Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

Mark P. Johnson
816.460.2424
mjohnson@sonnenschein.com

4520 Main Street
Suite 1100
Kansas City, MO 64111
816.460.2400
816.531.7545 fax
www.sonnenschein.com

Chicago
Kansas City
Los Angeles
New York
San Francisco
Short Hills, N.J.
St. Louis
Washington, D.C.
West Palm Beach

October 22, 2004

Via Hand-Delivery & Federal Express

Mr. Dale Hardy Roberts
Executive Secretary
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street, Suite 100
Jefferson City, Missouri 65102-0360

RE: Case No. TC-2002-57, et al.

Dear Mr. Roberts:

Please find enclosed for filing the original Post-Hearing Brief of Respondent T-Mobile USA, Inc. and the original Proposed Findings of Fact and Conclusions of Law of Respondent T-Mobile USA, Inc. in the above-captioned case. I am sending to you under separate cover the necessary copies to complete the filing and a return envelope for your convenience in returning a filed-stamped copy of each pleading to me.

A copy of the above-named pleadings are being served on all parties of record via U.S. mail on this date.

Thank you for your attention to this matter. Please give me a call if you have any questions.

Very truly yours,

Mark P. Johnson

MPJ/rgr
Enclosures
cc: All Parties of Record (w/enclosures) (via U.S. mail)

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company and Modern Telecommunications Company,	)	
Petitioners,	)	
v.	)	**Case No. TC-2002-57**
Southwestern Bell Telephone Company, et al.,	)	
Respondents.	)	

INITIAL BRIEF OF T-MOBILE USA, INC.

Mark P. Johnson
MO Bar No. 30740
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111
816-460-2400
Fax: 816-531-7545

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INITIAL BRIEF OF T-MOBILE USA, INC.

T-Mobile USA, Inc. ("T-Mobile") submits this Initial Brief in response to the September 21, 2004 Order Setting Briefing Schedule.

I. INTRODUCTION

The recent decision of the Missouri Court of Appeals in *State ex rel. Alma Telephone* v. *Mo. Pub. Serv. Comm'n*, WD-62961 (Oct. 5, 2004)("*Alma* Decision") impacts the issues to be briefed in this proceeding. In its *Alma* Decision, the court reversed the Commission's 2002 *Alma II* order (TT-99-428), which rejected the request of the rural local exchange carriers ("RLECs") to amend their intrastate access tariffs to impose access charges on intraMTA traffic originated by a provider of commercial mobile radio service ("CMRS").

The Court of Appeals' interpretation of federal law conflicts with the interpretation of the same federal law by the Federal Communications Commission ("FCC") and the federal courts. Indeed, to T-Mobile's knowledge, the *Alma* Decision is the first reported case to approve the application of access rates to intraMTA mobile-to-land termination. T-Mobile submits that the

Court of Appeals' decision is facially incorrect and should not be followed in this case. Federal decision makers, including the FCC and the federal courts, have interpreted the federal communications law to reject the application of access charges to intraMTA traffic.

In matters involving intercarrier interconnection, such as this proceeding, the Commission should follow federal law as interpreted by the FCC. Even though the Complainants may argue to the contrary, the *Alma* Decision has been appealed to the Supreme Court, in which case its precedential value would disappear. T-Mobile submits that the Commission should fairly and independently analyze the law and come to its own conclusion on the merits.[1]

The U.S. Supreme Court has ruled that in the Telecommunications Act of 1996, Congress took "regulation of local telecommunications competition away from the States." *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 378 n.6 (1999). Specifically, in addressing the interconnection of incumbent LECs and CMRS providers, this Commission now acts as "a deputized federal regulator." *MCI v. Illinois Bell*, 222 F.3d 323, 343-44 (7th Cir. 2001). *See also Iowa Network Services* v. *Qwest*, 363 F.3d 683, 690 (8th Cir. 2004)("There can be no doubt that in the 1996 Act Congress greatly expanded the federal government's involvement in the telecommunications industry, even into areas such as local exchange service that previously had been left to state regulation.").

