ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.

ATTORNEYS AT LAW
700 EAST CAPITOL AVENUE
COL. DARWIN MARMADUKE HOUSE
P.O. BOX 1438
JEFFERSON CITY, MISSOURI 65102-1438
TELEPHONE 573-634-3422
FAX 573-634-7822

EUGENE E. ANDERECK
TERRY M. EVANS
ERWIN L. MILNE
JACK PEACE
CRAIG S. JOHNSON
RODRIC A. WIDGER
GEORGE M. JOHNSON
BEVERLY J. FIGG
WILLIAM S. LEWIS
VICTOR S. SCOTT
COREY K. HERRON

LANETTE R. GOOCH
SHAWN BATTAGLER
ROB TROWBRIDGE
JOSEPH M. PAGE
LISA C. CHASE
JUDITH E. KOEHLER
ANDREW J. SPORLEDER
KELLIE R. NILGES
NICOLE D. LINDSEY
OF COUNSEL
MARVIN J. SHARP
PATRICK A. BAUMHOER
GREGORY C. STOCKARD *(1904-1993)*
PHIL HAUCK *(1924-1991)*

October 18, 2002

FILED[3]
NOV 2 2 2002

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

Re: Consolidated Case No. TC-2002-57

Dear Secretary:

Enclosed for filing please find an original and five (5) copies of the Reply Brief of Petitioners the Missouri Independent Telephone Company. A copy has been sent to all attorneys of record listed below.

Thank you for seeing this filed.

Sincerely,

Lisa Chase

Lisa Cole Chase

LCC:tr
Enc.
cc: MITG Managers
PSC General Counsel
Office of Public Counsel
Paul S. DeFord
Leo J. Bub
Lisa Creighton Hendricks
Monica Barone
Larry W. Dority
Richard S. Brownlee, III
James F. Mauze/Thomas E. Pulliam
Joseph D. Murphy
Mark P. Johnson

Trenton Office
9th And Washington
Trenton, Missouri 64683
660-359-2244
Fax 660-359-2116

Springfield Office
1111 S. Glenstone
P.O. Box 4929
Springfield, Missouri 65808
417-864-6401
Fax 417-864-4967

Princeton Office
207 North Washington
Princeton, Missouri 64673
660-748-2244
Fax 660-748-4405

Smithville Office
119 E. Main Street
P.O. Box. 654
Smithville, Missouri 64089
816-532-3895
Fax 816-532-3899

F:\Docs\TEL\TO362\Filing_Ltr_Consolidated.dot

FILED[3]
NOV 2 2 2002
Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company, et al.,
Petitioners,

v.

Southwestern Bell Telephone Company, et al.,
Respondents.

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

Reply Brief of Petitioners the Missouri Independent Telephone Company Group

Summary

As set forth in the parties' initial brief, the determinative issue in this proceeding is a legal one. Are the MITG companies entitled to bill pursuant to their filed tariffs—their access tariffs, until such time as those access tariffs are superseded by an approved reciprocal compensation agreement? Or, as Respondents contend, are the MITG companies required to involuntarily accept reciprocal compensation on a "transit" basis in the absence of an approved reciprocal compensation agreement?

The MITG suggests that the recent decision of the FCC in the Verizon of Virginia arbitration provides assistance in analyzing the "transit" position of Respondents. That decision is from the FCC, perhaps the agency that is best situated to make these determinations. In the Verizon of Virginia decision, the FCC concluded that large carriers do NOT have a duty to transit traffic destined for third party LECs at reciprocal compensation rates. The MITG suggests that extending the logic of the FCC supports a decision in the MITG companies' favor:

1. As there is no duty to transit pursuant to reciprocal compensation rates, it follows that there is no duty of SWBT to transit the traffic subject to this complaint. Respondent SWBT's position that it was obligated under the Act to transit traffic at reciprocal compensation rates has now been rejected. There was no basis for SWBT's agreements, to which the MITG were not party, to displace effective state tariffs. Accordingly the Respondent wireless carriers' position that the MITG had to accept reciprocal compensation on a transit basis has also been rejected.

2. The FCC was deciding the obligation of an incumbent local exchange carrier to reciprocally exchange local traffic pursuant to an approved interconnection agreement. When the FCC rejected the obligation to transit traffic at reciprocal compensation rates, the FCC rejected the conclusion that "transit" traffic is reciprocal compensation traffic.

