

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

December 11, 2002

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

FILED³

DEC 11 2002

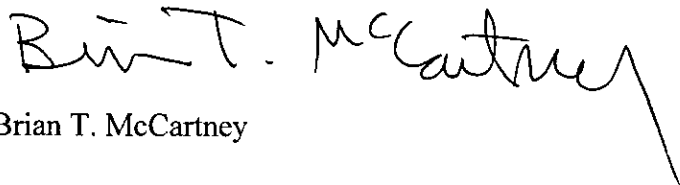
Re: Case No. TC-2002-1077

Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing please find an original and eight copies of 1) Initial Complainants' Brief of the Small Missouri Local Exchange Companies and 2) Complainants' Proposed Findings of Fact and Conclusions of Law. Please see that these filings are brought to the attention of the appropriate Commission personnel. If there are any questions, please give me a call. I thank you in advance for your attention to and cooperation in this matter.

Sincerely,



Brian T. McCartney

BTM/da
Enclosures
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

DEC 11 2002

Missouri Public
Service Commission

BPS Telephone Company,)
Cass County Telephone Company,)
Citizens Telephone Company of Higginsville,)
Missouri,)
Craw-Kan Telephone Cooperative, Inc.,)
Fidelity Communication Services I, Inc.,)
Fidelity Telephone Company,)
Grand River Mutual Telephone Corporation,)
Green Hills Telephone Corporation,)
Holway Telephone Company,)
Iamo Telephone Company,)
Kingdom Telephone Company,)
K.L.M. Telephone Company,)
Lathrop Telephone Company, and)
Mark Twain Rural Telephone Company,)

Complainants,)

vs.)

Case No. TC-2002-1077

VoiceStream Wireless Corporation,)
Western Wireless Corporation and)
Southwestern Bell Telephone Company.)

Respondents.)

COMPLAINANTS'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COME NOW the Complainants in this matter and for their proposed findings of
fact and conclusions of law, state to the Commission as follows:

PROPOSED FINDINGS OF FACT

The Parties

The Complainants in this case are BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communication Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, K.L.M. Telephone Company, Lathrop Telephone Company and Mark Twain Rural Telephone Company. Complainants are "telecommunications companies" providing "basic local telecommunications services" and "exchange access services," as those terms are defined by §386.020,¹ to customers located in their service areas pursuant to certificates of public convenience and necessity issued by the Commission.

Respondents VoiceStream Wireless Corporation (VoiceStream) and Western Wireless Corporation (Western Wireless) are providers of commercial mobile radio service (CMRS) within the state of Missouri.

Respondent Southwestern Bell Telephone Company (SWBT) is a telecommunications company providing "basic local telecommunications services," "basic interexchange telecommunications services" and "exchange access services," as those terms are defined in §386.020, within the state of Missouri.

¹ Unless otherwise indicated, all references to Missouri statutes are to RSMo 2000.

The Nature of the Dispute

Complainants provide telecommunications service in rural areas of Missouri. As a part of this service, Complainants provide the facilities and services necessary to complete wireless-originated calls to customers in Missouri's rural exchanges.

VoiceStream and Western Wireless originate wireless telecommunications traffic from their end-user customers ("wireless-originated traffic") which is terminated to customers in Complainants' service areas via the "transit" services or facilities of SWBT.

SWBT provides these "transit" services or facilities pursuant to interconnection agreements entered into between SWBT and VoiceStream in Case No. TO-2001-489, and between SWBT and Western Wireless in Case No. TO-98-12.

The wireless-originated traffic is terminated to Complainants over common trunk groups owned by SWBT. SWBT commingles this wireless-originated traffic with other wireline interexchange (i.e. toll) traffic destined for termination to Complainants' end-user customers. As a result, Complainants are not able to distinguish the wireless-originated traffic from other interexchange traffic. Complainants are unable to unilaterally block or otherwise prevent the wireless-originated traffic from terminating to Complainants' facilities, even in those circumstances where the wireless carriers refuse to pay for the terminating service which Complainants provide.

After the wireless-originated traffic is delivered by SWBT to Complainants' facilities, it is transported over Complainants' wire/cable facilities to Complainants' central offices where the traffic is switched and directed to individual customers. In

addition to owning the switches, Complainants also own the distribution facilities that carry the calls throughout their exchanges before the calls are ultimately terminated over the cable pair or loop which serves each individual customer's residence or place of business.

