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Missouri Public
Service Commission

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

Re: Case No. TC-2002-57 et al.

Dear Mr. Roberts:

Enclosed for filing on behalf of the Small Telephone Company Group, please find an original and eight copies of the following documents:

1. Petition for Leave to File Brief as an *Amicus Curiae*; and

2. *Amicus Curiae* Brief of the Small Telephone Company Group.

Please see that these filings are brought to the attention of the appropriate Commission personnel. If there are any questions regarding the filings, please give me a call. I 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

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Northeast Missouri Rural Telephone Company and Modern Telecommunications Company,	)	
Petitioners,	)	
vs.	)	
Southwestern Bell Telephone Company, Southwestern Bell Wireless (Cingular), Voicestream Wireless (Western Wireless), Aerial Communications, Inc., CMT Partners (Verizon Wireless), Sprint Spectrum LP, United States Cellular Corp., and Ameritech Mobile Communications, Inc.,	)	Case No. TC-2002-57 et al.
Respondents.	)	

AMICUS CURIAE BRIEF OF THE SMALL TELEPHONE COMPANY GROUP

EXECUTIVE SUMMARY

In Case No. TT-2001-139, the Commission approved wireless termination service tariffs for a number of Missouri's small incumbent local exchange companies (ILECs). These tariffs established the rates, terms, and conditions for intra-MTA wireless traffic that is delivered to the small companies' exchanges in the absence of a compensation or interconnection agreement. Once the tariffs became effective, the Small Telephone Company Group member companies began billing the wireless providers for terminating intra-MTA wireless traffic at their respective wireless termination tariff rates.

The small companies' Commission-approved wireless termination tariffs are deemed lawful and reasonable until proven otherwise. § 386.270 RSMo; *see also State ex rel. GTE North v. Public Service Comm'n*, 835 S.W.2d 356, 364 (Mo. App. W.D. 1992). Therefore, for any wireless-originated traffic that is identified as intra-MTA traffic, the wireless termination service tariff rates apply unless and until they are superceded by a Commission-approved compensation or interconnection agreement.

Under the filed tariff doctrine, access rates should apply to any wireless-originated intraMTA traffic that was sent prior to the effective date of the small company wireless tariffs. Access rates continue to apply to any wireless-originated traffic that is not intraMTA. Although the wireless carriers seek to raise defenses of estoppel and waiver against the small companies, neither the facts nor Missouri law will support estoppel or waiver in this case.

INTRODUCTION

The Small Telephone Company Group (STCG) is a group of small incumbent local exchange companies (ILECs) that provide telecommunications service in the rural areas of Missouri. As a part of this service, the STCG member companies provide the facilities and services necessary to complete wireless-originated calls to customers in the STCG member companies' rural exchanges. Some of the wireless carriers in this case have not paid for their pre-tariff use of STCG member companies' facilities and services.

The STCG's *amicus* brief will address these issues: (1) the appropriate rate for wireless-originated intraMTA traffic delivered prior to the effective date of a wireless termination tariff or an agreement; (2) estoppel and waiver; and (3) SWBT's wireless tariff.

ARGUMENT

Issue No. 2. In the absence of a wireless termination service tariff or an interconnection agreement, can Petitioners charge access rates for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Petitioners' respective networks?

Yes. The small companies' access rates can and do apply to intra-MTA traffic that is originated by wireless carriers and delivered by a transiting carrier for termination to the STCG member companies' networks in the absence of a compensation or interconnection agreement under the Act. This is consistent with the filed tariff doctrine and prior decisions by this Commission, Missouri courts, and the United States Court of Appeals for the Ninth Circuit.

A. 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, the small companies' access tariffs were the only tariffs in place that would apply to wireless-originated traffic transiting SWBT's facilities and delivered to the small companies prior to the wireless termination tariffs or an approved agreement under the Act. These access tariffs set forth the rates, terms, and conditions for use of the small companies' facilities and services. Therefore, the small companies must be compensated for the full amount lawfully due under their Commission-approved access rates for any wireless-originated traffic that was delivered before the effective date of the small company wireless termination tariffs.

