

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

FILED

JUL 12 2002

Missouri Public
Service Commission

Northeast Missouri Rural Telephone Company)
And Modern Telecommunications Company,)

Petitioners,)

v.)

Case No. TC-2002-57, et al.
consolidated.

Southwestern Bell Telephone Company,)
Southwestern Bell Wireless (Cingular),)
Voicestream Wireless (Western Wireless),)
Aerial Communications, Inc., CMT Partners)
(Verizon Wireless), Sprint Spectrum LP,)
United States Cellular Corp., and Ameritech)
Mobile Communications, Inc.,)

Respondents.)

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
SOUTHWESTERN BELL WIRELESS LLC D/B/A CINGULAR WIRELESS**

In compliance with the January 22, 2002 Order Adopting Procedural Schedule, as most recently amended by the March 21, 2002 Order Amending Procedural Schedule in this case, Southwestern Bell Wireless LLC d/b/a Cingular Wireless ("Cingular") hereby provides the following Proposed Findings of Fact and Conclusions of Law.

Unless it otherwise states to the contrary, Cingular's Proposed Findings of Fact and Conclusions of Law will be only as to Cingular and not as to the other respondents.

FINDINGS OF FACT

1. Complainant Northeast Missouri Rural Telephone Company ("Northeast") is a certificated local exchange company providing local exchange and exchange access telecommunications services in 11 exchanges in northeast Missouri.

2. Complainant Modern Telecommunications Company ("Modern") is a certificated local exchange company providing local exchange and exchange access telecommunications services in 3 exchanges in northeast Missouri.
3. Complainant Mid-Missouri Telephone Company ("Mid-Mo") is a certificated local exchange company providing local exchange and exchange access telecommunications services in 12 exchanges in west central Missouri.
4. Complainant Chariton Valley Telephone Company ("Chariton Valley") is a certificated local exchange company providing local exchange and exchange access telecommunications services in 18 exchanges in north central Missouri.
5. Complainant MoKan Dial, Inc. ("MoKan") is a certificated local exchange company providing local exchange and exchange access telecommunications services in one exchange in western Missouri. MoKan has a wireless termination service tariff approved by the Commission with an effective date of February 19, 2001.
6. Complainant Choctaw Telephone Company ("Choctaw") is a certificated local exchange company providing local exchange and exchange access telecommunications services in one exchange in southwest Missouri. Choctaw has a wireless termination service tariff approved by the Commission with an effective date of February 17, 2001.
7. Complainant Alma Telephone Company ("Alma") is a certificated local exchange company providing local exchange and exchange access telecommunications services in one exchange in west central Missouri. Alma has a wireless termination service tariff approved by the Commission with an effective date of February 17, 2001.
8. Respondent Southwestern Bell Telephone Company ("SWBT") is a local exchange carrier authorized to provide local exchange and exchange access

telecommunications services in exchanges located throughout the State of Missouri. SWBT is also a local and intraLATA transport provider in many parts of the State of Missouri.

9. Respondent Southwestern Bell Wireless LLC d/b/a Cingular Wireless ("Cingular") is a commercial mobile radio service provider licensed by the FCC to provide CMRS telephone services in a number of areas of the State of Missouri. Cingular as used in these findings of fact refers to Cingular and its corporate predecessor, Southwestern Bell Wireless, Inc.

10. Respondent Cingular, through its predecessor Southwestern Bell Wireless, Inc. entered into an interconnection agreement with SWBT on October 13, 1997. Under that interconnection agreement, SWBT provides transport services between Cingular's network and each of the Complainants' networks. Under that interconnection agreement, SWBT is prohibited from blocking traffic originated by Cingular and terminated to the Complainants.

11. Cingular has offered to negotiate an interconnection agreement with each of the Complainants. Each of the Complainants rejected Cingular's offer to negotiate an interconnection agreement based, in part, on the assertion, made separately by each Complainant, that the Complainant was not obligated to negotiate with Cingular until such time as Cingular established a direct interconnection with the Complainant.

12. As is explained more fully in the Conclusions of Law, below, calls that originate and terminate within the same major trading area ("MTA") and involve a wireless carrier have been deemed by the FCC to be local calls for purposes of intercarrier compensation.