3. As transit traffic is not reciprocal compensation traffic, it follows that the MITG companies are entitled to negotiate reciprocal compensation over direct interconnections, as opposed to being transited by third party carriers.

4. SWBT's claim that it was obligated to negotiate reciprocal compensation for transit traffic, without including the MITG companies in the negotiations or in the agreement, has been implicitly rejected. The MITG companies are not bound, prejudiced, or otherwise effected by Respondents' decisions to address transit traffic in their agreements without MITG participation.

5. As transit traffic is not reciprocal compensation traffic, and as Respondents were not entitled to transit traffic to the MITG, there is no legal basis for the claim that there was some form of "defacto" reciprocal compensation arrangement with the MITG for transit traffic. If

transit traffic is not reciprocal compensation traffic, it is not "defacto" reciprocal compensation traffic.

6. As transit traffic to the MITG is not reciprocal compensation traffic, there is no basis for Respondents' claim that MITG companies' filed tariffs were not applicable to this traffic.[1] Without a legitimate reciprocal compensation arrangement, there is nothing to displace the MITG filed access tariffs, or filed wireless termination tariffs. In the absence of an approved reciprocal compensation arrangement, filed state tariffs provide the exclusive basis for the relationships bewteen the MITG, SWBT, and the wireless carriers. Prior to the effective date of the wireless termination tariffs, the MITG access tariffs exclusively defined the relationship of SWBT to the MITG as that of an IXC. Under the MITG companies access tariffs, SWBT was responsible to pay for all traffic it delivered. Under those tariffs SWBT was not entitled to "transit" or not pay terminating compensation for traffic it delivered. It was not until the wireless termination tariffs that there existed a compensation relationship between the wireless carriers and those MITG companies with such wireless termination tariffs.

7. Bill and keep is a specific form of reciprocal compensation, once in an approved agreement. Respondents' "transit" position does not qualify as bill and keep. Bill and keep means the originating carrier keeps its end user revenue, and pays NO COMPENSATION to other carriers for completing the call.[2] Ignoring for the moment the MITGs objections to the concept of "de facto" (unapproved) bill and keep, the position of the Respondent wireless

---

[1] As the Ninth Circuit recently ruled, under the filed tariff doctrine there must be an examination of the effect of legitimate and approved reciprocal compensation arrangements on state tariffs. *Three Rivers Telephone Cooperative v. U.S. West Communications*, (9th Cir. 2002), No. 01-35065, D.C. No. CV-99-00080-RFC, *Memorandum Opinion*, filed August 27, 2002.

[2] 47 CFR 713(a). Actually, this rule specifies that bill and keep is confined to <u>two</u> interconnecting carriers in which <u>neither</u> carrier originating traffic bills the other for termination.

carriers does not square with the prescribed definition of bill and keep. Under their position, Respondent wireless carriers *would* pay SWBT compensation for transiting a call, but would *not* pay the MITG companies for termination of that same call. This is "bill, pay, and keep", not bill and keep. When one carrier is paid and another carrier is not paid the compensation structure is not "reciprocal". Either the originating carrier pays compensation to all carriers, or it pays no compensation to any carrier. If the compensation structure is "pay", all carriers should be paid. If the compensation structure is "keep", no carriers should be paid.

Having applied the logic of the FCC Verizon Virginia decision, the MITG here states that this logic is completely consistent with the MITG's initial brief. The FCC decision logic is inconsistent with the Respondents' initial briefs. Based on the initial briefs the MITG should prevail.

The balance of this reply brief will respond to some of the presentations made by Respondents in their initial briefs.

Introduction

This complaint was brought before the Commission because the MITG companies were not receiving compensation for the use of their networks to terminate wireless traffic. Petitioners have adequately pleaded and proven a cause of action for determination by this Commission. Petitioners have sought remedies from this Commission that would clarify the Respondents' obligations to the Petitioners with respect to compensation for traffic delivered to and terminated on Petitioners' networks by Respondents. The most recent, highest authority Petitioners are

---

The FCC rule limiting bill and keep to two directly interconnecting carriers is further support for the MITG position, as briefed in the MITG initial brief.

aware of to assist the Commission in making its determinations is the FCC's decision in its *Verizon-Virginia Order*[3].