B. The *Three Rivers Telephone* case.

In the past, the wireless carriers have relied heavily on the *Three Rivers Telephone Cooperative*[1] decision from the U.S. District Court of Montana in their arguments before the Commission, the Cole County Circuit Court, and the Western District Court of Appeals. For example, in the Western District the wireless carriers stated that they were "aware of only one judicial opinion addressing the status of intra-MTA calls originating on a wireless network."[2] The wireless carriers then cited the *Three Rivers* case for the proposition that local exchange companies may not collect terminating access charges for intra-MTA wireless calls.

Unfortunately for the wireless carriers, the *Three Rivers* case has been reversed and remanded by the Ninth Circuit Court of Appeals. The Ninth Circuit explained:

> **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.**[3]

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[1] *Three Rivers Telephone Cooperative v. U.S. West Communications*, 125 F. Supp.2d 417 (D. Mont. 2000).

[2] Brief of AT&T Wireless, Verizon Wireless, and Sprint Spectrum L.P., July 13, 2001, page 38, filed in *AT&T v. Missouri Public Service Comm'n*, 62 S.W.3d 545 (Mo. App. W.D. 2001). In this case, the Western District reversed and remanded the Commission's *Alma* tariff decision for failure to provide adequate findings of fact.

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

In this case, the small companies' access tariffs provided the exclusive source of the terms, conditions, and rates for the completion of wireless-originated calls prior to the implementation of their wireless tariffs. Therefore, until the Commission approves an alternate compensation arrangement or interconnection agreement for wireless-originated traffic, the Commission must interpret and apply the small companies' access tariffs.

C. Access rates are consistent with prior rulings by this Commission and the Cole County Circuit Court.

Prior decisions by this Commission and the Cole County Circuit Court hold that access rates are appropriate for intra-MTA traffic that is delivered to the small companies' exchanges in the absence of an agreement under the Act.

In 1997, the Commission addressed a factual scenario similar to the facts presented by this case. *See United Telephone Company Complaint*, Case No. TC-96-112 (6 Mo. P.S.C. 3d 224) *Report and Order*, issued April 11, 1997. In the *United* complaint case, SWBT had been delivering wireless calls to United Telephone Company (now Sprint), and United filed a complaint at the Commission seeking compensation for the wireless calls being delivered. In that case, the Commission 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." *Id.* at 231 (emphasis added). 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." *Id.*

Likewise, in two cases involving small Missouri companies, the Commission held that access rates apply to wireless-originated traffic delivered by SWBT in the absence of an agreement. *See 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. 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**." (emphasis added). Both the *United* and *Chariton Valley* cases were decided after the implementation of the 1996 Act and the release of the FCC's *Interconnection Order.*

The Cole County Circuit Court has squarely ruled that access rates apply to wireless-originated traffic that is delivered to the small companies in the absence of an approved agreement under the Act. The Court explained:

> The Telecommunications Act of 1996 does not preclude Relators from collecting switched access compensation until an interconnection agreement containing reciprocal compensation replaces switched access. **Switched access rates may lawfully be applied prior to the approval of an interconnection agreement**.[5]

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[5] *State ex rel. Alma Telephone Company v. Missouri Public Service Comm'n*, Case No. 00CV323379, *Findings of Fact, Conclusions of Law, Judgment, Decision and Order*, issued Nov. 1, 2000, ¶ 30 (emphasis added).

Thus, until a compensation or interconnection agreement is approved, the small companies are entitled to be compensated pursuant to their lawfully-approved access rates for wireless-originated traffic that is terminated to their exchanges.

The Commission and Circuit Court rulings that access rates apply to traffic delivered in the absence of an agreement are consistent with Missouri case law. For example, in *Laclede Gas v. Hampton Speedway*, 520 S.W.2d 625, 630 (Mo. App. E.D. 1975), the court explained:

> The general principle is that, even though there has been no specific request for goods or services, **where goods and services are knowingly accepted by the party receiving the benefit, there is an obligation to pay the reasonable value of such services and a promise to pay such reasonable value is inferred by either the conduct of the parties or by law under circumstances which would justify the belief that the party furnishing such service expected payment**.

(emphasis added) The court went on to state that "by receiving the benefit and use of gas and gas service, a promise to pay the lawful and reasonable charge of such service is implied." *Id.* at 631.