The wireless traffic at issue in this Complaint originates and terminates either within the same Major Trading Area (i.e., intraMTA traffic) or between various MTAs (i.e. interMTA traffic). Complainants have Commission-approved tariffs on file at the Commission's offices which apply to both types of traffic.

IntraMTA Traffic

In Case Nos. TT-2001-139, TT-2001-646, and TT-2002-127, the Commission approved Complainants' Wireless Termination Service Tariffs which contain the rates, terms, and conditions for the termination of intraMTA wireless-originated traffic delivered to Complainants via the transit services or facilities of an intermediate LEC such as SWBT.

InterMTA Traffic

Complainants' intrastate access tariffs on file with and approved by the Commission contain the rates, terms, and conditions for the termination of interMTA wireless-originated traffic delivered to Complainants via the access tandem facilities of an intermediate LEC, such as SWBT.

Post-tariff VoiceStream and Western Wireless traffic

It is undisputed that VoiceStream and Western Wireless have terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SWBT after Complainants' tariffs were approved by the Commission.² Each month, Complainants receive from SWBT cellular transiting usage summary reports (CTUSRs) which identify, by carrier, the wireless carriers who have transited wireless originated traffic over SWBT's facilities for termination to Complainants' exchanges.³ The CTUSRs show that VoiceStream and Western Wireless have terminated traffic to Complainants, and the specific amounts of VoiceStream and Western Wireless traffic are shown on the copies of CTUSRs which were attached to Complainants' Direct Testimony.

As of May 13, 2002 (the date the Complaint was filed) VoiceStream's total amount owing and outstanding was \$159,726.21, representing 2,568,015 minutes of use (MOU). Western Wireless' total amount owing and outstanding was \$36,384.87, representing 622,530 MOU. Neither of these amounts include interest, late fees, or attorneys' fees as permitted by Complainants' tariffs. These amounts are

² Beier/FCS Direct p. 5 (lines 3-5); Beier/FTC Direct p. 4 (26-27), p. 5 (1); Boyd Direct p. 4 (25-27); Copsey/Holway Direct p.4 (25-27), p. 5 (1-4); Copsey/KLM Direct p. 4 (26-27), p. 5 (1-2); Cornelius Direct p. 8 (2-5); Cotton/Grand River Direct p. 5 (22), p. 6 (1-2); Cotton/Lathrop Direct p. 5 (18-20); Faircloth Direct p. 5 (2-5); Matzdorff Direct p. 4 (23-24); Reeter Direct p. 4 (20-23); Rohde Direct p. 6 (13-16); Wilbert Direct p. 3 (27), p. 4 (1); Winberry Direct p. 5 (2-4).

³ The CTUSRs do not distinguish between interMTA and intraMTA wireless-originated traffic. The CTUSRs simply show, in total, for each month, the amount of traffic a particular CMRS provider has terminated to Complainants' exchanges.

unchallenged, and Respondents VoiceStream and Western Wireless concede that "[t]hey do not have the records to dispute the traffic data contained in the Complainants' direct testimony."⁴

The amounts owed by VoiceStream and Western Wireless are ongoing, and the amount of uncompensated traffic has increased substantially since the Complaint was filed in the spring of 2002. Complainants have continued to send bills for the traffic, but despite Complainants' demands to be paid for these amounts, the bills remain unpaid.

Interconnection Agreements

VoiceStream and Western Wireless have interconnection agreements with SWBT that establish the terms and conditions for the exchange of traffic between those companies.

The Commission-approved interconnection agreement between SWBT and VoiceStream contains the following language regarding Traffic to Third Party Providers, such as Complainants:

Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider, as specified in Appendix PRICING. **The Parties agree to enter into their own agreements with Third Party Providers.** In the event that Carrier sends traffic through SWBT's network to a Third Party Provider with whom Carrier does not have a traffic interchange agreement, then Carrier agrees to indemnify SWBT for any termination charges rendered by a Third Party Provider for such traffic.

⁴ *VoiceStream and Western Wireless' Motion to Cancel Hearing and for Commission to Decide Complaint on the Pleadings*, filed Sept. 23, 2002.

Interconnection Agreement between SWBT and VoiceStream Wireless Inc., §3.1.3, MoPSC Case No. TO-2001-489 (emphasis added).

The Commission-approved interconnection agreement between SWBT and Western Wireless contains the following language regarding Traffic to Third Party Providers, such as Complainants:

Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider, as specified in Appendix PRICING. **The Parties agree to enter into their own agreements with Third Party Providers.** In the event that Carrier sends traffic through SWBT's network to a Third Party Provider with whom Carrier does not have a traffic interchange agreement, then Carrier agrees to indemnify SWBT for any termination charges rendered by a Third Party Provider for such traffic.