According to this decision, SWBT and Sprint are not required to transit traffic, and the duties of Petitioners as incumbent LECs are to interconnect pursuant to section 251(c), while non-incumbents are required to interconnect pursuant to section 251(a). The duty to interconnect directly under section 251(c) does not 'gut' the expectations of Congress or the FCC under the Act. In fact, wireless carriers currently have direct interconnection to the vast majority of the access lines in Missouri through their agreements with SWBT, Sprint, Spectra and CenturyTel (formerly Verizon). Congress and the FCC did not expect CMRS providers would have 100% of their intraMTA traffic treated as local at the passage of the Act. The Act provided rural telephone carriers with an exemption from section 251(c). Rural telephone carriers, such as Petitioners, only have a duty to negotiate and directly interconnect with other carriers after a bona fide request is made, submitted to the state commission, and the state commission finds the terms are not too onerous. That has not happened in Missouri.

Furthermore, under the Safe Harbor provisions of the Act, the FCC recognized that not all intraMTA traffic falls under the provisions of section 251(b). The Missouri Commission treated wireless traffic terminated by SWBT as access traffic at the time of the Act, and Petitioners' access tariffs continue to apply to this intraMTA traffic until explicitly superceded by another tariff or an interconnection agreement. Respondents have all stated that they terminate traffic to Petitioners pursuant to agreements, not SWBT's wireless tariff. Petitioners

[3] In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al., Memorandum Opinion and Order, CC Docket No. 00-218, et al., (Released July 17, 2002) ("*Verizon-Virginia Order*").

have not been a party to these agreements, and thus are not to be adversely impacted by such agreements.

Under the filed tariff doctrine, Petitioners' tariffs form the exclusive source of terms and conditions applicable to Respondents as customers. The Ninth Circuit has held that Petitioners' tariffs must be interpreted when analyzing party obligations under the Act. Any agreement SWBT or Sprint has pursuant to its interconnection agreements to transit traffic does not relieve SWBT or Sprint of their trunking obligations pursuant to Petitioners' tariffs. The FCC has made it clear that these Respondents are not required to transit traffic at TELRIC rates. In compliance therewith, Respondents can incorporate the independent LECs' termination charges into their transit rates, and the transit carrier as IXC should pay terminating access charges unless a MITG wireless termination tariff is in effect. When such a tariff is in effect, the wireless carrier is directly responsible to pay the terminating tariff rate to the MITG company.

Applying this structure, the originating wireless carrier continues to pay for the traffic of it's end user, and the transiting carrier continues to abide by its interconnection or trunking obligations. A wireless carrier remains free to exercise its rights under the Act to request, negotiate, and have approved a reciprocal compensation arrangement superseding state tariffs, as the Act originally intended.

As set forth below, Petitioners have asserted a cause of action that is not barred by Respondents' affirmative defenses. Petitioners will discuss the basis for the Respondents' position that Petitioners must accept wireless traffic through an indirect interconnection on a 'de facto' bill-and-keep basis in light of the FCC's determinations.

Interconnection Obligations and the FCC *Verizon-Virginia Order*

The starting point for Respondents' position is that SWBT must 'transit' wireless traffic to the Petitioners at TELRIC rates pursuant to section 251(a) of the Act requiring carriers to interconnect directly or indirectly[4]. This is a necessary premise to Respondents' position, because from there, Respondents assert that Petitioners are obligated to negotiate from this 'transit' point. The FCC has found this assertion is *not* true. In the *Verizon-Virginia Order*, the wireless carriers made many of the same arguments in support of their position to the FCC that they make to this Commission, and the FCC rejected those arguments.[5]

---

[4] *See* Sprint Missouri, Inc. and Sprint Spectrum, L.P., d/b/a Sprint PCS Post-Hearing Brief, p. 30 ("Sprint"); Initial Brief of Ameritech Mobile Communications, Inc., CMT Partners, Ameritech Cellular, and Verizon Wireless, p. 13 ("Verizon"); Southwestern Bell Telephone Company's Initial Brief, p. 12 ("SWBT")

[5] *Verizon-Virginia Order*:

"108. ... AT&T argues Verizon has a legal obligation to provide transit service to AT&T, regardless of the level of traffic. ... In addition, according to AT&T, Verizon's duty to interconnect pursuant to §251(c)(2)(A) is not limited solely to interconnection for the exchange of traffic between AT&T and Verizon. ...