It only makes sense that the wireless carriers must pay for the facilities they have used and the services they have received. This is standard practice in the world of legitimate business. In this case, the wireless carriers acknowledge that they have used the small companies' termination facilities and services. In doing so, the wireless carriers and their customers have received the benefit of completing calls to the small company exchanges. Therefore, the wireless

carriers should be expected to pay the reasonable value for the use of those facilities – the small companies' lawful and Commission-approved access rates – for traffic that was delivered prior to a wireless termination tariff or an approved agreement under the Act.

D. The wireless carriers have failed to show that any of the traffic is intra-MTA traffic.

The Commission's Staff has provided an alternative reason why access rates should apply to the wireless-originated traffic in this case: the wireless carriers have failed to show that the traffic they are sending is intra-MTA traffic.

The Cellular Transiting Usage Summary Reports (CTUSRs) provided by SWBT establish that the wireless carriers have sent traffic for termination in the small companies' exchanges. However, the CTUSRs do not distinguish between intra-MTA and inter-MTA wireless traffic. The wireless carriers are the only parties with the ability to provide call detail information that would determine whether the traffic in question is intra-MTA or inter-MTA, but the wireless carriers have not retained or produced any such jurisdictional information. Thus, although the record conclusively shows that the wireless carriers have sent wireless traffic to the small companies, the wireless carriers have failed to prove that the traffic is intra-MTA traffic.

Staff proposes to assume that all wireless traffic is interMTA and subject to switched access charges in the absence of information from the wireless carriers that would prove otherwise. Staff explains that, in the absence of any

jurisdictional information from the wireless carriers to determine whether the traffic that they are sending is intra-MTA or inter-MTA, "***it should be assumed switched access charges are appropriate on all wireless traffic***." (Staff Witness Scheperle Rebuttal, p. 16)(emphasis added).

The Commission has exclusive jurisdiction to determine, in the first instance, the interpretation of the lawful rate applicable to the service provided to the customer. *Inter-City Beverage Co. v. Missouri Public Service Comm'n*, 889 S.W.2d 875, 878 (Mo. App. W.D. 1994). The Commission also has exclusive jurisdiction to determine which of two approved rates should be charged to a customer. *Id.* The Commission's powers are not limited to the service to be rendered; rather, the Commission "has power to determine the classification of the service rendered." *De Paul Hospital School of Nursing v. Southwestern Bell Telephone Company*, 539 S.W.2d 542, 547 (Mo. App. E.D. 1976).

In this case, it is clear that the wireless carriers have used the small companies' facilities and services. For the wireless-originated traffic that was delivered prior to an agreement, the small companies' access rates are the only rates applicable. Moreover, because the wireless carriers have failed to establish that the traffic was intra-MTA traffic, they cannot argue that access rates are somehow prohibited by the provisions for negotiated or arbitrated agreements under the Act. Therefore, the Commission should find that the small companies' access rates apply to wireless-originated traffic delivered prior to the effective date of the small company wireless tariffs or approved agreements under the Act.

9. Does the record support a finding that Petitioners are barred from collecting compensation for traffic in dispute under the principles of estoppel, waiver, or any other affirmative defense pled by any of the Wireless Carrier Respondents?

Missouri's small companies have consistently and vigorously pursued compensation for wireless-originated traffic before this Commission,[6] the Cole County Circuit Court,[7] and the Missouri Court of Appeals.[8] In addition, the small companies have filed comments in various proceedings before the Federal Communications Commission (FCC).[9] At all times, the STCG member

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[6] *In the Matter of United Telephone Company's Complaint against SWBT for Failure to Pay Terminating Access for Cellular-Originated Calls*, Case No. TC-96-112, *Report and Order*, issued April 11, 1997; *In the Matter of SWBT's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff*, Case No. TT-97-524, *Report and Order*, issued Dec. 23, 1997; *In the Matter of Chariton Valley Telephone Corporation's Complaint against SWBT for Terminating Cellular Compensation*, Case No. TC-98-251, *Report and Order*, issued June 10, 1999; *In the Matter of Alma Telephone Company's Tariff Filing to Revise its Access Service Tariff*, Case No. TT-99-428, *Report and Order*, issued Jan. 27, 2000; *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 Feb. 8, 2001; *In the Matter of Alma Telephone Company's Tariff Filing to Revise its Access Service Tariff*, Case No. TT-99-428, *Amended Report and Order*, issued April 9, 2002.

