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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

PRE-HEARING CONFERENCE
TRANSCRIPT OF PROCEEDINGS
VOLUME 9

KEVIN THOMPSON,
DEPUTY CHIEF REGULATORY LAW JUDGE,
Presiding

October 2, 2003

10:00 a.m.

REPORTED BY: Monnie S. VanZant, CCR, CSR, RPR
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TRANSCRIPT OF PROCEEDINGS

JUDGE THOMPSON: Okay. We'll go ahead and go on the record. Good morning, ladies and gentlemen. We're here for a prehearing conference in Northeast Missouri Rural Telephone Company and Modern Telecommunications Company and others, Petitioners, versus Southwestern Bell Telephone Company and others, Case Number TC-2002-57. We'll go ahead and take oral entries of appearance at this time. Let's just start with this corner of the room with the complainant and work our way around.

MR. CRAIG JOHNSON: Thank you, your Honor. Craig Johnson. Here with me are Lisa Chase and Brian Lade, Andereck, Evans, Milne, Peace & Johnson, 700 E. Capitol, Post Office Box 1438, Jefferson City, Missouri, 65102, on behalf of the petitioner companies.

JUDGE THOMPSON: Thank you. Mr. Dority?

MR. DORITY: Thank you, your Honor. We submitted our written entries. Appearing on behalf of the Southwestern Bell Wireless,

1 LLC, doing business as Cingular Wireless,
2 Larry Dority and Joseph Murphy.

3 JUDGE THOMPSON: Okay.

4 MS. Creighton Hendricks: Good
5 morning, your Honor. Lisa Creighton Hendricks
6 appearing on behalf of Sprint Missouri, Inc.,
7 Sprint Spectrum, LPD and Sprint PSC. My
8 address is 6450 Sprint Parkway, Overland Park,
9 Kansas, 66251.

10 JUDGE THOMPSON: Thank you. Mr.
11 Bub?

12 MR. BUB: Thank you, your Honor.
13 Good morning. Leo Bub for Southwestern Bell
14 Telephone, LP, doing business as the SBC
15 Missouri. Our address is One SBC Center, St.
16 Louis, Missouri, 63101.

17 JUDGE THOMPSON: Thank you. Mr.
18 Johnson?

19 MR. MARK JOHNSON: Thank you, your
20 Honor. Mark P. Johnson of the law firm of
21 Sonnenschein, Naft & Rosenthal, 4520 Main
22 Street, Suite 1100, Kansas City, Missouri,
23 64111, appearing today on behalf of the
24 T-Mobile USA, Incorporated and Western
25 Wireless.

1 JUDGE THOMPSON: Thank you. Yeah.
2 Let's take you.

3 MR. WENZEL: Keith Wenzel. Law firm
4 of Hendren & Andrae here in Jefferson City,
5 221 Bolivar Street, appearing on behalf of
6 United States Cellular Corporation.

7 JUDGE THOMPSON: Thank you.
8 Mr. Meyer?

9 MR. MEYER: Good morning, your
10 Honor. David Meyer, appearing on behalf of
11 the staff of the Public Service Commission.
12 Our address is P.O. Box 360, Jefferson City,
13 Missouri, 65102.

14 JUDGE THOMPSON: Thank you. I
15 excused Verizon Wireless from attending on
16 their representation that all of the claims
17 against Verizon Wireless had been dismissed by
18 all of the complainants. And, in fact, there
19 are three outstanding motions to dismiss with
20 prejudice, which I had not yet acted upon
21 because I wanted to make sure that in this
22 case with many complainants that, in fact, all
23 of them have dismissed their claims.

24 So Mr. Johnson, can you inform me as to
25 whether, in fact, that's the truth?

1 MR. CRAIG JOHNSON: Well, your
2 Honor, the three claims that are pending
3 dismissal are MO-KAN and Verizon Wireless,
4 Chariton Valley and Verizon Wireless, Missouri
5 Telephone and Verizon Wireless. We're still
6 awaiting confirmation that the checks have
7 actually been received, cleared, and then
8 we'll file the dismissals. But I do
9 anticipate that happening. I'm not aware that
10 any stipulations of dismissals for those three
11 particular individual claims have been filed
12 as of this date.

13 JUDGE THOMPSON: Okay. In that
14 case, we'll wait and deal with all of the
15 dismissals at the same time, then, so that we
16 don't inadvertently dismiss something that
17 should not be dismissed.

18 MR. CRAIG JOHNSON: I have received
19 notice that two of the checks have been
20 received. I don't know if they've been
21 cleared. And I have not received notice as to
22 whether the third has been received.

23 JUDGE THOMPSON: Very well. Thank
24 you. The Commission reopened this record in
25 June in order to receive certain evidence

1 which the Commission deemed necessary to the
2 resolution of this case. That evidence has to
3 do with the nature of the traffic that was
4 delivered as to whether or not or -- I should
5 say which proportions are inter-MTA traffic
6 and which proportions are intra-MTA traffic.
7 This information is necessary because of the
8 structures of the tariffs of the complainants.

9 At that time, the parties entered into
10 negotiations in an attempt to reach a
11 stipulation and agreement by which to provide
12 those traffic proportions. And it is my
13 understanding from the status reports filed by
14 staff that those negotiations have not been
15 fruitful. Is that true, Mr. Meyer?

16 MR.MEYER: The most recent
17 information I have from the parties is that is
18 accurate. However, at this point, my
19 information is a four weeks out of date.

20 JUDGE THOMPSON: Okay. Well,
21 perhaps, then, I'd ask Mr. Johnson to bring us
22 up to date as to whether or not the parties
23 have been able to reach an agreement on those
24 traffic proportions.

25 MR. CRAIG JOHNSON: Let me try to

1 explain it this way, your Honor. I think
2 there are approximately -- approximately 30
3 combinations of petitioners and respondents,
4 cellular providers that we would need to
5 negotiate a factor for. We have approximately
6 five factors that we've tentatively agreed to
7 between petitioner and respondent wireless
8 carrier. But we have not been successful in
9 getting either Southwestern Bell or Sprint to
10 join -- Sprint Missouri, Inc. I'm talking
11 about -- to join in those stipulations.

12 With respect to the other approximately
13 25, there have been different degrees of
14 negotiations, but we have not reached yet at
15 this time even a tentative agreement between
16 the petitioner company and the respondent
17 wireless carrier.

18 JUDGE THOMPSON: Well, Mr. Johnson,
19 in your opinion, is it the -- is the situation
20 such that a -- an additional period for
21 negotiation would likely be fruitful, or is it
22 your opinion that you have gone perhaps as far
23 as you can go in that direction?

24 MR. CRAIG JOHNSON: I think
25 additional negotiations would be fruitful. I

1 would like to see that built into the front
2 end of a procedural schedule today rather than
3 wait another month or two months and come back
4 for another prehearing conference. There are
5 certain things that could happen. There's
6 some negotiations that are relatively close
7 and I think we could complete subject to the
8 disagreement about what the parties'
9 stipulations are going to be.

10 JUDGE THOMPSON: Very well. I think
11 that your suggestion that an additional period
12 be built into a procedural schedule is a good
13 one so that the case will proceed to
14 resolution whether or not those discussions
15 are, in fact, eventually fruitful. There was
16 talk at the time that the Commission reopened
17 the record of perhaps doing a traffic study.
18 I'd like to hear from the parties on whether
19 or not that's a feasible solution at this
20 point and how much such a study would likely
21 cost. Mr. Johnson?