109. ... AT&T further argues that any direct trunking arrangement displacing a tandem transit arrangement would require AT&T to negotiate and possibly arbitrate an interconnection agreement with any third-party carrier with which it seeks to exchange traffic. According to AT&T, the time and expense required to create such arrangements would be an impediment to efficient interconnection and unnecessary, given that Verizon already has such arrangements with third-party carriers. ... Finally, AT&T contends that, contrary to Verizon's characterization, AT&T's witness did not testify that AT&T seeks to evade its responsibility to establish reciprocal compensation arrangements with other carriers. Rather, AT&T states that its testimony reflects the common practice among indirectly interconnected carriers of agreeing to exchange traffic on a bill and keep basis.

110. Like AT&T, Worldcom argues that Verizon's restrictions on transit service would frustrate the Act's requirement in §251(a)(1) that carriers be allowed to use indirect interconnection, which Worldcom states necessarily involves the use of a third carrier's facilities. ...

111. ... Transit service, according to Worldcom, allows such carriers to avoid the fixed costs of an interconnection facility that would be used only minimally and the unnecessary expense of negotiating multiple interconnection arrangements. ... According to Worldcom, direct interconnection between carriers in lieu of transiting arrangements would require the

The FCC stated:

> "117. We rejects AT&T's proposal because it would require Verizon to provide transit service at TELRIC rates without limitation. While Verizon as an incumbent LEC is required to provide interconnection at forward-looking costs under the Commission's rules implementing §251(c)(2), the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under this provision of the statute, nor do we find clear Commission precedent or rules declaring such a duty. In the absence of such a precedent or rule, we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates. Furthermore, any duty Verizon may have under §251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC."

Contrary to the Respondents assertions that the FCC *clearly* contemplated interconnection on an indirect basis,[6] the FCC stated that "the Commission <u>has not had occasion to determine</u> whether incumbent LECs have a duty to provide transit service under this provision of the statute, <u>nor do we find clear Commission precedent or rules declaring such a duty</u>."[7] What the FCC did find was that the obligations of carriers to interconnect with one another stem from different provisions of the Act. The FCC stated:

> "The Commission's rules define "interconnection" as the "linking of <u>two networks</u> for the <u>mutual exchange</u> of traffic." 47 C.F.R. § 51.5. The parties' respective obligations to interconnect with each other, however, arise from different provisions of the Act. <u>Incumbent LECs are required by section 251(c)(2)</u> to permit any requesting telecommunications carrier to interconnect 'for the transmission and routing of telephone exchange service and exchange access' with the incumbent's network ' at any technically feasible point within the [incumbent] carriers network." <u>Non-incumbent carriers, on the other hand, are required by section 251(a)(1)</u> 'to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." fn. 200 (emphasis added).

---

construction of new physical interconnection facilities, whereas direct trunks to Verizon end offices are established over existing transport facilities. ... Furthermore, Worldcom states that Verizon's proposal would result in inefficiencies for the entire network, due to the number of additional trunks required of each carrier in order for it to be interconnected directly with other carriers."

[6] Sprint p. 29

[7] Verizon-Virginia Order, para. 117.

Petitioners are the incumbent LECs in their exchanges. The FCC has determined that Petitioners' obligations to interconnect stem from section 251(c)(2). As extensively addressed in the MITG Initial Brief, this section contemplates a *direct* interconnection of the *requesting* carrier's facilities and equipment to the local exchange carrier's network. No wireless carrier has requested direct interconnection to the Petitioners' networks. Instead, Petitioners directly interconnect with other landline carriers pursuant to the Petitioners' tariffs.

The Safe Harbor provisions of the Act.

The FCC and the 1996 Act set forth certain "Safe Harbor" rules in 47 C.F.R. 51.717(a) and 47 U.S.C. §251(g). Petitioners respectfully disagree with Sprint that the "Safe Harbor" is limited to *contracts* in existence prior to 1996.[8] The FCC contemplated the renegotiations of nonreciprocal arrangements in place on the effective date of the Act, which supports the conclusion that the Act contemplated subsequent negotiation and approval of reciprocal compensation agreements, not an automatic or 'de facto' implementation effective in February of 1996 when the Act took effect.[9] As Mr. Jones testified, the safe harbor is the regime that existed at the implementation of the Act, which for Petitioners was their access tariffs.[10] Again, the MITG Initial Brief extensively addressed the safe harbor aspects of §251(g).