Congress adopted the 1996 Act so that a national framework would be developed for the interconnection of networks necessary to foster competition and increase consumer choice. This fundamental objective would be gravely undermined if each state was allowed to interpret federal communications law in its own way, without regard to the interpretations made by the expert

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[1] Because the issues in this complaint proceeding involve application of federal law, an appeal of the Commission's decision is appropriately lodged in federal court. *See, e.g., Rural Iowa Independent Telephone Ass'n v. Iowa Utilities Board*, 362 F.3d 1027 (8th Cir. 2004)(district court erred in dismissing a complaint challenging the lawfulness under federal law of a state commission declaratory order).

regulatory agencies and by federal courts that are accustomed to applying federal law on a daily basis.

II. FEDERAL LAW PROHIBITS THE USE OF TARIFFS TO GOVERN INTRAMTA LEC-CMRS INTERCONNECTION

In its *Alma* Decision, the Court in part reaffirmed its decision in *State ex. rel. Sprint Spectrum* v. *Mo. Pub. Serv. Comm'n*, 112 S.W.20 (Mo. App. 2003), which held that state interconnections tariffs are lawful so long as they are subordinate to the procedures set forth in federal law. The Missouri court's interpretation of federal law at odds with the interpretation of the same federal law by federal courts. Specifically, tariffs of the sort that Complainants seek to apply to CMRS carriers in this proceeding conflict with the procedures specified in federal law and are thus void as they are preempted by federal law. *See, e.g., Verizon North* v. *Strand*, 367 F.3d 577 (6th Cir. 2004); *Indiana Bell* v. *Indiana Utility Regulatory Comm'n*, 359 F.3d 493 (7th Cir. 2004); *Wisconsin Bell v. Bie*, 340 F.3d 441 (7th Cir. 2003); *Illinois Bell v. Wright*, 2004 U.S. Dist. LEXIS 16575 (N.D. Ill., Aug. 23, 2004). *See also Illinois Bell* v. *Illinois Commerce Comm'n*, 343 Ill. App. 3d 249 (2003). The tariff may be intended to accomplish the goal of providing appropriate terms and conditions of interconnection, but if it preempts the negotiation process called for by the Federal Act, it must fall.

The decision in *Verizon North, supra,* is illustrative of the limited power of state regulatory commissions to approve tariffs which conflict with the negotiation process required by the Act. There, a CLEC filed a state tariff which required ILECs to pay reciprocal compensation for traffic termination, in the absence of an interconnection agreement. The Sixth Circuit affirmed the district court's decision that the state commission lacked the power to approve the tariff, as it effectively required compensation where the CLEC and ILEC had not negotiated an interconnection agreement. As the Court held, the state commission's order "completely obviate[d] the need

for negotiations by allowing the competitor to establish its own rate without any interaction between the incumbent and the competitor." 367 F.2d at 585. In like fashion, the tariffs which the Complainants herein seek to enforce require compensation to be paid for intraMTA traffic in the absence of an interconnection agreement between the Complainants and T-Mobile. The tariffs are preempted because they short-circuit the negotiation process required by the Federal Act.[2]

The Federal Communications Commission ("FCC") has similarly ruled that tariff procedures are "mutually exclusive" of the interconnection procedures that Congress established in the 1996 Act and that use of "the tariff process to circumvent the section 251 and 252 processes cannot be allowed." *Bell Atlantic* v. *Global NAPs Reconsideration Order*, 15 FCC Rcd 5997, 6002 ¶ 14 (2000), *affirming Bell Atlantic* v. *Global NAPs Order*, 15 FCC Rcd 12946, 12959 ¶ 23 (1999), *aff'd Global NAPs* v. *FCC*, 247 F.3d 252 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27331-32 ¶ 601-02 (2002).

T-Mobile appreciates that this Commission may choose not to reconsider the lawfulness under federal law of unilaterally-filed incumbent LEC interconnection or access tariffs, and T-Mobile will therefore not burden this Commission with a more extended discussion of the issue here.

