Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL

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
St. Louis
Washington, D.C.

Mark P. Johnson
816.460.2424
mjohnson@sonnenschein.com

January 7, 2003

VIA HAND-DELIVERY

Mr. Dale Roberts
Executive Secretary
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

RE: Case No. TC-2002-1077

Dear Judge Roberts:

Enclosed you will find the original and nine copies of a Reply Brief of Respondents T-Mobile USA, Inc. and Western Wireless Corporation with respect to the above-referenced case. By copy of this letter, I have sent same to all parties of record.

Very truly yours,

Mark P. Johnson /km

Mark P. Johnson

MPJ/rgr
Enclosures
cc : All Parties of Record (w/enclosure)

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[2]
JAN 07 2003
Missouri Public Service Commission

BPS Telephone Company, et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	Case No. TC-2002-1077
	)	
	)	
VoiceStream Wireless Corporation, et al.,	)	
	)	
Respondents.	)	

REPLY BRIEF OF RESPONDENTS T-MOBILE USA, INC. AND WESTERN WIRELESS CORPORATION

Come now Respondents T-Mobile USA, Inc. ("T-Mobile") and Western Wireless Corporation ("Western Wireless"), and for their reply brief in this proceeding, state the following.

Based on the principal briefs filed by the parties, including Staff, it is evident that the controlling question is whether the Commission has the power to order CMRS carriers to pay compensation to the Complainants for intraMTA traffic, based solely on the terms of wireless termination tariffs which were never subject to negotiation. As demonstrated in the Respondents' principal brief, the Commission lacks such power. The Complaint should be dismissed.

In the Complainants' opening brief, they rely solely on their wireless termination tariffs (for intraMTA traffic) and their intrastate access tariffs (for interMTA traffic) as the basis for their claims. Arguing for application of the filed tariff doctrine, the Complainants state "[their] tariffs are the only mechanisms in place that apply to the wireless-originated traffic transiting SWBT's facilities and delivered to Complainants."

(Complainants' Brief, at p. 14). However, as even the recent *Three Rivers* case relied on by the Complainants demonstrates, state-commission approved tariffs may -- and indeed should -- fall when they conflict with federal law. Such is that case here, as the Commission may not enforce the wireless termination and intrastate access tariffs to find liability by the Respondents, as the history of the tariffs shows that they were not the subject of negotiation between the Complainants and the Respondents, contrary to the federal policies mandating such negotiations.

1. The Complainants' Reliance on Ch. 386.270, RSMo, and the Filed Tariff Doctrine is Misplaced.

The Complainants' claim falls if the Commission refuses to enforce the wireless termination and intrastate access tariffs. Their brief acknowledges that point, by limiting its arguments to reliance on the presumption that tariffs are lawful and the filed tariff doctrine. The Complainants state that under Ch. 386.270, RSMo, their tariffs "are lawful and in effect until a court finds otherwise." (Complainants' brief, at p. 13). However, the Commission has the power to find that tariffs it has previously approved are improper and should be rescinded.

Similarly, the filed tariff doctrine is not available where the Commission determines that a tariff is unreasonable, as the Respondents ask here (and in their filing at the FCC). See *Southwestern Bell Telephone Company v. Allnet Communications Services, Inc.*, 789 F.Supp. 302, 305 (E.D.Mo. 1992) ("...the filed-rate doctrine has an important caveat: the filed-rate is not enforceable if the regulating agency finds it unreasonable."). Thus, the filed tariff doctrine does not apply here, as the Respondents are questioning whether the rates in the wireless termination and access service tariffs are lawful, as applied to CMRS providers. *Id.* ("...courts have held the filed-rate

doctrine inapplicable in cases where a party challenges the reasonableness of the rates charged.").

In *Allnet*, the defendant challenged the rates in question by filing a complaint at the FCC. The Respondents here have done precisely that, through their FCC petition filed in September, 2002. Under those circumstances, Judge Limbaugh of the Federal District Court in St. Louis found SWBT's reliance on the filed tariff doctrine misplaced, as the Commission should here.[1]

Justice need not await an appeal. The Commission has the power to determine that the wireless termination and access service tariff rates are unreasonable, as applied to the Respondents and other CMRS providers. The Respondents have shown that the tariffs in question are inconsistent with federal law and precedents. Access service tariffs cannot be applied to intraMTA traffic, to assess charges on what is considered to be local traffic. The wireless termination tariffs improperly circumvent the carefully-crafted interconnection regime[2] and unilaterally and without review establish rates for intraMTA traffic that are not TELRIC-based. The Commission should acknowledge those facts and decline to enforce the tariffs.

---

[1] In fact, this is not a typical case for use of the filed tariff doctrine. As was the case in *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W. 568 (Mo. App. 1997), the usual filed tariff case involves a carrier using the doctrine as a defense to a claim by a consumer who was unaware of the tariff's existence. Relying on the standard presumption that all consumers are aware of the tariffs filed at the Commission, the court in *Bauer* dismissed a civil action in which Southwestern Bell relied on a PSC-approved tariff. But in the case at bar, the Respondents do not argue that they did not know about the tariffs, or that the Complainants misled them as to the terms of the tariff. They argue that the Commission should not enforce the tariffs in light of governing and directly contradictory federal law.