> Under section 251(g), on the effective date of the Act, each wireline LEC was required to "provide exchange access, information access, and exchange service for such access to interexchange carriers and information service providers [in the same manner as applied to such carrier on the date immediately preceding the Act,] under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded. ... [Until superceded,] such restrictions and

[8] Sprint p. 8-9.
[9] See David Jones Surrebuttal, pp. 5-6.

obligations shall be enforceable in the same manner as regulations of the Commission." 47 U.S.C. §251(g) (emphasis added).

Thus, not all intraMTA traffic falls under the provisions of section 251(b). On the date the Act took effect, SWBT terminated wireless traffic to the MITG companies as an interexchange carrier, and paid the MITG companies terminating access.[11] The MoPSC then approved a revision to SWBT's Wireless Interconnection Service Tariff to terminate SWBT's function at its meetpoint with the third party LECs, thereby eliminating its obligation to pay terminating access charges on wireless traffic terminated pursuant to SWBT's tariff.[12]

The wireless carriers each state that they do not transit traffic to SWBT pursuant to SWBT's tariff, and SWBT states that it handles virtually no traffic under it's tariff.[13] Instead, Respondents' traffic terminates pursuant to interconnection agreements to which none of the Petitioners were party.[14] These private agreements do not explicitly supercede the access tariffs

---

[10] TR. p. 362, l. 5-10, David Jones' testimony.
[11] *See* Opening Post-Hearing Brief of Western Wireless Corporation and T-Mobile USA, Inc. p. 3 ("Western Wireless"); Initial Brief of Staff, p. 9 ("Staff"). In Missouri, the MoPCS has held that SWBT is obligated to pay the rural ILECs' access rates pursuant to their access tariffs for wireless terminating traffic terminated by SWBT from 1990 to February of 1998. See *In the Matter of United Telephone Company*, Case No. TC-96-112, *Report and Order*, issued April 11, 1997; *Chariton Valley and Mid-Missouri's Complaint against SWBT for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-240, *Report and Order*, issued June 10, 1999. SWBT is not the ILEC in the MITG exchanges, it's only capacity in the MITG exchanges is as an interexchange carrier or IXC.
[12] SWBT states that today over 99 percent of the wireless traffic it terminates is pursuant to interconnection agreements (to which none of the MITG companies have been made a party), not its tariff.
[13] See SWBT, p. 15; Verizon, p. 14; Western Wireless p. 2; Cingular p. 17
[14] See Staff p. 5 The interconnection agreements bypass or overrule the conditions set forth for 'transiting' under SWBT's tariff.

of Petitioners. The FCC and this Commission have found that third-party carriers are not to be adversely impacted by interconnection agreements.[16]

In fact, Respondents state that Petitioners have no grounds to seek enforcement of the interconnection agreements, and that whether either party to those agreements complies with its terms is irrelevant given Petitioners standing as non-parties to the negotiations[17]. Petitioners agree -- with the understanding that such agreements are not to have an adverse impact on Petitioners. However, Respondents then suggest that they had a *right* to expect that Petitioners would negotiate the terms and conditions that mirrored the interconnection agreements already reached with SWBT.[18]

Respondents have no such right. It has become clear that, in the process of their negotiations, Respondents have incorrectly determined that large LECs like SWBT and Sprint are obligated to transit traffic, and that incumbent LECs like the Petitioners are obligated to interconnect indirectly pursuant to section 251(a). Respondents are allowed to voluntarily reach terms under their agreements without regard to the standards set forth in sections 251(b) and (c), but they are not allowed to impose such terms on third-party carriers who do not agree to them.[19]

To the extent wireless traffic is not terminated pursuant to SWBT's PSC Mo No 40 Wireless Interconnection Service Tariff, SWBT's obligations are based on Petitioners' access

---

[16] *Interconnection Order*, CC Docket 96-98, para 167 (Released August 8, 1996); Commission Order in TO-97-40/TO-97-67 (December 11, 1996) (finding the switched access rates of independent LECs not a party to the arbitration should not be affected by the results of the arbitration and continued to apply)
[17] Verizon, p. 16
[18] Verizon, p. 16.
[19] 47 U.S.C. 252(a)(1)

service tariffs from which SWBT gains access to their networks[20]. As testified to by David Jones, existing access compensation is the safe harbor that applies until the agreement is effective.[21] There is no issue as to what applies prior to the agreement. The access regime was not disturbed by the Act until another tariff or an interconnection agreement with reciprocal compensation arrangements superseded it.