22 MR. CRAIG JOHNSON: My three smaller
23 clients, MO-KAN, Chocktaw and Alma, have not
24 attempted any study or traffic analysis as of
25 this point. I'm not confident that they can.

1 Or if they can, they may have to engage the
2 services of a billing vendor. I don't know
3 how much it would cost. I do believe that
4 Northeast, which now includes Modern, Chariton
5 Valley and Mid Missouri can do their own
6 traffic analyses or traffic studies. Mid
7 Missouri and Northeast have actually done
8 some. I don't think there's any external
9 cost. And we haven't attempted to quantify
10 how much it costs them internally to prepare
11 such a study. What they do, for your
12 information, is they confine the study to the
13 Southwestern Bell trunk group because that's
14 where the traffic in question was being
15 delivered, at least for those three companies.
16 Then they try to focus in on MPANXSs that are
17 assigned to the particular wireless carrier
18 respondent in this case. And then they look
19 at that traffic and from the originating
20 MPANXS, they assign that to a geographic
21 location. Then they match that against their
22 terminating numbers, which they assign to an
23 MTA as well and they will come up with a
24 portion of the intra and inter MTA traffic.

25 There are three potential errors in that.

1 They can identify an inter MTA call, but it
2 might really be an intra MTA roaming call.
3 They don't capture information that allows
4 them to discern whether it was roaming or
5 where, in fact, the call was placed. The
6 second type of error that they might have is
7 they might identify an intra MTA call that's
8 really an inter MTA call because the customer
9 was roaming outside of the MTA when the call
10 was made.

11 And then we have discovered in other
12 proceedings that sometimes the LERG is not
13 accurate. When we look at either the LERG
14 tries to identify MPANXSSs as dedicated to land
15 line, dedicated to cellular or shared codes,
16 which means that in a 10,000 block, you can
17 have different 1000 blocks that are assigned
18 to wireless or different ones that are
19 assigned to wire line. And we have found
20 sometimes that calls we thought were wire line
21 originated, which we have not looked at for
22 purposes of these studies, in actuality are
23 wireless originated calls where where's they
24 bought a thousand number block from an
25 incumbent, maybe out of state, and it shows up

1 in the LERG as a wire line only NXS.

2 So that's what we're capable of doing.
3 We have done it. I think we could continue to
4 do it and refine it. But it is subject to
5 those weaknesses. And I don't have any
6 estimates at this point in time as to what it
7 costs in terms of man hours or rates to
8 perform those studies.

9 JUDGE THOMPSON: Very well. Thank
10 you. Do any of the other parties have
11 anything they'd like to add or bring to my
12 attention at this time?

13 MR. MURPHY: Two things, your Honor.

14 JUDGE THOMPSON: Mr. Murphy?

15 MR. MURPHY: I'd like to -- one
16 thing in regard to where the negotiations
17 stand and one thing in regard to what it would
18 take to do the traffic study. and I'll do
19 that in reverse order.

20 JUDGE THOMPSON: Sure.

21 MR. MURPHY: On the traffic studies,
22 I understand Mr. Johnson has done these
23 studies. I haven't seen them. Cingular
24 hasn't seen them. But as he describes them,
25 there is -- and he noted it. There is one

1 fairly fundamental weakness in the study in
2 that it identifies the wireless call by
3 originating MPANX and not by the originating
4 cell site, which the FCC says is the
5 appropriate measurement. Cingular has done
6 some looking into what it would take to create
7 records or create even a -- you know, a 30 day
8 study or a snapshot study to determine that.
9 And I'm sorry. I didn't bring those numbers
10 here. But as I recall, and this is some time
11 ago, the cost was in the -- in the hundreds of
12 thousands and perhaps heading towards seven
13 digits to accomplish that study, to -- to get
14 that issue in there because currently the cell
15 site is not captured in the billing record and
16 it would take a lot of software and hardware
17 adjustments to capture that even for a traffic
18 study.

19 As Mr. Johnson noted, there are perhaps
20 30 combinations of wireless carriers and wire
21 line carriers. And for any one wireless
22 carrier, it would have to do six different
23 studies because of the six different
24 complainants here. And they would -- they
25 would probably result in six different factors

1 because everything is idiosyncratic to the
2 combination of the wireless carrier and the
3 wire line carrier. So I believe it would be
4 expensive. I believe it would take a long
5 time.

6 As to whether the further negotiations
7 would be fruitful or whether the prior ones
8 have been, I think they have been fruitful to
9 an extent. And I believe that we could bring
10 to the Commission what it asked us for, which
11 were stipulations that would show an inter and
12 intra MTA factor. Mr. Johnson noted that
13 there were five near stipulations. I don't
14 think he was counting Cingular's among those.
15 And I do think -- I do think Cingular -- based
16 on some recent numbers that Mr. Johnson has
17 given me, I think we can make headway in
18 negotiation. But what has held up the
19 negotiations to date has not been so much what
20 the inter and intra MTA factors have been.
21 The hold-up has been whether the transiting
22 carriers had to be a party to the stipulation.
23 The question has arisen to the extent that the
24 traffic is inter MTA and, therefore, subject
25 to access, who would pay the access? To me --

1 to the best of my knowledge, each of the
2 wireless carriers -- and I am certain that
3 Cingular has said that to the extent we
4 identify traffic as inter MTA traffic subject
5 to access that Cingular or the wireless
6 carrier in the case of these other carriers
7 would be responsible for and be the one that
8 paid the access.

9 JUDGE THOMPSON: So, in other words,
10 regardless of the flavor of traffic, the
11 wireless originating carrier would be liable?

12 MR. MURPHY: Yes, if it was --

13 JUDGE THOMPSON: Even if perhaps
14 formal legal liability might lie on the
15 transiting ILAC?

16 MR. MURPHY: Well, and that's the
17 question out there. Where does the formal
18 legal liability lie? But the wireless
19 carriers have attempted for the purpose of
20 arriving at stipulation and responding to
21 these cases to take that formal legal issue
22 off the table.

23 JUDGE TOMPSON: Well, in fact, if
24 they say they're responsible for the traffic
25 in either event, that would take it off the

1 table.

2 MR. MURPHY: That would take it off
3 the table in combination -- in these carrier
4 combinations.

5 JUDGE THOMPSON: Right.

6 MR. MURPHY: To the best of my
7 understanding, what has held up the
8 stipulations is that Mr. Johnson, Craig
9 Johnson, has taken the position that he needs
10 to have the transiting carrier on the hook in
11 some fashion. So even if the wireless carrier
12 shows up at the door and says, I have the
13 money here, he's saying, No, no, I don't want
14 the money from you. I want the ability to get
15 the money from Mr. Bub or Ms. Creighton
16 Hendricks in her position as a transiting LEC.

17 I believe if there was some way to move
18 that issue off the table and say, if the
19 wireless carriers are willing to undertake the
20 liability here, that's sufficient for the
21 stipulation and we don't need to involve the
22 transiting carrier.

23 JUDGE THOMPSON: Well, if we're only
24 concerned -- perhaps we can divide the issues
25 in a temporal sense. In other words, if we're

1 only talking about traffic that has already
2 been delivered, then the undertaking of the
3 wireless carriers to be responsible for that
4 liability regardless of whether it was inter
5 or intra MTA, I think, would permit that
6 question to be resolved. If the going forward
7 question involves possible potential future
8 liability of the transiting carriers, then
9 that could be isolated perhaps to be resolved
10 by the Commission.