[2] *See* 47 U.S.C. § 252.

2. The *Three Rivers* Decision Supports the Respondents' Argument that the Commission May Decline to Enforce the Wireless Termination and Access Service Tariffs in this Case.

Simply because the Commission has previously approved a tariff does not mean that the Commission should never reexamine its decision. Indeed, in the recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Three Rivers Telephone Cooperative v. U.S. West Communications*, No. 01-35065, 2002 U.S. App. LEXIS 18196, at 2-3 (9 Cir. Aug. 27, 2002),[3] on which the Complainants heavily rely, the Court suggested that the District Court could send the case to the state regulatory commission for resolution.

The traffic in question in *Three Rivers* was interexchange traffic originated on an independent local exchange carrier's network, delivered to an intervening LEC (Qwest), and transited to another ILEC for termination. Qwest refused to pay access charges to the terminating ILEC, arguing that it was not the call originator's long distance carrier. The Court of Appeals took the District Court to task for failing to consider the impact of the state-approved access tariffs. In its remand, the Court of Appeals suggested that the District Court stay the case to allow the parties to commence proceedings before the Montana Public Service Commission to consider the validity and applicability of the tariffs. Consideration of the tariffs was the issue, not the preemptive effect of the federal law. The Court specifically noted that the Commission had the power to determine whether the tariffs could be enforced in light of possibly-conflicting federal authority: "It does, however, appear to be within the PSC's authority and expertise to issue a

[3] Under Local Rule 36-3 of the Ninth Circuit, the Complainants should not have cited this opinion as precedent in this case. However, as the Complainants have already violated the Rule, the Respondents have no choice but to show how the opinion actually undercuts the Complainants' position.

declaratory ruling with regard to ... whether a tariff, interpreted to require payment for such calls, is just and reasonable in light of the FCC's interpretation of federal law." *Id., n. 2.*

This is precisely what the Respondents are arguing for in this case: a Commission determination that application of the wireless termination and access services to CMRS providers falls in the face of compelling FCC authority that unilateral, non-negotiated wireless termination and access service tariffs are inconsistent with federal policy.

There is a dearth of evidence of contact between the parties, and there is absolutely no evidence of negotiation. As pointed out in the Respondents' brief, the only evidence adduced by the Complainants, which bear the burden of proof, of contact with the Complainants involves attempts to collect the amounts allegedly due. There is no evidence that the parties have ever participated in negotiations involving the charges in the tariffs.

The Commission does not have to apply a black and white standard in determining whether the wireless termination tariffs should be enforced. Even with the filed tariff doctrine, a tariff is void if it is inconsistent with federal law. *TSR Wireless v. U.S. West*, 15 FCC Rcd 11166, 11183 ¶ 29 (2000), *aff'd*, 252 F. 3d 462 (D.C. Cir. 2001). The Respondents' principal brief points out why the wireless termination tariffs are inconsistent with federal precedent, and should not be enforced in this case. The Complainants cannot ask the Commission to rely blindly on the filed tariff doctrine in rejecting the Respondents' arguments.

3. Conclusion

The Complainants' reliance on the filed tariff doctrine is misplaced. This is not a "filed tariff" case. It is an "unlawful tariff" case, at least with respect to the application of tariffs under the circumstances presented here. The wireless termination and access service tariffs should not be applied to require the Respondents to pay compensation to the Complainants for the traffic at issue. These compensation mechanisms in these tariffs were not negotiated, as the federal policies require, and thus should not be used to force compensation from the Respondents.

The arguments presented by the Complainants do not carry the candle. The application of the wireless termination and access tariffs for which the Complainants argue violate federal policies. State tariffs, even if approved by the state's regulatory commission, cannot trump federal laws or regulations, or even FCC interpretations of those laws and regulations. The Complainants have failed to prove that the Commission has the power to require the Respondents to make the requested payments under the wireless termination and access service tariffs, and the Complaint should be dismissed.

Respectfully submitted,

SONNENSCHEIN NATH & ROSENTHAL

Mark P. Johnson MO Bar No. 30740
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
Tel: (816) 460-2400
Fax: (816) 531-7545
Email: mjohnson@sonnenschein.com

ATTORNEYS FOR T-MOBILE USA, INC., and
WESTERN WIRELESS CORPORATION

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 the following parties on this 7th day of January, 2003:

W. R. England, III Brian T. McCartney Brydon, Swearengen & England, P.C. 312 E. Capitol Avenue P. O. Box 456 Jefferson City, MO 65102-0456	Office of the General Counsel P. O. Box 360 Jefferson City, MO 65102
Leo J. Bub, Senior Counsel Southwestern Bell Telephone Company One Bell Center, Room 3520 St. Louis, MO 63101	Office of the Public Counsel P. O. Box 7800 Jefferson City, MO 65102

Counsel for T-Mobile USA, Inc., and
Western Wireless Corporation