Missouri is divided into two MTAs that split the state on a roughly north-south line in the middle of the State.

13. Each Complainant charges its local service customer a local service rate designed to reflect the cost of originating and terminating local calling. In the case of calls originated by customers of the Complainants that terminate to customers of Cingular located within the same MTA, the Complainants do not incur the cost of originating, switching or terminating the call without compensation. Rather, the Complainants treat the calls as long distance calls and collect from the long distance carriers involved originating carrier access rates designed to cover all of the costs of originating and switching the call. The customers of the Complainants pay long distance rates for all such intraMTA calls, whether they are terminated across the street, across the town, across the county, across the exchange or from one end of the MTA to the other.

14. As long as each Complainant avoids negotiating an interconnection agreement with Cingular and this Commission takes no further action, each Complainant can expect to continue to collect originating access on intraMTA (local) calls between its customers and customers of Cingular.

15. Since February 17 or 19, 2001, Complainants MoKan, Choctaw and Alma have had a wireless termination service tariff in place, under which each of these Complainants has billed a charge to Cingular for terminating intraMTA traffic to its customers. These charges are in addition to the originating carrier access that each of these Complainants charges long distance carriers for originating intraMTA calls from Complainants' customers to Cingular's customers.

16. Cingular has paid under protest all charges appropriately billed to it by Complainants MoKan, Choctaw, and Alma under their wireless termination service tariffs.

CONCLUSIONS OF LAW

ISSUE 1 – TRAFFIC SUBJECT TO A WIRELESS TERMINATION TARIFF

1. The Complainants with Wireless Termination Service Tariffs -- Alma, Choctaw and MoKan -- have each established a basis for charging Cingular for terminating intraMTA calls after the effective dates of their Wireless Service Termination Tariffs. The evidence shows that Cingular has paid or is paying all invoices appropriately rendered under those tariffs until such time as the order approving those tariffs is reversed or vacated. Therefore, while Cingular does not dispute its liability under those tariffs until they are reversed or vacated, Alma Telephone Company, Choctaw Telephone Company and MoKan Dial, Inc. have not established that Cingular is in arrears on tariff payments.

ISSUE 2 – TRAFFIC NOT SUBJECT TO A WIRELESS TERMINATION TARIFF

2. In the absence of a wireless termination service tariff or an interconnection agreement, Complainants cannot charge access rates for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Complainants' respective networks.

This Commission has twice concluded that access charges are inappropriate for terminating intraMTA wireless traffic. See *In the Matter of Mid-Missouri Group's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2*, Case No. TT-99-428 *et al.*, Report

and Order of January 27, 2000; *In the Matter of Mid-Missouri Group's Filing to Revise its Access Service Tariff*, P.S.C. Mo. No. 2, Case No. TT-99-428 *et al.*, Report and Order of April 9, 2002 (the "*Alma* decisions"). In addition, a number of authorities, including the Iowa Board of Public Utilities, the FCC and a federal district court have interpreted and applied federal law in exactly the same manner as the Commission's *Alma* decisions.

Most recently, the United States District Court for the District of Montana stated (at pp. 7-8 of its slip opinion):

The Court notes for the benefit of the parties that this case presents very similar issues to those presented in *3-Rivers Telephone Coop., Inc. v. U.S. West Communications, Inc.*, 125 F.Supp.2d 417 (D. Mont. 2000), which was previously decided by this Court. In that case the Court relied on the FCC ruling entitled *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, FCC Docket 96-325. The FCC Ruling provided the following at ¶ 1036:

Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and *intrastate access charges*. (emphasis added by District Court).

In the instant case there is an attempt by the plaintiff to force a CMRS provider to pay an access charge for calls terminating at the plaintiff's facilities. This attempt is being made under the argument that the indirect method of transit used by the CMRS providers makes them subject to an access charge. Such an attempt is in direct contravention of the ruling promulgated by the FCC in the above-mentioned case. A party may receive an access charge for a long distance telephone call. However, when the call is considered local traffic, the appropriate compensation is reciprocal compensation pursuant to the rules set out by the FCC in 47 C.F.R. 20.11.