11 MR. MURPHY: Well, and --

12 JUDGE THOMPSON: And I don't know
13 that it would involve a traffic study since
14 there would not be any actual minutes on the
15 table.

16 MR. MURPHY: Well, two things. One
17 is there has been an important change in the
18 status of the case since the hearings closed.

19 JUDGE THOMPSON: Okay.

20 MR. MURPHY: And that is currently,
21 as I understand it, each of Mr. Johnson's
22 clients now has a wireless service termination
23 tariff. Is that not true?

24 MR. CRAIG JOHNSON: That's not true.

25 JUDGE THOMPSON: I think there are

1 three who do not.

2 MR. MURPHY: Well, Mid Missouri has
3 one now. Okay. And that's the only one
4 that's changed?

5 MR. CRAIG JOHNSON: Yes. The only
6 two that do not are Chariton Valley and
7 Northeast.

8 JUDGE THOMPSON: Right. And I think
9 you had submitted the tariffs and eventually
10 they were withdrawn.

11 MR. CRAIG JOHNSON: We withdrew
12 them. We refiled Mid Missouri's, and they are
13 effective now.

14 JUDGE THOMPSON: Oh, good. Okay.

15 MR. MURPHY: In those cases,
16 particularly Mid Missouri and all but the two
17 cases who have not filed the termination
18 tariffs, this has become purely a
19 retrospective case. Because going forward,
20 those suits should be handled under those
21 tariffs.

22 Now, to the question about forward
23 looking traffic and forward looking liability,
24 it may be useful to break those out
25 temporally. But I guess it -- it would be my

1 position that if the wireless carrier was
2 willing to undertake that liability on a going
3 forward basis with that carrier, it should
4 take the transiting carrier out of the picture
5 all together.

6 JUDGE THOMPSON: Absolutely. It
7 seems like it would to me.

8 MR. MURPHY: And the only -- I think
9 the only thing that would benefit us, if we
10 got some direction from the bench or from the
11 Commission is where we stand. If a wireless
12 carrier is willing to undertake that
13 liability, do we really need to involve the
14 transiting carrier? Because if we have the
15 ability to take the transiting carrier out
16 through that position, I think we could arrive
17 at a number of stipulations.

18 JUDGE THOMPSON: Well, my response
19 to you would be that if -- if the wireless
20 carriers are willing to undertake that
21 liability, both in a retrospective sense and
22 in a going forward sense, then I think perhaps
23 you could even dismiss the transiting carriers
24 out of the case.

25 MR. MURPHY: Well, the wireless

1 carriers would be willing to do that, but
2 we're not the ones who are --

3 JUDGE THOMPSON: Your clients would
4 get paid and they wouldn't any longer want to
5 stick a stick in the spokes of this
6 proceeding. Is that accurate?

7 MR. BUB: That's true, your Honor.

8 MS. CREIGHTON-HENDRICK: Yes, your
9 Honor.

10 JUDGE THOMPSON: Your concern is we
11 don't want to pay. If you're not going to
12 have to pay, you don't even need to be here,
13 right? So you how do you feel about that?

14 MR. CRAIG JOHNSON: Here's how I
15 feel about it, your Honor. Before we filed
16 this case, both the transiting LECS and the
17 originating carriers refused to be responsible
18 for this traffic. There was actually a
19 Commission order that says we're not supposed
20 to get this traffic after February of 1998 we
21 had an agreement.

22 JUDGE THOMPSON: Okay.

23 MR. JOHNSON: Nobody's complied with
24 that. When we filed this complaint, we said
25 that we think Bell's responsible for it.

1 We're -- the wireless carrier should be made
2 responsible for it. We don't -- we don't have
3 preferences as to which, but we did not want
4 to accept the notion that only the wireless
5 carrier is responsible for traffic that
6 Southwestern Bell delivers. No.

7 It -- it helps solve the financial
8 problem if we, in fact, get paid
9 retrospectively and going forward. But if we
10 walk away from this case and somebody doesn't
11 pay after this case is dismissed, where do we
12 go for relief? These wireless carriers have
13 never ordered access from us. They've not
14 complied with our access tariffs. If we don't
15 have trunks that they've ordered and they're
16 responsible for that we can disconnect in case
17 of a future non-payment. The only trunks that
18 we can disconnect are the Southwestern Bell
19 trunks upon which this traffic is delivered.
20 So there is a problem with just dismissing the
21 transiting carriers upon the promise, the
22 unenforceable promise, that the wireless
23 carrier would continue to pay.

24 JUDGE THOMPSON: Okay.

25 MR. BUB: Judge, can I

1 respond?

2 JUDGE THOMPSON: Yes.

3 MR. BUB: Leo Bub for Southwestern
4 Bell. I'd like to give a little bit of
5 perspective on this dispute because I think
6 there really is some misunderstanding here
7 about how we all got here.

8 JUDGE THOMPSON: Okay.

9 MR. BUB: I think as the Commission
10 is aware, you know, all the wireless carriers
11 in this room interconnect and send traffic
12 under interconnection agreements that this
13 Commission approved years ago. And those
14 Commission approved agreements set out
15 responsibilities for each party. And the
16 representation has been made here that both
17 Southwestern Bell, the transiting carrier, and
18 wireless carriers have refused to pay and
19 somehow have violated a Commission order.

20 In those agreements, there are provisions
21 that require arrangements to be made before
22 the traffic is sent. But there has been a
23 longstanding dispute that's prevented those
24 arrangements from being made. I think this
25 Commission is well aware going back to the

1 2001-428 case, call it the Alma case, that the
2 original position in negotiations between the
3 wireless carriers and the terminating small
4 ILECs is that they wanted access. And, in
5 fact, some of them filed tariffs changing
6 their access tariffs to apply to wireless --
7 access to wireless intra MTA traffic. And
8 this Commission has twice ruled that that has
9 been unlawful. So there are some reasons why
10 those arrangements have not been made. And
11 there's been some negotiations that, you know,
12 haven't worked. And I think it's mostly
13 because of the rate dispute about what that
14 appropriate rate is. They tried to apply an
15 illegal rate, which the commission has ruled
16 that twice. Since that time, the Commission
17 has given the wire -- the small ILECs a way to
18 get paid. And that has been through the
19 wireless termination tariffs. They have
20 approved it.

21 Some of Mr. Johnson's clients have taken
22 advantage of that. Here, two have not. But
23 there are ways that they can get paid. and I
24 think there is also a misunderstanding in a
25 recent Commission order about, you know, the

1 present posture. Throughout the history of
2 these negotiations, there really has not been
3 any effort on the part of the transit carrier
4 to impede or to encourage the wireless carrier
5 to take any responsibility for the
6 interconnection agreements. I think it's just
7 the opposite. There's been encouragement to
8 get this worked out because it's in our
9 interest that resolution be reached so that
10 the traffic can flow without dispute. And
11 that's the primary interest we have as a
12 transit carrier here.

13 I think what you've seen through the --
14 over time and as this case has progressed is
15 that the wireless carriers have been paying
16 once the Commission approved -- a tariff has
17 been filed and approved. And I -- I would
18 echo Mr. Murphy's comments that since the case
19 has been filed, a lot of the issues in dispute
20 have been resolved and it's mostly because of
21 the tariffs. You know, once the tariff is
22 filed and bills are sent under the tariffs,
23 they're paid. You know, I think the record in
24 this case will show that there's no dispute
25 from wireless carriers that the calls that are

1 in dispute are their calls, that they're
2 responsible for them. There's no dispute
3 about how many calls. You know, they all rely
4 on the records that we produce. The cellular
5 transiting use CTOSR that was attached to the
6 complaint. There has been no dispute about
7 the accuracy of those. And those have been
8 the basis of the small companies that have
9 tariffs, the basis of their billing, and those
10 disputes have not -- those bills have not been
11 disputed. They've been paid.

