposed the tariff modification, on two bases: (1) the Petitioners did not negotiate interconnection requests in good faith, and (2) that there were “defacto” (not approved by any Commission) interconnection agreements wherein Petitioners had agreed to accept “bill and keep” compensation.

Ninth, SWBT’s CTUSR does not distinguish between traffic it transits pursuant to its wireless interconnection tariff and traffic it transits pursuant to interconnection agreements. The MITG companies were not parties to those interconnection agreements. Nevertheless, SWB has stated that the MITG secondary liability rights against SWBT, as established in TT-97-524, do not apply to interconnection agreement traffic. Yet the CTUSRs do not tell the small companies which traffic is SWBT tariff traffic and which is interconnection agreement traffic.

Tenth, the wireless carriers have made an issue of the “feasibility” of them doing direct interconnections with small companies as they have done with the former PTCs. Yet the Telecommunications Act does not distinguish between large LECs or small LECs when it comes to the wireless carriers’ duty to request and obtain interconnection agreements with a LEC in order to obtain reciprocal compensation. There is no legal basis for the wireless carriers to contend they are entitled to reciprocal compensation in the absence of either direct or “indirect” interconnection agreements.

Eleventh, whenever the small companies began collection efforts for the traffic, SWBT and the wireless carriers asserted that collection efforts were not timely commenced, were “estopped”, or that collection efforts were barred by “laches”. It was SWBT and the wireless carriers who sent traffic prior to an authorizing interconnection agreement with the small companies. It was SWBT and the wireless carriers who caused this traffic to be delivered when

the only rate potential applicable were access rates. They refused to pay those rates. Now they contend the small companies are not entitled to collect because the small companies waited to long.

7. As summarized above, the factual disputes raised in this case are extensive and complex. There are different facts asserted by different parties as supporting their legal positions as to a multitude of issues.

8. Thus the Commission's statement in its Order Directing Filing that "none of the parties have ever disputed any of the facts of this case" is perhaps an overstatement or an oversimplification.

Supplemental Hearing. Additional Briefs, Proposed Findings and Conclusions

9. In light of the above, it is respectfully suggested that the purpose underlying the STCG/MITG Joint Motion for a procedural schedule, providing for consideration of a supplemental hearing, additional briefs and proposed findings with references to the record that the new Commissioners can make good use of, are all useful and proper purposes.

Wherefore, the MITG respectfully requests that the Commission issue an order granting the joint motion of the MITG and the STCG requesting the assignment of a new judge, and extension to attempt to effectuate a stipulation of facts, and the granting of a procedural schedule providing for supplemental hearing and/or proposed findings, conclusions, and briefs in support thereof.

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By 

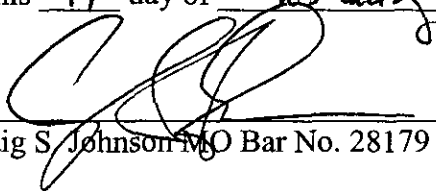
Craig S. Johnson MO Bar No. 28179
The Col. Darwin Marmaduke House

700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822
Email: CJohnson@AEMPB.com

ATTORNEYS FOR *MITG*

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, via U.S. Mail, postage prepaid, this 11 day of February, 2002, to all attorneys of record in this proceeding.



Craig S. Johnson MO Bar No. 28179