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[2] Indeed, Commissioner Murray observed at the hearing that she had predicted that the wireless tariffs which the Commission has approved, and which include payments of compensation equivalent to intrastate access charges, would eliminate any incentive for the LECs to negotiate in good faith. As she observed, "at the motion for rehearing, I [dissented]. The wireless carriers had filed a motion for rehearing, and I felt it my [dissent], I stated that approval of the tariffs will not provide effective incentives for negotiation of reciprocal compensation agreements... The filing companies will no longer have any incentive to negotiate reciprocal compensation for indirect interconnection." Tr. P. 1484 l. 12-20.

III. FEDERAL LAW PROHIBITS THE USE OF ACCESS (NON-TELRIC) RATES FOR INTRAMTA LEC-CMRS INTERCONNECTION

The Complainants acknowledge that intraMTA calls constitute local traffic, as noted by William Biere in responding to questions from Commissioner Murray. Tr. P. 1482 l. 18-21. Under federal law the Complainants may not charge access rates for intraMTA CMRS traffic. 47 C.F.R. § 51.701; *First Local Competition Order,* 11 FCC Rcd 15499, 16014 ¶ 1036 (1996); *Unified Intercarrier Compensation,* 16 FCC Rcd 9610, 9613 ¶ 7 (2001). Nevertheless, the Complainants assert before the Commission that they can exempt themselves from these federal law requirements simply by preparing a piece of paper (state tariffs) that is incompatible with federal law. The Commission understandably (and correctly) rejected this argument. However, in *Alma,* Court of Appeals has reversed the Commission's decision, with the court agreeing with the Complainants that they can alone decide when (if at all) they will comply with the requirements of federal law.

The FCC has squarely rejected the Complainants' argument and this FCC decision was affirmed on appeal:

> [ILECs] claim further that ceasing to charge for LEC-originated traffic would violate their pricing obligations under state tariffs by compelling them to provide certain state tariffed interconnection services free of charge. The *Local Competition Order* made clear, however, that as of the order's effective date, LECs had to provide LEC-originated traffic to CMRS carriers without charge. Accordingly, any LEC efforts to continue charging CMRS or other carriers for delivery of such traffic would be unjust and unreasonable and violate the Commission's rules, *regardless of whether the charges were contained in a federal or a state tariff.*

TSR Wireless v. *U S WEST,* 15 FCC Rcd 11166, 11183 ¶ 29 (2000), *aff'd Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001)(emphasis added).

Federal courts have likewise rejected the Complainants' argument. For example, in *3 Rivers Telephone* v. *U S WEST,* CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 (D. Mt.,

Aug. 22, 2003), rural ILECs in Montana, like the Complainants here, argued that access charges should apply when they terminate wireless intraMTA traffic. And like the Complainants here, the Montana ILECs asserted that "the filed tariff doctrine, which makes a filed tariff the 'exclusive source' of terms and conditions governing the provision of service of a common carrier to its customers, and which has the force of law, precludes a judicial challenge to the validity of a filed tariff." *Id.* at *47. The federal court summarily rejected this RLEC argument:

> The filed tariff doctrine, in and of itself, does not wholly preclude Qwest's preemption argument. The preemption doctrine, which derives from the Supremacy Clause of the United States constitution, allows federal law to preempt and displace state law under certain circumstances. . . . Thus, in the instance case, the filed tariffs at issue in this case, which have the force and effect of state law, are subject to potential preemption by federal law. . . . *Id.* at *50.

The court thereafter ruled that the RLEC access tariffs were unlawful under federal law:

> [T]raffic between a LEC and CMRS network that originates and terminates in the same MTA is local and, therefore, subject to reciprocal compensation rather than access charges. . . . [T]he Court concludes that 47 U.S.C. § 251(b), as implemented by the FCC's *1996 Local Competition Order*, preempts the tariffs in this case to the extent that the reciprocal compensation scheme applies to CMRS traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination. *Id.* at *67-68.