12 So I think what we really have here isn't
13 a dispute about responsibility of traffic.
14 It's over the rate. And I think the
15 Commission has seen once that rate issue has
16 been resolved, the problem has gone away.
17 With respect to the inter versus intra MTA
18 factor here, as long as there's an allegation
19 that the transit carrier's responsible, I
20 think the Commission will see that, you know,
21 we have an interest in the accuracy of that
22 figure. If we're going to be billed and have
23 to pay, we want to make sure it's accurate
24 because the Commission knows that the access
25 rate is much higher than the tariff intra MTA

1 rate. In negotiations for an interconnection
2 agreement, the parties of the originating
3 wireless carrier and the terminating small LEC
4 agree to many things, including the factor.
5 And we -- as transiting carrier, we stay out
6 of that because it's their deal. We're not
7 required to pay, so we have no interest in
8 what that factor is. They agree to it. They
9 agree to live with it and agree to exchange
10 their payments based on those factors. That's
11 their business. If Mr. Murphy's suggestion is
12 followed through so that the stipulations can
13 be drafted so that the transit carriers'
14 interest is taken out, then you won't see us
15 object to the factor.

16 JUDGE THOMPSON: Okay. Mr. Murphy?

17 MR. MURPHY: Briefly, I just want to
18 make sure a couple of things are understood.
19 The wireless carrier, or at least Cingular,
20 while we are here to try to do what the
21 Commission is asking us to do, I don't want it
22 to be misunderstood that we agree that somehow
23 we've been failing to pay in deregation of the
24 Commission's orders. I mean, we believe we
25 have done what we're supposed to do. And I

1 won't belabor the point.

2 JUDGE THOMPSON: I understand that
3 part.

4 MR. MURPHY: But the Commission has
5 asked under the circumstances -- in this
6 instance when we came here in August, you
7 asked us to get stipulations.

8 JUDGE THOMPSON: Right.

9 MR. MURPHY: These are complaint
10 cases. These are not rule makers.

11 JUDGE THOMPSON: I understand.

12 MR. MURPHY: And I believe that the
13 Commission has been very generous to
14 complainants to reopen the record to fill in
15 an element of evidence that is their burden
16 and they didn't meet.

17 JUDGE THOMPSON: Okay.

18 MR. MURPHY: Nonetheless, the
19 Commission reopened the record and it asked us
20 to reach stipulations. And we have made an
21 effort to reach stipulations. And the reason,
22 in my view, that the stipulations haven't been
23 reached or more stipulations haven't been
24 reached has nothing to do with whether the
25 wireless carriers and Mr. Johnson can figure

1 out an inter MTA factor that would be
2 acceptable under all the other conditions that
3 are in front of us. The reason we haven't
4 been able to reach a stipulation is because
5 there is a separate agenda here, and that is
6 to change the business arrangement and to
7 impose on the transiting carriers the role of
8 an IXE. And we can't seem to get to the
9 complaint issues because we keep opening up
10 this separate agenda. And I would like to
11 respond to what the Commission asked us to do
12 and to reach stipulations. We're doing what
13 we can.

14 JUDGE THOMPSON: I appreciate that.
15 Now, if you all keep jumping up, I forget what
16 they said and what I wanted to say in response
17 to it. Now, it's going to be my turn for a
18 while, and then you guys can have another shot
19 at it. As you pointed out, these are
20 complaint cases. And the Commission's task is
21 to determine who owes money for the traffic
22 that has been delivered in the past. Okay?
23 Liken it, if you would, to a trespass. Every
24 trespass is a separate and distinct cause of
25 action, and you can join them as many as you

1 want in one complaint or you can sue on each
2 of them separately. But as to future
3 trespasses, you know, you have to go back to
4 court and sue again. So I don't think this is
5 the proceeding in which to solve the problem
6 of what's going to happen tomorrow and the day
7 after that and the day after that. The issue
8 in this case is who is going to pay for the
9 traffic that has already been delivered to
10 your client. I see that as the issue.

11 If the wireless carriers are willing to
12 say we're going to pay for it, then I think
13 the case goes away. I mean, that's the way I
14 see it. It may leave you without the comfort
15 level that you want for tomorrow and the day
16 after that and the day after that, but I don't
17 think we can address that in this case. Most
18 of your clients now have wireless termination
19 tariffs. And are those bills being paid as
20 submitted?

21 MR. CRAIG JOHNSON: It's my belief
22 that most of the respondents in this case are
23 paying for the traffic terminated since those
24 tariffs were effective February of 2001, or
25 Mid Missouri, August of 2003. Yes, your

1 Honor.

2 JUDGE THOMPSON: Okay. So if -- if
3 we can get you paid for the traffic that's
4 already been delivered, I think we've done
5 everything that is reasonable to expect out of
6 this complaint case or out of this, what, 15
7 or however many complaint cases have been
8 consolidated together here. And if there's
9 further problems in the future, then those
10 will just have to be addressed in the future
11 because the facts may be different, the legal
12 environment may be different and perhaps those
13 problems won't arise. So on that basis, can
14 -- can we get stipulations that will resolve
15 this case?

16 MS. CREIGHTON HENDRICKS: Your Honor,
17 if I may?

18 JUDGE THOMPSON: You may. Because,
19 see, I said what I needed to say. Now I'm
20 ready to hear something new.

21 MS. CREIGHTON HENDRICKS: With
22 respect to the inter MTA factors, which was
23 our task to negotiate that you gave us back in
24 June, I think if you do take the ILECs out we
25 could file three stipulations today that have

1 inter MTA factors with Sprint PCS. Give me a
2 couple more days, I probably could secure a
3 fourht. And a little time I think I could
4 take care of everybody. That covers the inter
5 MTA. With respect to that traffic that is
6 inter MTA, Sprint PCS will pay the access
7 charges that result from that. I do think
8 think the case has another aspect which is the
9 intra MTA traffic. And on that traffic where
10 there isn't a tariff, one issue that remains
11 is what rate applies, if any, to that. So I
12 do think we can take out a bulk of the issues.

13 JUDGE THOMPSON: That is a thorny,
14 thorny issue. If that particular issue is
15 going to be left and the Commissioners
16 upstairs are going to have to figure it out,
17 that's what they get paid to do.

18 MS. CREIGHTON HENDRICKS: Great. As
19 far as our task that you gave us back in June,
20 I think it could be resolved in a very quick
21 manner. At least I know that I could file
22 stipulations assuming Mr. Johnson is still
23 willing to sign them this week or next week
24 for some of his clients. That matter could be
25 taken care of. And I'm confident -- we still

1 have some we haven't agreed to. I think if we
2 got the ILEC issue out of it, we could agree
3 to it.

4 JUDGE THOMPSON: Mr. Johnson?

5 MR. CRAIG JOHNSON: Yes, your Honor.
6 Let me take a minute to respond -- how to
7 organize the response. In August of 1996, the
8 FCC told the industry that unless there was a
9 different way of addressing the inter versus
10 intra MTA traffic in an approved agreement
11 that they were going to use the originating
12 location of the caller at the time the call
13 was made or the originating cell tower for
14 purposes of determining inter versus intra MTA
15 traffic.