The Court is not inclined to reverse its decision in the *3-Rivers* case or to "clarify" its opinion to allow the plaintiff in this case to levy access charges for local traffic which originates and terminates within the same Major Trading Area. Such a clarification would result in the abrogation of the FCC ruling relied upon in *3-Rivers*.

Mid-Rivers Telephone Cooperative Inc. v. Qwest Corp., CV 01-163-BLG-RFC, (D. Mont filed April 3, 2002).

Consistent with the quoted language from the federal court, this Commission's application of federal law is correct and need not be revisited. Similarly, the Iowa Board's decision in *In re: Exchange of Transit Traffic*, Iowa Utilities Board Docket No. SPU-00-7, *Order Affirming Proposed Decision and Order*, issued March 18, 2002, is directly on point and interprets federal law exactly as the Commission has in its *Alma* decisions. The record reflects that there does not appear to be any court or other regulatory body that has ruled in a manner inconsistent with the *Alma* decisions.

Complainants argue that their claim here is different because the wireless carriers have violated the Commission's Order in Case No. TT-97-524. However, Cingular does not acquire transport services from SWBT's wireless service tariff. Rather, it acquires its transport service from SWBT through an October 13, 1997 Interconnection Agreement.

3. As the petitioners in this complaint case, Complainants have the burden of proof of showing that the traffic is subject to their tariffs. None of the Complainants alleged in their amended complaints that the traffic being terminated to them through SWBT is other than intraMTA traffic. Moreover, each of the Complainants with Wireless Termination Service Tariffs -- Alma Telephone Company, Choctaw Telephone Company and MoKan Dial, Inc. -- have billed Cingular at Wireless Termination Service Tariff rates for all traffic terminated through SWBT.

4. This case, as a complaint case, is not an appropriate vehicle for the Commission to establish a rate for the Complainants without wireless termination service tariffs or an interconnection agreement for intraMTA traffic originated by wireless carriers and transited by a transiting carrier for termination to the Petitioners' respective networks. Complainants are currently being compensated under a *de facto* bill and keep insofar as they are retaining compensation they would otherwise be obligated to pay Cingular for terminating intraMTA traffic to Cingular, and they are collecting originating access on intraMTA wireless calls where they would otherwise be obligated to pay for transport and termination. The Complainants are not entitled to other compensation until they negotiate appropriate interconnection agreements with Cingular.

5. As the petitioners in this complaint case, Complainants have the burden of proof of showing that the traffic is subject to their tariffs. None of the Complainants alleged in their amended complaints that the traffic being terminated to them through SWBT is other than intraMTA traffic. Moreover, each of the Complainants with Wireless Termination Service Tariffs -- Alma Telephone Company, Choctaw Telephone Company and MoKan Dial, Inc. -- have billed Cingular at Wireless Termination Service Tariff rates for all traffic terminated through SWBT.

6. Intrastate interMTA traffic is subject to the Complainants' intrastate access tariff rates.

7. It is not appropriate for the Complainants to attempt to impose secondary liability on SWBT for traffic terminated to their customer and originated by Cingular because the Complainants are being compensated through a *de facto* bill and keep arrangement as described in Paragraph Nos. 4 and 5 above and because the Complainants have refused to

engage in good faith negotiations to establish interconnection agreements directly with Cingular.

8. Because the Complainants have refused to negotiate in good faith for an appropriate interconnection agreement, they are estopped from making any claim based on the absence of an interconnection agreement. Moreover, because Complainants are already receiving compensation through the *de facto* bill and keep arrangement, they are estopped from seeking additional compensation.

9. There is no basis for Complainants' conditioning negotiations for an interconnection agreement on Cingular establishing a direct connection. The interconnection obligations of TA96 do not distinguish between direct interconnection and indirect interconnection. TA96 defines the very first duty of all telecommunications carriers as the duty "to interconnect *directly or indirectly* with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1) (emphasis added). Section 251(b)(5) obligates local exchange carriers to establish reciprocal compensation, and Section 251(c)(1) requires local exchange carriers to engage in good faith negotiations to establish those arrangements. Nothing in TA96 or the FCC's rules requires wireless carriers to directly interconnect as a prerequisite to negotiating an interconnection agreement.