In summary, even if state tariffs were a lawful procedure under federal law (and they are not), such tariffs must still comply with federal substantive law standards (*e.g.*, access charges cannot be applied to intraMTA traffic).[3]

IV. UNDER STATE LAW, NORTHEAST IS NOT ENTITLED TO ANY RELIEF FROM T-MOBILE DURING THE COMPLAINT PERIOD

Northeast's complaint against T-Mobile is based exclusively on its intrastate access tariff, and it seeks compensation for traffic that T-Mobile allegedly sent to it during the period Febru-

[3] There are other federal law problems with the positions advocated by the Complainants. For example, under its delegated authority, this Commission may establish or approve intraMTA rates only in an arbitration proceeding.

ary 5, 1998 through December 31, 2001. Direct Testimony of Gary Godfrey, Ex. 307, p. 9 l. 6-7. However, T-Mobile was not subject to Northeast's access tariff during this complaint period. Accordingly, Northeast is entitled to no compensation from T-Mobile – whether for intraMTA traffic or interMTA traffic.

From 1998 through 2001, Northeast's intrastate access tariff did not apply to traffic originated on the networks of CMRS carriers like T-Mobile. By its language, the tariff was limited in application to "intrastate interexchange customers." T-Mobile is a CMRS carrier, not an intrastate, interexchange carrier. In addition, testifying on behalf of the MITG, the Complainant group, Mr. Biere acknowledged that T-Mobile was not a "customer" as that term is used in its tariff. Surrebuttal Testimony of William Biere, Ex. 302, p. 26 l. 22 - p. 27 l. 1.

On June 10, 2002, Northeast proposed to revise its access tariff to include CMRS traffic. Specifically, Northeast proposed to add the following sentence to its tariff:

> The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, direct or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended.

Northeast Access Tariff, 1st Revised Sheet No. 12-1, § 12.A. This tariff revision took effect on January 1, 2003. *Id.* Obviously, Northeast would not have amended its access tariff to include CMRS traffic if its prior tariff already encompassed this traffic. Northeast has provided no other explanation for the decision to revise its tariff -- *after* the filing of the complaints herein.

The defect in Northeast's case becomes immediately apparent. Northeast seeks compensation from T-Mobile for the period prior to the effective date of the tariff revision which purported to bring wireless traffic under the tariff. Further, Northeast's tariff does not distinguish between intraMTA intrastate traffic and interMTA intrastate traffic. Thus, Northeast is not enti-

tled to any compensation from T-Mobile during the complaint period – whether for intraMTA traffic or interMTA traffic.

V. UNDER STATE LAW, CHARITON IS NOT ENTITLED TO RELIEF FROM T-MOBILE PRIOR TO APRIL 9, 1999

Chariton's complaint against T-Mobile is based exclusively on its intrastate access tariff, and it seeks compensation for traffic that T-Mobile allegedly sent to it during the period February 5, 1998 through December 31, 2001. Direct Testimony of William Biere, Ex. 301, p. 6 l. 1-2. However, T-Mobile was not subject to Chariton's access tariff during this entire complaint period. To the extent that Chariton is entitled to any compensation from T-Mobile under state law, T-Mobile's liability – for both intraMTA and interMTA traffic – is triggered only after the date that Chariton's access tariff applied to T-Mobile.

Chariton's access tariff, like Northeast's access tariff, did not purport to apply to CMRS traffic until it amended the tariff in 1999, as the tariff was limited in application to "intrastate interexchange customers." Chariton Tariff P.S.C. Mo. No. 1, 1st Revised Sheet No. 14. Also like Northeast, Chariton revised its tariff to broaden its scope to include CMRS carriers by adding the same sentence Northeast added to its tariff. Chariton Tariff, 1st Revised Sheet No. 12-1, § 12.A. Chariton made this amendment over three years before Northeast revised its tariff. Specifically, Chariton proposed its CMRS traffic amendment on March 9, 1999 and proposed an effective date of April 9, 1999. *Id.* Accordingly, even under the court's recent *Alma* Decision, T-Mobile was not subject to Chariton's access tariff for the period prior to April 9, 1999. Consequently, Chariton's claim for compensation for the period February 5, 1998 through April 8, 1999 must be dismissed.