16 JUDGE THOMPSON: Okay.

17 MR. CRAIG JOHNSON: We have no
18 agreements with these carriers.

19 JUDGE THOMPSON: Okay.

20 MR. CRAIG JOHNSON: They've been
21 responsible since 1996 to capture and provide
22 this information. They never did it. Bell
23 didn't report anything with respect to the
24 jurisdiction of this traffic. At this
25 hearing, they admitted they don't have that

1 information. Then they sit here and accuse me
2 of not demonstrating or supporting my burden
3 of proof because I can't prove what they don't
4 even retain in violation of an FCC order. So
5 I don't think that is my burden.

6 I understand the Commission's direction
7 for us to come back and attempt to develop
8 inter MTA factors that can be used in this
9 case. But I -- I resent the notion that
10 somehow we're at fault here for not having
11 provided this information when we did. We
12 actually asked the Commission to say in -- in
13 view of their failure to capture and provide
14 this information to just apply their own
15 default factor and maybe say it's all inter
16 MTA.

17 And I understand that hasn't been done
18 and I understand we're not talking about that
19 right now. But with respect to the -- the --
20 the propriety of these Southwestern Bell and
21 Sprint Missouri, Inc., being parties to this
22 case and included in the stipulation, first of
23 all -- and as I understand it from another
24 case, when the wireless carrier and the ILEC
25 reached a factor stipulation and entered it,

1 this is one of the small telephone company
2 group cases, when they tendered that, Bell
3 objected to it and they had to go to hearing
4 because there was not a unanimous stipulation.

5 JUDGE THOMPSON: Are you talking
6 about the 1077 case?

7 MR. CRAIG JOHNSON: I'm not sure
8 what the number is.

9 JUDGE THOMPSON: The one where
10 Mr. Lane and Mr. England nearly came to fisted
11 cuffs?

12 MR. JOHNSON: Yes. What I'm saying
13 is we filed this case. They had refused to
14 pay. We specifically sued Southwestern Bell
15 and Sprint Missouri, Inc., because they were a
16 responsible party under our access tariffs,
17 not these wireless carriers. And in the
18 Commission's order approving Bell's change of
19 its wireless tariff, it said if the wireless
20 carrier doesn't pay, Southwestern Bell will be
21 secondarily liable. And if it has to pay us,
22 it has indemnity rights against the wireless
23 carriers. So there in that case, Bell has a
24 liability and it has protection back towards
25 the wireless carrier. We don't have any

1 decision one way or another under the
2 interconnection agreements between
3 Southwestern Bell and the wireless carrier
4 that says Southwestern Bell has a secondary
5 liability or indemnity rights. Although the
6 -- I believe the terms of both of those
7 agreements do say that Bell is indemnified
8 from them. And I have a huge --

9 JUDGE THOMPSON: It seems to me we
10 get to the same place if the wireless carriers
11 say, We'll pay, don't bother Bell, don't
12 bother Sprint. We'll just pay you.

13 MR. CRAIG JOHNSON: What they're
14 doing is coming in here and asking you to
15 foreclose one possible decision that I have
16 asked for and I think I have a legal basis
17 for. I have asked them in the stipulation to
18 say, We don't disagree with the factor and
19 we'll agree to pay it if the Commission orders
20 us to do so. I've asked the wireless carriers
21 to sign that and I've asked that the
22 transiting carriers sign that. They won't
23 sign that stipulation. They're wanting to
24 foreclose one possible decision that's a legal
25 decision the Commission can make in this case.

1 And that is my problem with just waiving the
2 wand here and letting them beat it out the
3 door.

4 JUDGE THOMPSON: Well, I understand
5 your position. Mr. Bub?

6 MR.BUB: Just one thing. Your
7 Honor, I think there's a critical distinction
8 that I think you're identifying, your Honor,
9 is that if the wireless carriers do beat it
10 out the door, they will be leaving a big check
11 behind that will resolve the complaint here.
12 At least with respect to that type of traffic
13 at issue. On a going forward basis, they have
14 -- at least the exception of the two that
15 don't have tariffs but they're certainly free
16 to file tariffs --

17 MR. CRAIG JOHNSON: What if we sign
18 a stipulation, your Honor --

19 MR. BUB: Excuse me. I'm talking.
20 You can be next.

21 MR. CRAIG JOHNSON: I'm sorry.

22 MR. BUB: With the tariffs in place,
23 there is a remedy that the Commission gave the
24 small ILECs in this tariff and that is to
25 block. That would be sort of blocking all of

1 the traffic that came over the common trunks
2 in those tariffs. I believe Mid Missouri has
3 the same provision that allows the small ILEC
4 to direct the transit carrier, which would be
5 either Southwestern Bell or Sprint Missouri,
6 Inc., the LEC to block that wireless traffic
7 specifically destined for that particular
8 small ILEC. And I can tell you that -- that
9 in one case that that has happened and that we
10 were putting the block in place and on the eve
11 of that traffic being shut down, the dispute
12 got resolved between the small -- group of
13 small ILECs and the wireless carrier. So
14 there is a remedy.

15 JUDGE THOMPSON: Are you talking
16 about the one where Mid Missouri wanted to
17 take the axe to the trunks?

18 MR.BUB: No. This is a different
19 one. This is three small ILECs. It didn't
20 come to the Commission because instead of
21 taking the route of a complaint case, they
22 came to the remedy the Commission gave them
23 under the tariff and directed us -- I can back
24 up. This said, How much is it going to cost?
25 We gave them a quote. It is a reasonable --

1 very reasonable because they said, yeah, we
2 can do it. The only requirements that we had
3 was that we were to give sufficient notice to
4 the carrier whose traffic would be blocked.
5 All we ask for was 30 days. They agreed to
6 give us that 30 day period. And at the end of
7 that 30 day period the traffic was going to
8 get blocked. And what that -- what happened
9 was that kind of fostered -- put pressure on
10 both sides. It fostered negotiations and the
11 -- and the blocking date got delayed two or
12 three times. And finally an agreement was
13 reached between the two carriers and we were
14 told that blocking would not be necessary.

15 So there is an effective remedy that the
16 Commission gave under the tariff. And I think
17 in most cases that that remedy won't need to
18 be taken. But it is there if it's
19 needed.

20 JUDGE THOMPSON: Okay. Mr. Johnson?

21 MR. CRAIG JOHNSON: What happens if
22 we sign a stipulation just between the ILEC
23 and the originating wireless carrier, dismiss
24 the transiting carrier and then the Commission
25 says the transiting carrier is responsible for

1 this traffic? I've just dismissed a party and
2 the Commission hasn't even ordered the
3 wireless carrier to pay what it says it will
4 be responsible to pay for.

5 JUDGE THOMPSON: Well, I'm not going
6 to tell you to dismiss a party if that's going
7 to leave your clients in jeopardy. I mean,
8 you have to try your case and you have to
9 present it to the Commission in whatever
10 posture it may be in. Okay? I cannot tell
11 you what the Commissioners are going to do
12 about any of these questions. Right? So I
13 can't predict. They're going to do what
14 they're going do. And are they willing to
15 give you the declaration which you're seeking
16 against the transiting carriers? I don't
17 know.

18 MR. JOHNSON: I don't know either,
19 your Honor. What I do know is --

20 JUDGE THOMPSON: It seems to me --
21 it seems to me if you can get the money that
22 your clients are owed that they would at least
23 have something to content themselves with even
24 if they don't have as much as they would like.