[7] *State ex rel. Alma Telephone Co. v. Missouri Public Service Comm'n*, Case No. CV198-178CC (decision issued Feb. 23, 1999); *State ex rel. Alma Telephone Co. v. Missouri Public Service Comm'n*, Case No. 00CV323379 (decision issued Nov. 1, 2000); *State ex rel. Sprint Spectrum L.P. v. Missouri Public Service Comm'n*, Case No. 01CV323740 (decision issued Nov. 26, 2001); *Missouri Independent Telephone Company Group v. Missouri Public Service Comm'n*, Case No. 02CV324810 (Appellants' Briefs due October 25, 2002).

[8] *AT&T v. Missouri Public Service Comm'n*, 62 S.W.3d 545 (Mo. App. W.D. 2001); *Sprint Spectrum L.P. v. Missouri Public Service Comm'n*, Case No. WD 60928 (briefed, argued, and awaiting decision).

[9] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Sprint PCS and AT&T Petitions for Declaratory Ruling on CMRS Access*

companies have insisted that they are entitled to compensation for terminating wireless-originated traffic. As explained below, the wireless carriers have failed to establish an affirmative defense of estoppel or waiver.

Estoppel. Estoppel is not favored by the law. *Capital City Water Co. v. Missouri Public Service Comm'n*, 850 S.W.2d 903, 910 (Mo. App. W.D. 1993). Moreover, Missouri law does not permit an estoppel defense against a public utility seeking to collect for services provided under lawful tariff rates. In *Laclede Gas v. Gershman*, 539 S.W.2d 574 (Mo. App. E.D. 1976), a gas utility sued for a balance due for natural gas used by the defendant over a four year period, and the defendant filed an answer setting out a defense of estoppel. The court explained, "[T]he duty of a carrier to collect the total amount due under its tariff rates could not be defeated by estoppel." *Id.* at 576. Accordingly, the court held that estoppel was not a defense to the company's action for a balance due on gas consumed by the defendant.[10]

Even if estoppel could apply in this case, none of the elements to establish the defense have been satisfied. Equitable estoppel applies only when: (1) an admission, statement or act, including silence or inaction, is inconsistent with a claim that is later asserted and sued upon; (2) action is taken by a second party on faith of that admission, statement, or act; and (3) injury occurs to the second

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Charge Issues, WT Docket No. 01-316.

[10] This is true in other jurisdictions as well. *See e.g. Memphis Light, Gas & Water Division v. Auburndale School System*, 705 S.W.2d 652 (Tenn. 1986)(holding that the defense of equitable estoppel was not available to bar the utility company from collecting for electricity appellant had consumed).

party if the first party is permitted to contradict or repudiate the admission, statement, or act. *Grannemann v. Columbia Insurance Group*, 931 S.W.2d 502 (Mo. App. W.D. 1996). The doctrine of equitable estoppel is restricted to those cases in which each element clearly appears, and the party asserting estoppel must establish each essential element by clear and satisfactory evidence. *Blake v. Irwin*, 913 S.W.2d 923 (Mo. App. W.D. 1996).

The wireless carriers have failed to establish any of the necessary elements to state a claim of equitable estoppel. First, there has been no admission, statement, or act that is inconsistent with the MITG's and the STCG's efforts to receive compensation for the wireless-originated traffic. Rather, the MITG and the STCG have consistently asserted before the Commission, Missouri courts, and the FCC that they are entitled to compensation for terminating wireless-originated traffic. Second, the small companies' position has been made quite clear to the wireless carriers. Thus, the wireless carriers' action in sending wireless traffic to the small companies in the absence of a compensation or interconnection agreement cannot have been made on faith of any admission, statement, or act. Third, because there has been no admission, statement, or act, there can be no injury caused by such an admission, statement, or act. In fact, the wireless carriers have been unjustly enriched by using the small companies' services and facilities without compensating the small companies. As explained above, both equity and Missouri law require the wireless carriers to pay for the facilities that they have used and the services that they have received. *See Hampton Speedway*, supra, 520 S.W.2d at 630.