VI. THE COMPLAINANTS' ASSERTION THAT THEY CAN DEMAND UNILATERALLY THAT T-MOBILE INTERCONNECT WITH THEM DIRECTLY IS WRONG AS A MATTER OF FEDERAL LAW

The Commission's September 21, 2004 Briefing Schedule Order directed parties to brief "every claim and every issue remaining in this case." Although the Complainants' recent conduct suggests they have abandoned their previous demand for "direct interconnection," they have not formally withdrawn this position so T-Mobile very briefly addresses this subject below.

Earlier in this proceeding, the Complainants argued that it was reasonable for them to refuse to negotiate with wireless carriers like T-Mobile until the wireless carrier agreed to interconnect directly with their networks. For example, Mr. Biere testified that his company, Chariton Valley (one of the Complainants still asserting a claim against T-Mobile), demanded that Sprint PCS directly interconnect with Chariton Valley before it would receive any reciprocal compensation for exchange of traffic, even though the level of traffic between the companies was so low that the cost of such a connection to Sprint in one month would exceed the revenues to Chariton Valley in two years. Tr. 431 l. 14 - 432 l. 2. This position is flatly inconsistent with governing federal law, and this Commission should affirmatively find that the Complainants engaged in bad faith in refusing to negotiate with wireless carriers unless wireless carriers first agreed to interconnect directly with them.

Section 251(a) of the Act states unequivocally that carriers may interconnect "directly or indirectly" with each other. 47 U.S.C. § 251(a)(1).[4] In interpreting this statute, the FCC has ruled that competitive wireless carriers can choose to interconnect indirectly with LECs "based

[4] Earlier in this proceeding, Complainants argued that they could demand direct interconnection under 47 U.S.C. § 251(c)(2)(B). Complainants' Brief of October 18, 2002, pp. 27-37. In fact, this statute has no relevance to this case, as Section 251(f) exempts them from the obligations created by Section 253(c).

upon their most efficient technical and economic choices." *First Local Competition Order*, 11 FCC Rcd 15499, 15991 ¶997 (1996).

The Complainants' reciprocal compensation obligation is based on Section 251(b)(5) of the Act. This statute on its face applies whether a competitive carrier interconnects directly or indirectly. The federal courts have uniformly recognized that competitive carriers, including wireless carriers, may interconnect indirectly with incumbent LECs and that an ILEC's reciprocal compensation duty applies to indirect interconnection. *See, e.g., MCIMetro* vs. *BellSouth*, 352 F.3d 872 (4th Cir. 2003); *Mountain Communications* v. *FCC*, 355 F.3d 644 (D.C. Cir. 2004); *Southwestern* Bell v. *Texas Comm'n*, 348 F.3d 482 (5th Cir. 2003); *Atlas Telephone* v. *Oklahoma Comm'n*, 309 F. Supp. 2d 1313 (W.D. Ok. 2004)(interconnection between CMRS carriers and rural LECs)

The Complainants' non-negotiable demand for direct interconnection is not simply inconsistent with federal law, it is also economically irrational. This Commission has previously recognized that "[g]iven the number of small ILECs, indirect interconnection between CMRS carriers and small LECs, though a large LEC's tandem switch, is the only economically feasible means of interconnection available." *Mark Twain Order*, Case No. TT-2001-139, at 15 (Feb. 8, 2001). As noted above, Chariton Valley made economically unjustifiable demands of Sprint PCS in the course of their interconnection negotiations. Tr. 431 l. 14 - 432 l. 2. Even a trade association of rural LECs recently told the FCC that "[a]s a practical matter the most feasible and cost-effective option for most rural ILECs is to use the RBOC's tandem for transiting functions":

> Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier.

National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?*, at 41 (March 2004), *attached to* NTCA Ex Parte, FCC Docket No. 01-92 (March 10,

2004). Perhaps the Complainants have finally "gotten the point," as their counsel acknowledged at last month's hearing that it was "logical" for wireless carriers to interconnect with RLECs *via* SBC's tandem switches. Tr. 1393. Finally, Mr. Biere conceded to Commissioner Murray that his company, Chariton Valley, is not asking T-Mobile for direct interconnection (although several years too late). Tr. P. 1541 l. 15-23.