25 MR. CRAIG JOHNSON: No one has

1 promised to pay me.

2 JUDGE THOMPSON: Okay.

3 MR. CRAIG JOHNSON: We were just
4 talking about stipulations to traffic
5 proportions. If they pay me like Verizon
6 Wireless has done and several other carriers
7 have done and we get paid for the traffic
8 that's the issue in this case, I will dismiss
9 them. That is not a problem.

10 JUDGE THOMPSON: Okay. Well, if -- if
11 they say they're liable for the traffic either
12 way, then either they're going to pay you or
13 you can go into Circuit Court and sue them and
14 they'll pay you. I mean, that's the only
15 missing slice, is it not?

16 MR. CRAIG JOHNSON: If we get a
17 stipulation that the Commission approves and
18 says, yes, this commission has primary
19 jurisdiction and it's got to issue an order
20 that says somebody owes me for this traffic
21 under a certain tariff before I can go to
22 Circuit Court. I'm not sure I can just
23 stipulate that.

24 MR. MARK JOHNSON: Your Honor, there
25 is another procedure that could be used.

1 Mark Johnson behalf of T-Mobile and Western
2 Wireless.

3 JUDGE THOMPSON: What's that?

4 MR. MARK JOHNSON: The wireless
5 carriers could pay the -- the liability that
6 Mr. Johnson seeks on behalf of his clients
7 and, in essence, Mr. Johnson's dispute with
8 Southwestern Bell and Sprint is one of
9 contract interpretation and of construction.
10 He could file a -- I mean, there is a remedy.
11 He could file an action in federal court for
12 declaratory judgment.

13 MR. CRAIG JOHNSON: I don't have a
14 contract dispute, your Honor. We're getting
15 way off base here.

16 MR. MARK JOHNSON: I'm just saying
17 that -- this is a suggestion. There is an
18 avenue which -- which could be pursued which
19 would allow resolution of the claim against
20 the wireless carriers and yet allow
21 Mr. Johnson's clients to continue -- to reach
22 some sort of resolution with Southwestern Bell
23 and Sprint on the application of the language
24 in the interconnection agreements.

25 JUDGE THOMPSON: Well -- and for

1 that matter, that issue can be left for the
2 Commissioners to decide.

3 MR. CRAIG JOHNSON: Well, I'm
4 curious as to what interconnection agreements
5 my clients have entered into that T-Mobile has
6 knowledge of with Southwestern Bell or anybody
7 else in this room that I could go to federal
8 court and get a declaratory judgment on. What
9 contract are you talking about? And No. 2,
10 even if I could go to federal court, why
11 wouldn't they say this is something for the
12 primary jurisdiction of the Commission? I
13 mean, we're getting way off base here.

14 JUDGE THOMPSON: Well, I think -- I
15 think everyone is making suggestions with an
16 aim to moving us forward in good faith. So
17 whether or not you like any particular
18 suggestions, nonetheless, I think they're
19 offered in a spirit of resolution. At this
20 point, I -- I've heard some things that --
21 that seem to me to be encouraging, but I can't
22 tell the parties what to do, obviously. So I
23 think what I will do is leave you to engage in
24 further discussions at this time. I like the
25 suggestion of a procedural schedule that will

1 perhaps have a cut-off date for negotiations.
2 Now, I'd like to explore just a little bit
3 further, Mr. Murphy, what you told me about
4 the wireless carriers and their willingness to
5 accept liability. Are you speaking for all
6 the carriers or only some?

7 MR. MURPHY: Let me make sure when
8 -- accept liability -- Cingular -- and I'll
9 let the other wireless carriers chime in to
10 the extent they agree or disagree. What
11 Cingular is willing to do as far as this
12 stipulation --

13 JUDGE THOMPSON: Okay.

14 MR. MURPHY: -- is to say that to
15 the extent the Commission ultimately finds
16 that some part of this traffic, the part we
17 would stipulate to, is inter MTA, Cingular
18 would be willing to pay the inter MTA access
19 as opposed to requiring a transiting carrier
20 to do it. I don't mean to imply that we are
21 agreeing that we are liable to pay intra MTA.
22 That's an issue that probably remains in this
23 case unless I can settle that with Mr. Johnson
24 separately. But Cingular, just to be clear,
25 do --

1 JUDGE THOMPSON: We really have
2 three types of traffic here, right?

3 MR. MURPHY: I'm not quite sure what
4 the third one is.

5 MR. CRAIG JOHNSON: Four types, your
6 Honor.

7 JUDGE THOMPSON: The third one would
8 be intra MTA traffic delivered to
9 Mr. Johnson's clients in the absence of a
10 wireless termination tariff.

11 MR. MURPHY: Yes. I agree. There
12 are three types of traffic.

13 JUDGE THOMPSON: Okay. Now, let's
14 go through them one by one because I'm slow,
15 and I want to make sure I understand what's
16 going on here. With respect to intra MTA
17 traffic that Cingular has sent to one of his
18 clients where there is a wireless termination
19 traffic -- tariff in effect, do your clients
20 admit that they're liable to pay under that
21 tariff or do they dispute that?

22 MR. MURPHY: We are paying under
23 that tariff. We have -- we have taken the
24 position the tariff is invalid, but we have
25 been overruled. And therefore the tariff is

1 in place and we are paying them.

2 JUDGE THOMPSON: Very good. And
3 with respect to inter MTA traffic, what I hear
4 you saying is that you're saying you're
5 willing to stipulate that you'll be
6 responsible for that traffic.

7 MR. MURPHY: We are willing to
8 stipulate that if we negotiate an inter MTA
9 factor with Mr. Johnson's clients, we will be
10 responsible ultimately for what we stipulate
11 to be the inter MTA percentage of that
12 traffic.

13 JUDGE THOMPSON: Okay. And you'll
14 pay for that?

15 MR. MURPHY: And we will pay for
16 that.

17 JUDGE THOMPSON: All right.

18 MR. CRAIG JOHNSON: If you don't
19 pay, are you willing to have Southwestern Bell
20 or Sprint Missouri, Inc., block it?

21 JUDGE THOMPSON: And then as to the
22 intra MTA traffic where there is no wireless
23 termination tariff, that remains
24 in dispute?

25 MR. MURPHY: Yes, sir.

1 JUDGE THOMPSON: Okay. It's very
2 helpful for me to see that.

3 MR. MARK JOHNSON: Your Honor, on
4 behalf of T-Mobile and Western Wireless, I --
5 we agree with Mr. Murphy's response to each of
6 your questions.

7 JUDGE THOMPSON: So your position
8 would be the same?

9 MR. MARK JOHNSON: Yes.

10 JUDGE THOMPSON: Very well.

11 MS. Creighton Hendricks: Your
12 Honor, if I may, for Sprint PCS, we would also
13 agree with the statements made by Mr. Murphy.
14 And I'd like to add in that last category the
15 intra MTA that is delivered without a wireless
16 tariff, I don't think the issue in this case
17 is who is liable, but really what rate would
18 apply. And I think the wireless defendants in
19 this case have maintained that bill and keep
20 would apply, whereas Mr. Johnson is
21 maintaining another compensation mechanism.
22 So I don't even believe with respect to that
23 traffic that it's a liability question. But
24 it's truly a rate question.

25 JUDGE THOMPSON: It's amount?

1 MS. CREIGHTON HENDRICKS: Correct.

2 JUDGE THOMPSON: Okay. From your

3 perspective --

4 MR. CRAIG JOHNSON: Your Honor, I

5 respectfully disagree.