Interconnection Agreement between SWBT and Western Wireless, §3.1.3, MoPSC Case No. TO-98-12 (emphasis added).

Neither VoiceStream nor Western Wireless have compensation agreements with Complainants.⁵

CONCLUSIONS OF LAW

The Telecommunications Act of 1996 provides that interconnection agreements, reached either by negotiation or arbitration, must be submitted to state commissions for approval, and state commissions may reject negotiated agreements that discriminate against non-parties to the agreement. 47 U.S.C. § 252(e). "This grant of power to

⁵ Beier/FCS Direct p. 4 (lines 18-20); Beier/FTC Direct p. 4 (14-16); Boyd Direct p. 4 (13-15); Copsey/Holway Direct p. 4 (13-15); Copsey/KLM Direct p. 4 (14-16); Cornelius Direct p. 7 (12-14); Cotton/Grand River Direct p. 5 (10-12); Cotton/Lathrop Direct p. 5 (6-8); Faircloth Direct p. 4 (17-19); Matzdorff Direct p. 4 (12-14); Reeter Direct p. 4 (8-10); Rohde Direct p. 6 (1-3); Winberry Direct p. 4 (16-18).

state commissions necessarily includes the power to enforce the interconnection agreement." *Southwestern Bell Tel. Co. v. Connect Communs. Corp.*, 225 F.3d 942 (8th Cir. 2000). Therefore, this Commission has the authority to enforce the terms of SWBT's agreements and ensure that the agreements do not discriminate or harm non-parties to those agreements. By enforcing the terms of these agreements, the Commission will ensure that Complainants are compensated for the facilities and services they provide.

The undisputed evidence in this case shows that VoiceStream and Western Wireless have been sending wireless-originated traffic to Complainants' exchanges. Thus, VoiceStream and Western Wireless owe compensation for the use of Complainants' facilities and services in completing wireless calls. The basis for this compensation is Complainants' lawfully-approved tariffs which are on file with the Commission. Complainants must be compensated for intraMTA traffic based upon the rates contained in their wireless termination service tariffs. Complainants must be compensated for interMTA traffic based upon the rates contained in their access tariffs.⁶ Complainants are also entitled to interest, late fees, and attorneys' fees as

⁶ Respondents have provided no jurisdictional data that would allow Complainants to distinguish intraMTA traffic from interMTA traffic. Therefore, the majority of Complainants have assumed that all traffic is intraMTA and applied their wireless termination tariff rates. Boyd Direct p. 5 (lines 17-21); Copsey/Holway Direct p. 5 (15-19); Copsey/KLM Direct p. 5 (15-19); Cornelius Direct p. 8 (20-22), p. 9 (1-2); Cotton/Grand River Direct p. 6 (15-18); Cotton/Lathrop Direct p. 6 (11-15); Faircloth Direct p. 5 (18-22); Matzdorff Direct p. 5 (9-12); Reeter Direct p. 5 (9-13); Rohde Direct p. 7 (8-12); Wilbert Direct p. 4 (13-16); Winberry Direct p. 5 (19-23). Fidelity Communications and Fidelity Telephone assumed that 95% of the traffic is intraMTA and applied their wireless termination tariff rates; intrastate access tariff rates were applied to the other 5%. (Beier/FCS Direct p. 5 (19-25); Beier/FTC Direct p. 5 (19-25).

permitted by those tariffs. By violating Complainants' Commission-approved tariffs, the Respondents in this case have breached Missouri law, the filed tariff doctrine, and recent federal decisions.

A. Missouri law

Under § 386.270, the Commission's *Orders* are *prima facie* lawful and reasonable:

All rates, tolls, charges, schedules and joint rates fixed by the Commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

(emphasis added) Thus, Complainants' Commission-approved tariffs are lawful and in effect until a court finds otherwise.

B. The filed tariff doctrine

The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of published tariffs. *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). "Neither a customer's ignorance nor a utility's misquotation of the applicable tariff provides refuge from the terms of the tariff." *Id.* Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the exclusive source of the terms and conditions governing the provision of service of a carrier to its customers. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002).