The FCC, recognizing that incumbent LECs have "scant, if any, economic incentive to reach agreement" – and this is especially the case if RLECs can obtain their interconnection "wish list" *via* unilaterally filed tariffs – has ruled that "at a minimum" an incumbent may not "intentionally obstruct negotiations."[5] *First Local Competition Order,* 11 FCC Rcd 15499, 15574 ¶ 148 (1996); *see also* 47 C.F.R. § 51.301. T-Mobile is confident that the FCC would find that the Complainants engaged in bad faith in conditioning the commencement of negotiations on a wireless carrier's "agreement" to engage in direct interconnections even when economically irrational.[6] Indeed, the FCC has already held, repeatedly, that an incumbent LEC engages in bad faith by filing interconnection tariffs in an attempt to "trump" intercarrier negotiations. *See, e.g., Cellular Interconnection Order,* 2 FCC Rcd 2910, 2916 ¶¶ 54-56 (1987); *Cellular Interconnection Reconsideration Order,* 4 FCC Rcd 2369, 2370-71 ¶ 13-15 (1989).

It is important for the Commission to note that Complainants admit that, had they requested negotiations with T-Mobile or had they responded to T-Mobile's overtures, "we would

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[5] The Complainants will no doubt argue that they are not obligated to engage in good faith negotiations with CMRS carriers because the good faith obligation is contained in 47 U.S.C. § 251(c)(1) and they are generally exempt from complying with the requirements of Section 251(c). *See* 47 U.S.C. § 251(f)(1). However, Complainants have an independent obligation to negotiate in good faith with wireless carriers. *See, e.g.,* 47 C.F.R. § 20.11; *Cellular Interconnection Order,* 2 FCC Rcd 2910, 2912 ¶ 21 (1987)(FCC preempts states from holding that incumbent LECs can negotiate in bad faith).

[6] The FCC has ruled that it will entertain complaints that incumbent carriers have failed to negotiate in good faith. *See First Local Competition Order,* 11 FCC Rcd 15499, 15570 ¶ 141 (1996). Thus, if this Commission does not address this good faith negotiation issue, T-Mobile may have no choice but to file an FCC complaint.

have had a reciprocal compensation [agreement], the [interMTA] factors would have been there, the rate would have been there, and we wouldn't have had the compensation dispute that we have today." Tr. 1383 l. 19-22 (Sept. 8, 2004). In other words, the only reason the Commission has been involved in this three-year complaint proceeding is because the Complainants refused to negotiate in good faith.

In the end, there is no basis whatsoever for Complainants' "direct interconnection" position, and the fact that Complainants appear to have abandoned this position (by executing interconnection agreements with certain wireless carriers without direct interconnection) confirms that Complainants now concede their past position lacked all merit. T-Mobile submits that the Commission has no choice but to conclude that Complainants engaged in bad faith by their prior, non-negotiable demands for direct interconnection.

VII. THE INTERMTA FACTOR

The Commission conducted the all day hearing on September 8, 2004 to hear evidence concerning the appropriate "interMTA factor" it should utilize in this case. Given the *Alma* Decision, this issue may not appear to be relevant to this complaint proceeding, but there is no assurance that *Alma* will withstand direct appeal to the Supreme Court or a collateral challenge in federal court. The Commission should not throw up its hands on the interMTA factor issue, as the findings in this case may be of significance at some point in the future. The Commission should not ignore the parties' efforts, simply because of an intermediate appellate court decision which may be of transitory effect.

Thus, T-Mobile addresses this "interMTA factor" issue. As demonstrated below, given the unique facts in this case, the Commission should determine that an interMTA factor of zero

is appropriate for both Complainants. They have simply failed to discharge their burden of proof.