6 JUDGE THOMPSON: Right.

7 Mr. Johnson's perspective, it may be who.

8 MR. CRAIG JOHNSON: Yes.

9 JUDGE THOMPSON: Okay. Very well.

10 And with respect to amounts from your

11 perspective, the disagreement is over bill and

12 keep versus access; is that correct?

13 MS. CREIGHTON HENDRICKS: Actually, I

14 think it's bill and keep versus some other

15 mechanism for compensation of reciprocal --

16 reciprocal local traffic.

17 JUDGE THOMPSON: So you think it

18 should be reciprocal no matter what?

19 MS. CREIGHTON HENDRICKS: What I'm

20 really talking about, there's rules that the

21 FCC has stated as far as the cost basis for

22 the different types of compensation that can

23 apply to local traffic.

24 JUDGE THOMPSON: Okay.

25 MS. CREIGHTON HENDRICKS: One of them

1 is bill and keep. That's the one we maintain
2 applies, and there's two other ones that
3 Mr. Johnson is free to argue that apply.

4 JUDGE THOMPSON: What are those two
5 others just so I can keep up with you?

6 MS. CREIGHTON HENDRICKS: Well, one
7 is a tel-rec. (Ph.) based rate, and the other
8 one is a negotiated rate.

9 JUDGE THOMPSON: Okay. Now, what
10 are about the recent Western District decision
11 upholding the Mark Twain wireless tariffs?
12 What about that? Doesn't that settle that
13 question?

14 MS. CREIGHTON HENDRICKS: To the ex
15 -- to the extent there's a tariff. And I
16 think if we go back to your Category 1, it has
17 settled that question. And we all are abiding
18 by that decision. And --

19 JUDGE THOMPSON: But you don't think
20 it settles the Category 3?

21 MS. CREIGHTON HENDRICKS: No, it
22 doesn't because there is no tariff in place
23 for Category 3.

24 JUDGE THOMPSON: Unless Mr. Johnson
25 is correct that there's access tariff in

1 place.

2 MS. CREIGHTON HENDRICKS: That was
3 not the determination, I believe, in the Mark
4 Twain case. It was whether or not the
5 wireless termination tariffs --

6 JUDGE THOMPSON: Didn't go quite
7 that far.

8 MS. CREIGHTON HENDRICKS: Correct.
9 Correct.

10 JUDGE THOMPSON: But maybe looked
11 over the fields of meadows to that point.

12 MS. CREIGHTON HENDRICKS: Well, I do
13 think that there are two Commission decisions
14 saying no, that's not the case and that one is
15 on appeal right now.

16 JUDGE THOMPSON: For '96, the Alma
17 case?

18 MS. CREIGHTON HENDRICKS: Right.
19 That one is on appeal right now.

20 COURT REPORTER: Excuse me,
21 your Honor. I'm sorry. Could we take a break
22 real quick? I'm supposed to be on an 11:00,
23 and I need to call them and tell them I won't
24 make it.

25 JUDGE THOMPSON: We could take a

1 break real quick. Sure.

2 (Break in proceedings.)

3 JUDGE THOMPSON: Okay. We have
4 heard Cingular's stated position as to the
5 three types of traffic at issue and that has
6 been concurred in by T-Mobile and Western and
7 by Sprint PCS. Are there other wireless
8 carrier representatives out there?
9 Mr. Wenzel?

10 MR. WENZEL: Yes, your Honor. I
11 believe that would be the position of U.S.
12 Cellular.

13 JUDGE THOMPSON: Okay. Now, Verizon
14 isn't here, so they can't tell us how they
15 feel. Anyone else? Does that cover everyone
16 that's here? Sir?

17 MR. CRAIG JOHNSON: Well, I'm not a
18 wireless carrier, your Honor, but -- Craig
19 Johnson, again, for the petitioners. I -- I
20 actually think it's helpful to think in terms
21 of four types of traffic for purposes of this
22 case.

23 JUDGE THOMPSON: Okay. What would
24 be the other type?

25 MR. CRAIG JOHNSON: There is both

1 inter MTA traffic and intra MTA traffic that
2 terminated in the absence of an agreement and
3 prior to the effective date of the wireless
4 termination tariff. Both those two types of
5 traffic are an issue for at least a period of
6 three years between each of the petitioners
7 and each of the respondents here today.

8 JUDGE THOMPSON: Okay. But -- but
9 correct me if I'm wrong, as I so often am, the
10 FCC has never said anything that would lead
11 anyone to believe that inter MTA traffic is
12 anything other than long distance traffic,
13 have they?

14 MR. JOHNSON: That's correct, your
15 Honor.

16 JUDGE THOMPSON: So that traffic,
17 whenever it was delivered, would be subject to
18 access like any other long distance traffic,
19 isn't that correct?

20 MR. CRAIG JOHNSON: Yes. But who
21 pays for it?

22 JUDGE THOMPSON: I don't know who
23 pays for it. That's, of course, a different
24 issue.

25 MR. CRAIG JOHNSON: It's just

1 helpful to me because then we have three of my
2 clients that have a wireless termination
3 tariff in effect since February of 2001 and
4 one client that now has such a tariff in place
5 since August of 2003. But even under those
6 tariffs, there are both inter and intra MTA
7 traffic being terminated.

8 JUDGE THOMPSON: I understand.

9 MR. CRAIG JOHNSON: Okay. Maybe
10 the --

11 JUDGE THOMPSON: And you don't know
12 the proportions, and that's why we're here.

13 MR. CRAIG JOHNSON: With respect to
14 the -- the recent decision in the Mark Twain
15 tariff case, I think it goes more than just
16 looking over the horizon at this next issue.
17 What that case said, your Honor, was the
18 federal act adopted a process. The wireless
19 carriers alone can initiate that process to
20 begin an agreement. When they engage in
21 calculated inaction by sending traffic without
22 effectuating that process, there's absolutely
23 no impediment to a state tariff being applied
24 to the traffic. That statement and that
25 conclusion is equally applicable to the access

1 tariff of my clients as it is to the wireless
2 termination tariff of three of my clients that
3 were specifically at issue in that case and I
4 now have one client that has such a tariff
5 been approved after that point in time.

6 JUDGE THOMPSON: But I don't know
7 for sure that that's how the Western
8 District's going to rule until, in fact, they
9 rule.

10 MR. CRAIG JOHNSON: That's correct,
11 your Honor.

12 JUDGE THOMPSON: Do we have any idea
13 when that will be?

14 MR. CRAIG JOHNSON: Well, I think
15 the briefing will be done assuming no --
16 assuming no extensions are -- are requested
17 and granted, I think the briefing will be done
18 in December. The case may be argued in
19 January to make a decision.

20 JUDGE THOMPSON: So we're looking at
21 April, May.

22 MR. JOHNSON: It's possible.
23 There's no guarantee.

24 JUDGE THOMPSON: Okay.

25 MR. MURPHY: Your Honor?

1 JUDGE THOMPSON: Yes, sir.

2 MR. MURPHY: Your Honor, just -- I
3 guess I would -- I'd like to refocus this a
4 little bit. Whatever the Court says in the
5 Alma appeal the Court says in the Alma appeal.
6 Frankly, whatever Mr. Johnson would like to
7 argue with regard to the intra traffic --
8 intra MTA traffic delivered without a tariff,
9 he can argue that. And we may need the
10 Commission to decide it. But as you indicated
11 earlier, this is a complaint case and,
12 therefore, it is about historical issues. So
13 Mr. Johnson's issues about who pays or how do
14 I get them to pay in the future are really
15 irrelevant here because those trunks have not
16 been pulled and nobody has been stopped in the
17 past. And those sums in the past are what is
18 at issue here. I -- I -- I continue to get
19 the impression that Mr. Johnson would like to
20 make this complaint case into a prospective
21 rule-making. and I believe it's procedurally
22 inappropriate.