Waiver. Waiver and estoppel are distinct legal theories. *Shahan v. Shahan*, 988 S.W.2d 529 (Mo. banc 1999). Waiver is the intentional relinquishment of a known right or privilege. *Id.* Waiver differs from estoppel in that: (1) waiver involves the act, conduct, or statement of one of the parties to the contract only; (2) waiver involves both knowledge and intent, while estoppel does not always require an intent to mislead; and (3) waiver does not require one to be misled to his or her prejudice into an altered position. *Link v. Kroenke*, 909 S.W.2d 740 (Mo. App. W.D. 1995).

For waiver of a right or benefit to be implied from a party's conduct, the conduct must clearly and unequivocally show a purpose to relinquish that right or benefit. *Woolsey v. Bank of Versailles*, 951 S.W.2d 662 (Mo. App. W.D. 1997). In other words, the conduct must be so manifestly consistent with and indicative of an intention to renounce the right or benefit that no other reasonable explanation of that party's conduct is possible. *Id.* at 668. This simply has not happened in this case. To the contrary, the MITG and the STCG have consistently appeared before this Commission and Missouri courts seeking to ensure their rights to be compensated. The wireless carriers have not and cannot establish the necessary elements for a claim of waiver.

11. What, if any, relevance do any of the terms and conditions of Southwestern Bell Telephone Company's Wireless Interconnection Tariff (PSC Mo. No. 40) have in connection with the determination of any of the issues in this proceeding?

SWBT's Wireless Interconnection Tariff is relevant to this proceeding in at least three ways. First, it establishes that wireless tariffs are lawful and valid vehicles for Missouri's ILECs to receive compensation from wireless carriers. Second, SWBT's tariff rates are based upon SWBT's access rates and demonstrate that access-based rates are appropriate. Third, the terms of SWBT's tariff indicate the Commission's and the Cole County Circuit Court's intent that wireless carriers were not supposed to send wireless traffic to the small companies' exchanges until they had reached agreements with the small companies.

SWBT's Wireless Interconnection Tariff allows SWBT to charge a rate for the termination of wireless traffic in the absence of an interconnection agreement. SWBT's Wireless Interconnection Tariff first went into effect on January 1, 1984. SWBT's tariffed wireless termination rates are neither forward-looking, nor are they reciprocal. SWBT's tariffed rates for the termination of wireless calls (roughly $0.043) were based upon SWBT's access charges, just as the small companies' wireless tariff rates are.[11] SWBT's wireless termination tariff contains

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[11] *In the Matter of Southwestern Bell Telephone Company's Proposed Radio Common Carrier Tariff*, Case No. TR-90-144; Mo. P.S.C. (N.S.) 416, *Report and Order*, issued Nov. 21, 1990.

a set of procedures, rates, and terms that are used in the absence of an approved interconnection agreement between SWBT and a wireless carrier. SWBT's wireless tariff was approved by both the Commission and the Cole County Circuit Court.

SWBT's wireless termination tariff expressly prohibits wireless carriers from sending calls to the small companies in the absence of an agreement:

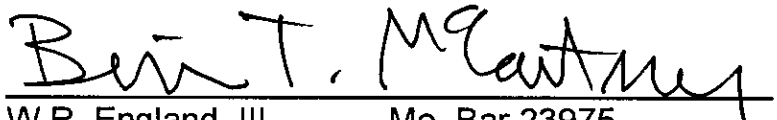
> **Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic**.

(SWBT's Wireless Interconnection Service Tariff, P.S.C. Mo. No. 40, Section 6.9, 5th Revised Sheet 16.02) The Commission insisted upon this language in Case No. TT-97-524, and it was upheld by the Cole County Circuit Court. Similar language is contained in many of the interconnection agreements between SWBT and the wireless carriers. This language and subsequent orders indicate the Commission's and the Circuit Court's intent that the wireless carriers should not be sending wireless calls to small company exchanges without first establishing a compensation or interconnection agreement.

CONCLUSION

Under the filed tariff doctrine, the STCG's lawful, Commission-approved access rates apply to wireless-originated traffic that was delivered to the STCG companies prior to the wireless tariffs and in the absence of an approved compensation or interconnection agreement under the Act. For wireless-originated interMTA traffic (i.e. between MTAs) delivered after the wireless tariffs became effective, access rates continue to apply. For wireless-originated intraMTA traffic (i.e. within an MTA) delivered after the wireless tariffs became effective, the wireless tariff rates apply unless and until there is an approved compensation or interconnection agreement in place.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed or hand-delivered, this 17th day of October, 2002 to:

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