10. Contrary to the allegations of the various Complaints, the terms and conditions of SWBT's Wireless Interconnection Tariff (PSC Mo. No. 40) have no relevance to Cingular because Cingular does not buy transport services from SWBT's Wireless Interconnection Tariff (PSC Mo. No. 40).

11. Complainants have already recovered the compensation, if any, that is due for intraMTA traffic terminated prior to the effective date of a Complainants' Wireless Termination Service Tariff. Each Complainant has been compensated under a *de facto* bill and keep insofar as it has retained compensation it would otherwise be obligated to pay Cingular for terminating intraMTA traffic to Cingular, and each Complainant is collecting originating access on intraMTA wireless calls where it would otherwise be obligated to pay for transport and termination. Even if the Commission were to determine that Complainants have not been compensated or have not been adequately compensated through the *de facto* bill and keep arrangement, Complainants are estopped from seeking compensation by their refusal to engage in good faith negotiations for appropriate interconnection agreements.

12. As to the final question of whether SWBT should block uncompensated wireless traffic for which it serves as a transitting carrier (and assuming the existence of uncompensated traffic), SWBT is prohibited by its interconnection agreement with Cingular from blocking traffic that Cingular originates.

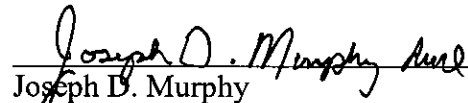
Dated this 12th day of July 2002

Respectfully submitted,



Larry W. Dority
Missouri Bar No. 25617
Fischer & Dority, P.C.
101 Madison, Suite 400
Jefferson City, MO 65101
(573) 636-6758
(573) 636-0383 (fax)
lwdority@sprintmail.com

and



Joseph D. Murphy
Meyer Capel, PC
306 West Church Street
Champaign, IL 61820
(217) 352-0030
(217) 352-9294 (fax)
jmurphy@meyercapel.com

**Attorneys for Southwestern Bell Wireless
LLC d/b/a Cingular Wireless**

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered or mailed, First Class mail, postage prepaid, this 12th day of July 2002, to:

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

Office of the Public Counsel
P.O. Box 7800
Jefferson City MO 65102

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

Craig S. Johnson
Lisa Chase and Joseph M. Page
Andereck Evans Milne Peace & Johnson LLC
P.O. Box 1438
Jefferson City MO 65102

Robert Vitanza
Regional General Counsel-Central
Cingular Wireless
17330 Preston Road, Suite 100A
Dallas TX 75252

Brian T. O'Connor
American Portable Telecom Inc.
12920 SE 38th Street
Bellevue WA 98006-1350

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

Monica Barone
6160 Sprint Parkway, 4th Floor
MS: KSOPHI0414
Overland Park KS 66251

Lisa Creighton Hendricks
Sprint - Legal and Exterman Affairs
6450 Sprint Parkway
MS: KSOPHN0212-2A253
Overland Park KS 66251

Joseph D. Murphy
Meyer Capel PC
306 West Church Street
Champaign IL 61820

Andrew T. Spence
101 South Tyron Street
Suite 4000
Charlotte NC 28280-4000

Paul S. DeFord
Lathrop & Gage LC
2345 Grand Blvd., Suite 2800
Kansas City MO 64108

John A. Kise, Jr.
Illinois Cellular & Communications Inc.
1721 Quail Court
Woodstock IL 60098

Paul H. Gardner
Goeller, Gardner and Feather
131 High Street
Jefferson City, MO 65101

Nextel Communications
Legal Department
1768 Old Meadow Road
McLean VA 22102

James F. Mauze`
Thomas E. Pulliam
Ottsen, Mauze` Leggat & Blez LC
112 S. Hanley Road
St. Louis, MO 63105-3418

Richard S. Brownlee III
Hendren and Andrae LLC
P.O. Box 1069
Jefferson City MO 65102

Larry Krajci
ALLTEL Communications Inc.
One Allied Drive
Little Rock AR 72202



Larry W. Dority