A. THE COMPLAINANTS HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING AN APPROPRIATE INTERMTA FACTOR

As they are the parties who brought these cases, the Complainants have the burden of proving each element of their claims, and to the extent resolution of their complaints requires that traffic be separated by MTA, they have the burden of demonstrating the appropriate interMTA factor. They have utterly failed to meet the required test of proving, by substantial evidence on the record as whole, an appropriate interMTA factor that the Commission could utilize.

First, the data that the Complainants used in their special studies is, as Staff witness Scheperle correctly recognized in responding to questions from Commissioner Murray, was "over 100 percent off" the data recorded by SBC, which transported the same traffic. Tr. P. 1575 l. 8-16. The Complainants have made no attempt to explain the enormous discrepancies between their data and SBC's data, even though Mr. Biere acknowledged that they should be identical and that SBC's CTUSR reports are "considered a sufficient billing record." Tr. P. 1423 l. 24 - 1424 l. 5; 1437 l. 25 - 1438 l. 2.

Second, the Complainants have conceded that they did not use an approach that the FCC has authorized or validated. Tr. 1472 l. 1-6 . As demonstrated below, there is an authorized approach that the Commission could utilize.

Third, the Complainants' special study assumed that wireless customers make calls only in their home MTA – that is, wireless customers do not make or receive calls when traveling outside of their home MTA. Tr. p. 1473 l. 17-20. This assumption is completely unreasonable. Indeed, evidence in the record shows that customers can, and do, make calls outside their home

MTA – including intraMTA calls that the Complainants in their study would erroneously classify as interMTA. Tr. P. 1477 l. 17 - 1479 l. 6.

Finally, the Complainants have effectively acknowledged that they are overreaching in this complaint case. For example, Northeast claims that 100 percent of T-Mobile's mobile-to-land carriers are interMTA, when Northeast earlier agreed to a interMTA factor of 49 percent. Northeast Suggestions in Opposition to Tariff Suspension, Case No. IT-2003-374, at 3 ¶ 8 (April 2, 2003). Similarly, Chariton here claims that 81.1 percent of T-Mobile's calls are interMTA, when it earlier agreed to an interMTA factor of 40 percent. Chariton Suggestions in Opposition to Tariff Suspension, Case No. IT-2003-375, at 3 ¶ 8 (April 2, 2003). It is an unfortunate reality that the Complainants were unwilling to compromise their interMTA demands in negotiation due to their expectation that high factors would be set for them. It also bears nothing that the Mr. Biere conceded to Commissioner Murray that his company's access rates are "too high" and "need to come down." Tr. P. 1492 l. 1 - 1493 l. 17.

In summary, the Complainants have failed entirely to meet their burden of demonstrating by substantial and competent evidence an interMTA factor for use in this complaint proceeding. Without such a factor, there is no basis in law to award any relief for interMTA traffic.[7]

B. THERE IS AN FCC AUTHORIZED METHOD THAT THE COMMISSION COULD, AND SHOULD, USE IN THIS CASE

The challenge the Complainants face in developing a credible interMTA factor is a self-inflicted wound. Ordinarily, LECs and wireless carriers agree to an interMTA factor during negotiations. As the Complainants have acknowledged, had they been willing to negotiate with T-

[7] Nor should the Commission entertain Staff's alternate proposed interMTA factors of 38 percent for Chariton and 41 percent for Northeast. Staff's methodology is not one of the approaches that the FCC approved, and Staff acknowledges that it did not perform a regression analysis -- or any type of statistical analysis, for that matter -- that would have confirmed the reliability of its methodology and results. Tr. P. 1572 l. 6-19.

Mobile, "we would have had a reciprocal compensation [agreement], the [interMTA] factors would have been there, the rate would have been there, and we wouldn't have had the compensation dispute that we have today." Tr. 1383 l. 19-22. As noted above, however, the Complainants refused to negotiate with T-Mobile because they placed unreasonable – and unlawful – preconditions on negotiations.