The 'transit' function does not displace the obligations of SWBT or Sprint.

SWBT asserts that it should not be held responsible for charges assessed by the terminating carrier.[22] Such a holding would permit SWBT to *unilaterally* change its status under Petitioners' tariffs by by entering into contracts to which Petitioners are not party. As this Commission is aware, these type of unilateral arrangements have led to: (1) SWBT and Sprint asserting that they are not required to compensate the MITG companies because they are

[20] The MITG companies' access tariffs apply unless and until replaced by another tariff (such as the wireless termination service tariff of three MITG companies) or a Commission-approved interconnection agreement or traffic termination agreement.

[21] TR. p. 362, l. 5-10, David Jones' testimony

[22] SWBT p. 3. SWBT recognized the FCC's decision rejects the notion SWBT is obligated to transit traffic at reciprocal compensation rates. In its brief SWBT suggests that the Commission nevertheless should continue to allow SWBT to transit traffic with no obligation to pay the terminating LEC. The Commission should reject SWBT's attempt to unilaterally assume a posture that contradicts state access tariffs. SWBT's role with respect to traffic it terminates to third party LECs is as an IXC under aproved access tariffs. SWBT cites the FCC *Verizon-Virginia Order* in support of it's position that a transit carrier should not be obligated to pay the terminating carrier. (see SWBT p. 8) But the FCC's decision supports the MITG position in this case. The FCC's decision in the *Verizon-Virginia Order* did not disturb Verizon's existing termination obligations. First, Verizon, unlike SWBT, objected to being required to transit traffic. (para. 113) Second, the FCC found that "[w]ith respect to calls that originate on AT&T's UNE-platforms, both parties agree to the status quo in Virginia: Verizon bills AT&T for unbundled switching and common transport, *plus a termination charge to recover the third-party LEC's charges for termination*." (para. 541) Third, "[a]ccording to AT&T, both parties have agreed that intrastate toll traffic will be carried to the end user's chosen intraLATA toll provider, over the exchange access trunks corresponding to that particular provider." (fn. 137). Petitioners

required to transit the wireless traffic and asserting that the CMRS provider originating the traffic is responsible to pay; and (2) the CMRS providers refusing to compensate the MITG companies citing the fact that they have no compensation agreement in place with the MITG companies. The Missouri Commission required them to have such arrangements in place before sending the traffic in dispute. This has placed Petitioners in the untenable situation of not being able to collect terminating compensation under the only compensation mechanism legally available—their state approved tariffs. Approval of the position set forth by SWBT and Sprint would permit such transit carriers to unilaterally displace their trunking obligations[23].

This Commission's approval of SWBT's revised tariff was based on it's understanding that SWBT would perform a 'transit' function for the wireless carriers. The Commission's Order was premised upon the assumption that the Act did provided for transiting at reciprocal compensation rates. Now the FCC has ruled this assumption to be incorrect. The requirements set forth under the 1996 Act and *Interconnection Order* are with respect to telecommunications carriers in their capacities as local exchange carriers, incumbent local exchange carriers, CMRS providers and interexchange carriers, not as 'transit' providers. 47 U.S.C. 251(c)(2) sets forth the obligation of *incumbent* local exchange carriers to interconnect with *requesting* telecommunication carriers. SWBT is not the incumbent local exchange carrier in the MITG

---

assert that the terms to which these carriers agreed are the same duties SWBT has with respect to Petitioners' under their access tariffs and the rules pertaining to intraLATA presubscription.

[23] SWBT p. 3; Sprint p. 20 (Sprint ignores the fact that it interconnects with MoKan pursuant to MoKan's access tariff, and that it has no legal authority to 'transit' the traffic in dispute to MoKan under any other arrangement. Sprint does have an interconnection agreement with Sprint PCS, Cingular, and Aerial (not all of the wireless carriers terminating traffic to MoKan), but MoKan has not been a party to those agreements. MoKan and Sprint interconnect pursuant to MoKan's access tariff which sets forth the legal obligations of the parties. Sprint's assertions that it is a 'transiting carrier' with no contract or legal obligations to MoKan have no legal basis.

exchanges. No CMRS provider has requested interconnection in the MITG exchanges. SWBT's only capacity in the MITG exchanges is that of an interexchange carrier.