23 JUDGE THOMPSON: Well, I don't think
24 it's -- perhaps his clients want to settle the
25 issue once and for all. I mean, that's not --

1 clients are like that.

2 MR. MURPHY: If they settle that
3 issue, that's fine to settle it. But to
4 litigate it on a prospective basis, I think it
5 is an inappropriate request to the Commission.

6 MR. CRAIG JOHNSON: I agree, your
7 Honor. But by the same yard stick, we've got
8 a complaint from Bell issuing liability to
9 Sprint Missouri, Inc., and Southwestern Bell.
10 We're entitled to have those allegations of
11 liability determined. And I resent them
12 trying to come in at this point in time and
13 stipulate that possible decision away.

14 JUDGE THOMPSON: Well, it is true,
15 you are entitled to have those determined. On
16 the other hand, to get them determined, you
17 have to prove to the Commission the
18 proportions of the traffic. If you're unable
19 to prove the portion -- proportions of the
20 traffic, then your entitlement to have it
21 resolved perhaps would evaporate because the
22 Commission doesn't know what amount of traffic
23 there is to put against this tariff, what
24 amount of traffic there is to put against that
25 tariff. Right? Which is, in fact, why the

1 record was reopened because the Commission
2 read the lengthy transcript and many exhibits
3 and the very well-prepared briefs and was left
4 saying, How much do we put against this one
5 and how much do we put against that one? We
6 just don't know. Okay. Let us say, arguendo,
7 that the negotiations are not successful and
8 that this case has to go through an additional
9 hearing on this particular point, that is,
10 traffic proportions. Are you -- will you be
11 ready to put evidence on with respect to that?

12 MR. CRAIG JOHNSON: Definitely with
13 respect to three of my clients. With respect
14 to the other three, I cannot affirmatively
15 tell you we'll be able to do that at this
16 point.

17 JUDGE THOMPSON: Okay. Well, that's
18 fair enough.

19 MR. CRAIG JOHNSON: And keep in
20 mind, your Honor, if we put evidence in,
21 unless we have sitting on a tape somewhere
22 historical traffic information, we are only
23 going to be able to look at current traffic
24 information to come up with a factor that
25 we're going to you suggest it's all we have

1 and leave it up to the Commission as to
2 whether they're going to apply that
3 retrospectively.

4 JUDGE THOMPSON: I understand that.
5 And perhaps if you have persuasive expert
6 testimony on why they should, that might do
7 it. On the other hand, I can't talk for them.
8 I can only talk for me. Is there anything
9 else we need to are consider at this time?
10 Mr. Bub?

11 MR. BUB: Your Honor, if we do have
12 to have that hearing that you're talking
13 about, I think there's been enough things that
14 have changed that we probably ought to look
15 at, you know, refreshing the record to make
16 sure that we have the evidence in the record
17 of what carriers of Mr. Johnson's have tariffs
18 and -- and any change in the change in the
19 law. If there's an issue about liability for
20 the inter MTA, I think we need to look to make
21 sure that's fully explored and that the
22 Commission has all the information it needs to
23 decide that question if it, indeed, has to if
24 it can't be resolved here.

25 JUDGE THOMPSON: Okay. As to -- as

1 to tariffs that have been put in place since
2 the case was initiated, I don't think there's
3 any issue to that because those -- traffic
4 from those periods aren't included in the
5 complaint. Right?

6 MR. CRAIG JOHNSON: That's correct,
7 your Honor.

8 JUDGE THOMPSON: Okay. It is -- as
9 we've agreed, it's a historical case. So the
10 traffic that's as at issue is the traffic that
11 had been delivered as of the time the
12 complaint was drafted and filed. So I haven't
13 heard any motion to amend the complaint to
14 bring additional traffic or additional time
15 periods in. If such a motion is made, you
16 guys would all get to respond and the
17 Commission would decide. But as of what we're
18 dealing with right now, it's only that traffic
19 that we've already had a hearing about. So it
20 seems to me that's closed. As far as changes
21 in the law, the Commission is aware of those
22 and you would, of course, be given an
23 opportunity to update your arguments to take
24 those into account. I think that's only fair.
25 There is -- there is -- the Commission wants

1 to avoid error, if possible. And so why not
2 get as much help as we can from you guys?
3 But that would not be an opportunity to retill
4 the same field, but simply to alert the
5 Commission to the significance of changes
6 sense you briefed the case the first time.
7 Okay. I think that's fair. And the hearing
8 if it, in fact, is going to be necessary,
9 would be limited to traffic proportions for
10 the traffic that has already passed. If the
11 only way they can prove that is to show us a
12 study that's just been done or something else,
13 then that's the evidence that they'll put on.
14 And you guys can all talk about why the
15 Commission shouldn't trust dit or shouldn't
16 follow it or whatever. I mean, that's
17 litigation. that's how it works. Okay? So
18 today I hope you will engage in further
19 discussions and prepare a procedural schedule
20 so that the case will move forward so that
21 when the Commissioners asked me what in God's
22 name I've been doing all this time with this
23 case, I will have some sort of an answer for
24 them. Okay?

25 And with respect to the liability issue

1 that Mr. Murphy raised and that all the
2 carriers who are here have concurred in, if
3 you can't get a signed stipulation, then you
4 can always essentially confess that liability
5 and make a motion, right, saying, Here's what
6 we say and based on what we say, here's what
7 we want the Commission to do. For -- for
8 example, if you confessed liability to the
9 inter MTA traffic delivered by your client,
10 whenever it was delivered, then perhaps you
11 could move the Commission to dismiss the
12 transiting carriers from the case. Whether
13 the Commission would do it or not, I don't
14 know. That's for them to decide. But the
15 point is is if you can't get agreement, there
16 may be other paths you can follow to get to
17 where you want to go. Okay?

18 Of course, I told you to run down and get
19 a writ in a different case and you never did.
20 There you are. So whether you listen to me or
21 not, I don't know. Anything else?

22 MR. MEYER: Your Honor, just for
23 clarification, I suppose that there's still
24 the outstanding order that staff should file
25 status reports on a monthly basis --

1 JUDGE THOMPSON: No. Once there is
2 a procedural schedule in place, status reports
3 are unnecessary because we know what's
4 happening and when it's supposed to happen.
5 The purpose of the status reports was simply
6 so that we could be confident that discussions
7 were taking place and we could see whether or
8 not they were going to bear fruit.

9 MR. MEYER: Thank you. I just
10 wanted that clarified on the record.

11 JUDGE THOMPSON: Thank you for
12 asking for that. So I will -- we will relieve
13 you of that obligation in the order adopting
14 the procedural schedule. How's that? That
15 way we've got a nice paper trail, and I won't
16 forget. Nothing falls through the cracks.
17 Anything else at this time?

18 I think I told you you've got this room
19 until 5. Okay. We can send in pizza if
20 that's going to help you get where you need to
21 be. Thank you very much. I think we've had
22 very fruitful discussions this morning. We
23 are off the record. Thank you.

24
25