The record evidence establishes that wireless carriers do not use intra/interMTA data in the conduct of their wireless business. Tr. P. 1578 l. 16-20. The Complainants are aware of this fact, based on their own wireless carrier affiliates that also do not use intra/interMTA data in the conduct of their wireless business. Mr. Biere admitted that his company and its cellular affiliate, Chariton Valley Cellular, "don't not have the mechanisms in place" to determine the interMTA/intraMTA percentage. Tr. 464 (Aug. 6, 2002). Nevertheless, the Complainants decided to file their complaint case seeking recovery for past traffic knowing that accurate intra/interMTA data would not be available for the past traffic subject to their complaints.

The Commission cannot rely on the interMTA factors that the Complainants have proposed because of the numerous problems with their underlying data and methodology, as discussed above. The question then becomes: what interMTA factor can the Commission utilize?

There is one FCC-approved methodology that the Commission can, and should, utilize. Specifically, the FCC has ruled that "LECs and CMRS providers can use the point of interconnection between two carriers at the beginning of the call to determine the location of the mobile caller or the called party." *First Local Competition Order*, 11 FCC Rcd 115499, 16018 ¶ 1044 (1996). For mobile-to-land traffic – that is, the traffic that T-Mobile sends to the Complainants – the point of interconnection is at the Complainants' meet point with SBC, located in the St. Louis

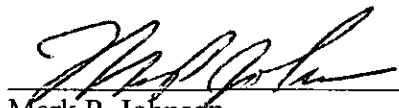
MTA. Under this FCC-approved approach, all of the traffic that T-Mobile sent to Complainants during the complaint period would be deemed intraMTA traffic.

The Complainants will no doubt cry foul by use of this FCC-approved approach. But it bears remembering that it was the Complainants – not T-Mobile – that chose not to negotiate these issues. And, it was Complainants that decided to file a complaint case for past traffic knowing that accurate data could never be assembled after the fact. In the end, there are no alternatives to the FCC-approved "point of interconnection" approach that the Commission could lawfully adopt.

IX. CONCLUSION

For all the foregoing reasons, T-Mobile respectfully requests that the Commission deny the complaints in full.

Respectfully submitted,



Mark P. Johnson
MO Bar No. 30740
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: 816-460-2400
Facsimile: 816-531-7545

ATTORNEYS FOR T-MOBILE USA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by First Class United States mail, postage prepaid, on this 22nd day of October, 2004, on the following parties of record:

Dana K. Joyce
Associate General Counsel
MISSOURI PUBLIC SERVICE COMMISSION
P. O. Box 360
Jefferson City, MO 65102

John B. Coffman
OFFICE OF THE PUBLIC COUNSEL
P. O. Box 2230
Jefferson City, MO 65102-2230

Craig S. Johnson
ANDERECK, EVANS, MILNE, PEACE
& JOHNSON, L.L.C.
700 E. Capitol
P. O. Box 1438
Jefferson City, MO 65102-1438

Paul G. Lane / Leo J. Bub
Anthony K. Conroy / Mimi B. MacDonald
SOUTHWESTERN BELL TELEPHONE COMPANY
One Bell Center, Room 3520
St. Louis, MO 63101

Richard S. Brownlee, III
HENDREN AND ANDRAE, L.L.C.
221 Bolivar Street, Suite 300
P. O. Box 1069
Jefferson City, MO 65102

Kenneth Schifman
Sprint Missouri, Inc., d/b/a Sprint
6450 Sprint Parkway, Building 14
Mail Stop: KSOPHN0212-2A303
Overland Park, KS 66251

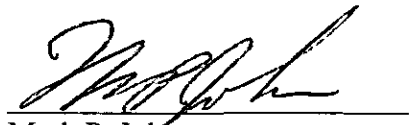
Brian T. McCartney
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102-0456

Larry W. Dority
FISCHER & DORITY, P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101

Joseph D. Murphy
MEYER CAPEL, P.C.
306 Church Street
Champaign, IL 61820

James F. Mauze
Thomas E. Pulliam
OTTSEN, MAUZE, LEGGAT & BELZ, L.C.
112 S. Hanley Road
St. Louis, MO 63105-3418

Paul H. Gardner
GOLLER, GARDNER & FEATHER
131 East High Street
Jefferson City, MO 65101



Mark P. Johnson