In *Laclede Gas v. Gershman*, 539 S.W.2d 574, 577 (Mo. App. E.D. 1976), the court observed that “lawful tariffs are published and are available to the public.” The court reasoned, “The shipper must be held to notice of the lawful rate in effect at the time of shipment. Here, there is no misrepresentation of a lawful rate by the gas company, or a billing based upon an unlawful rate.” *Id.* Accordingly, the court explained that the utility must be compensated for the full amount lawfully due to it under the law and the rates fixed by the Commission. *Id.*

In the instant case, Complainants’ tariffs are the only mechanisms in place that apply to wireless-originated traffic transiting SWBT’s facilities and delivered to Complainants. These tariffs set forth the rates, terms, and conditions for use of the Complainants’ facilities and services. Therefore, Complainants must be compensated for the full amount lawfully due under their Commission-approved tariffs.

C. The Three Rivers Telephone case

VoiceStream and Western Wireless argue that Complainants’ tariffs are unlawful under the Telecommunications Act of 1996. This argument was already addressed and rejected by this Commission in the *Mark Twain* wireless tariff case.⁷ Recent federal decisions support the view that small company tariffs may be applied in the absence of an agreement under the Act. In *Three Rivers Telephone Cooperative*, the Ninth Circuit Court of Appeals explained:

⁷ See *In the Matter of Mark Twain Rural Telephone Company’s Proposed Tariff to Introduce Its Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, issued February 8, 2001, pp. 28-33.

Because the Independents' tariffs form the exclusive source of the obligations between the independents and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, 47 U.S.C. § 251-52, without interpreting the tariffs themselves.⁸

In this case, Complainants' tariffs provide the exclusive source of the terms, conditions, and rates for the completion of wireless-originated calls. Therefore, until the Commission approves a negotiated (or arbitrated) agreement for wireless-originated traffic, the Commission must interpret and apply the small companies' wireless tariffs.

SWBT's Secondary Liability

Respondent SWBT has violated the terms of its Commission-approved interconnection agreements with VoiceStream and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of an agreement. In their Commission-approved interconnection agreements, Respondents agreed to "enter into their own agreements with Third Party Providers," but SWBT, VoiceStream, and Western Wireless have not done so. Instead, they have delivered wireless-originated traffic to Complainants' exchanges and failed to pay for it.⁹

⁸ *Three Rivers Telephone Cooperative v. U.S. West Communications*, (9th Cir. 2002), No. 01-35065, *Memorandum Opinion*, filed August 27, 2002 (emphasis added).

⁹ Beier/FCS Direct p. 5 (lines 15-17, 26-27), p. 6 (1-3); Beier/FTC Direct p. 5 (13-17, 26-27), p. 6 (1-3); Boyd Direct p. 5 (10-15, 22-26); Copsey/Holway Direct p. 5 (10-13, 20-25); Copsey/KLM Direct p. 5 (11-13, 20-25); Cornelius Direct p. 8 (14-18), p. 9 (3-8); Cotton/Grand River Direct p. 6 (11-13, 19-22); Cotton/Lathrop Direct p. 6 (7-9, 16-21); Faircloth Direct p. 5 (14-16, 23-27); Matzdorff Direct p. 5 (6-7, 13-16); Reeter Direct p. 5 (5-7, 14-19); Rohde Direct p. 7 (1-6, 13-18); Wilbert Direct p. 4 (10-11, 17-20); Winberry Direct p. 5 (14-17, 24-27), p. 6 (1-2).

Pursuant to Commission order and the terms of SWBT's Commission-approved interconnection agreements with VoiceStream and Western Wireless, Respondent SWBT is secondarily liable to Complainants for this traffic. Therefore, if Respondents VoiceStream and Western Wireless do not pay for their wireless-originated traffic, then SWBT must pay Complainants for all wireless-originated traffic terminated to Complainants by Respondents VoiceStream and Western Wireless, including interest, late fees, and attorneys' fees where appropriate.

The terms of SWBT's interconnection agreements and the language of the Commission *Orders* approving those agreements both indicate that SWBT is secondarily liable for the uncompensated wireless traffic that it delivers to Complainants' exchanges. Nearly five years ago, the Commission explained SWBT's responsibilities in Case No. TT-97-524:

The wireless carriers are primarily liable to the third-party LECs for reciprocal compensation for the termination of wireless-originating traffic in the exchanges of third-party LECs, and third-party LECs will be required to bill the wireless carriers and make good-faith efforts to collect. **In the event a wireless carrier refuses to pay a third-party LEC for such termination and the wireless carrier does not have a reciprocal compensation agreement with the third-party LEC, SWBT will remain secondarily liable to the third-party LEC for the termination of this traffic, but will be entitled to indemnification from the wireless carrier upon payment of the loss.**¹⁰

¹⁰ *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff*, P.S.C. Mo.- No. 40, Case No. TT-97-524, 7 Mo. P.S.C. 3d 38, issued December 23, 1997 (emphasis added). Although this case addressed SWBT's wireless tariff rather than specific interconnection agreements, the Commission's reasoning should be analogous.

The Commission also explained its rationale for imposing secondary liability upon SWBT:

[I]f SWBT knows it will be secondarily liable to the third-party LECs, it will have **an incentive to enforce the provisions of . . . its interconnection agreements**, which require wireless carriers to enter into agreements with third-party LECs.¹¹

In Case No. TO-98-12, the Commission specifically addressed the question of wireless-originated traffic that is delivered by Western Wireless to Complainants over SWBT's facilities. The Commission observed:

With respect to third-party providers, Western and SWBT agree to compensate each other for traffic that transits their respective systems to any third-party provider. The parties also agree to enter into their own agreements with third-party providers. **In the event that Western sends traffic through SWBT's network to a third-party provider with whom Western does not have an interconnection agreement, Western will indemnify SWBT for any termination charges rendered by a third-party provider for such traffic.**

In the Matter of the Joint Application of SWBT and Western Wireless for Approval of an Interconnection Agreement, Case No. TO-98-12, *Order Approving Interconnection Agreement*, issued Oct. 1997 (emphasis added).

Clearly, the Commission intended that SWBT enforce its interconnection agreements so that third-party LECs are compensated for the use of their facilities and services. Unfortunately, SWBT has not followed the Commission's *Order* or enforced

¹¹ *Id.* (emphasis added).

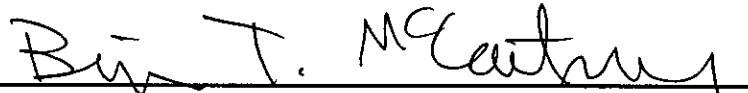
the provisions of its interconnection agreements. The Commission will not allow SWBT to continue delivering uncompensated traffic to Complainants' networks. Therefore, if SWBT continues to transit this wireless-originated traffic for termination to Complainants, and to the extent Respondents VoiceStream and Western Wireless refuse or fail to pay for same, then SWBT will be directed to pay Complainants for the traffic. SWBT will not be harmed by this requirement because SWBT is entitled to indemnity under its interconnection agreements.

Respondents VoiceStream and Western Wireless have violated the terms of their Commission-approved interconnection agreements with SWBT by sending traffic to SWBT for termination in Complainants' exchanges without first obtaining a compensation or interconnection agreement for the termination of such traffic. Complainants should be compensated for this wireless-originated traffic based upon the rates contained in their wireless termination service tariffs for intraMTA traffic or their access tariffs for interMTA traffic, including interest, late fees, and attorneys' fees as permitted by those tariffs.

Respondent SWBT has violated the terms of Commission orders and the Commission-approved interconnection agreements with VoiceStream and Western Wireless by allowing VoiceStream and Western Wireless to transit wireless-originated traffic to Complainants in the absence of an agreement. Therefore, SWBT is secondarily liable in accordance with its Commission-approved interconnection agreements with VoiceStream and Western Wireless, and SWBT must pay

Complainants for all wireless-originated traffic terminated to Complainants by
Respondents VoiceStream and Western Wireless.

Respectfully submitted,

A handwritten signature in cursive script, reading "Brian T. McCartney", written over a horizontal line.

W.R. England, III Mo. Bar 23975

Brian T. McCartney Mo. Bar 47788

Diana C. Farr Mo. Bar 50527

Brydon, Swearngen & England P.C.

312 East Capitol Avenue

P.O. Box 456

Jefferson City, MO 65102-0456

573/635-7166

573/634-7431 (facsimile)

Email: trip@brydonlaw.com

brian@brydonlaw.com

dfarr@brydonlaw.com

Attorneys for Complainants

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed or hand-delivered, this 14th day of December, 2002 to:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

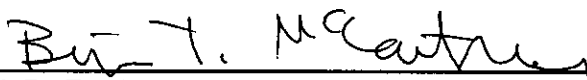
Michael Dandino
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Director of Regulatory Affairs
VoiceStream Wireless Corporation
3650 131st Ave. SE, Suite 200
Bellevue, Washington 98006

Gene DeJordy
Executive Director of Legal Affairs
Western Wireless Corporation
3650 131st Ave. SE, Suite 400
Bellevue, Washington 98006

Mark P. Johnson
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111

Leo Bub
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101



W. R. England, III/Brian T. McCartney