In 2000, the FCC decided a complaint case involving paging carriers and local exchange carriers (LECs). Paging carriers have the same status as CMRS providers in this regard. In *TSR Wireless, LLC, et al. v. US West Communications, Inc., et al.*, File Nos. E-98-13 et al., *Memorandum Opinion and Order*, FCC 00-194 (2000 FCC LEXIS 3219) rel. June 21, 2000, p. 19, para. 3. In that case, the FCC observed:

> Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. **Such traffic falls under our reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.**

Paragraph 26 of that same Order recognized that the term "interconnection" under section 251(c) (2) refers only to the physical linking of two networks for the mutual exchange of traffic. As noted above, the FCC has recently ruled that carriers such as SWBT have no obligation to transit traffic at TELRIC rates. [24]

If SWBT or Sprint choose to enter into transiting arrangements with CMRS providers, then the rate should be set to take into consideration the cost of termination on the small LECs' networks under the trunking arrangements SWBT and Sprint have with the small LECs.[25] Such costs are based on the approved tariffs, including the wireless termination service tariffs, of the small LEC. The wireless carriers can undertake a cost/benefit analysis and make a business decision to either transit traffic indirectly based on the costs of transit and termination pursuant to approved tariffs, or to terminate their traffic directly and obtain a negotiated rate by availing

[24] See the July 17, 2002 Memorandum Opinion and Order in the Matter of the Petition of Worldcom, Cox, and AT&T versus Verizon-Virginia, DD Docket No. 00-218, paragraph 117.
[25] In fact this was the process agreed to by the parties in the Verizon-Virginia case. "With respect to calls that originate on AT&T's UNE platforms, both parties agree to the status quo in Virginia: Verizon bills AT&T for unbundled switching and common transport, plus a termination charge to recover the third-party LEC's charges for termination." para. 541.

themselves of the FCC interconnection/reciprocal compensation procedures under the Act. Under either procedure, the wireless carrier is obligated to pay the carrier it interconnects with for the traffic it hands off to them.[26] However the carrier it hands the traffic off to is bound by the provisions controlling its interconnection with the terminating company. In this case, the MITG access tariffs controlled until those MITG companies with wireless termination tariffs had those tariffs become effective. For these companies, after February of 2001 the wireless terminating tariff controlled.

Some Respondents cite the FCC's Unified Intercarrier Compensation docket for the proposition that the FCC adheres to a "calling-party-network-pays" ("CPNP") regime.[27] The case referred to is an *investigation* docket only. The FCC has found that a number of carriers have opted into this regime *as part of their interconnection agreements*. CPNP does not now exist, and never has existed, for the MITG. In fact, in it's Order in the Sprint PCS/AT&T case, the FCC stated:

> 14. "We offer the court two important observations regarding the regulatory regimes applicable to both IXCs and CMRS carriers during the period in dispute. First, CMRS carriers have never operated under the same calling party's network pays (CPNP) compensation regime as wireline LECs. Under a CPNP regime, LECs are compensated for terminating calls by the carrier of the customer that originates the call, not by the customer receiving the call. In contrast, since the advent of commercial wireless service, and continuing today, CMRS carriers have charged their end users both to make and receive calls.[28]

SWBT threatens to not transit traffic if it will be required to compensate the terminating carrier. By making such statements, SWBT suggests it has no terminating obligations to

[26] This will not disturb the interconnection agreements between the Respondents, because those agreements contain indemnity provisions entitling SWBT or Sprint to compensation from the wireless carriers for any compensation SWBT or Sprint pays to Petitioners. *See* section 8.5 of Exhibits 25, 28, and 29; section 3.1.3 of Exhibits 26, 27, 30, 31, 33, 34, 36, 37, and 38; section 8.4 of Exhibit 32; and section X of Exhibit 35.
[27] SWBT pp. 7 & 16; Staff p. 14.
[28] In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, WT Docket No. 01-316 (Released July 3, 2002).

Petitioners[29]. The MITG reject this attempt by SWBT to try to unilaterally change its IXC/access trunking arrangements with Petitioners. However, the compensation obligation of an indirect transiting arrangement as discussed above comports with the FCC's finding that transport need not be at TELRIC rates, and with the basis upon which SWBT stated it would continue to transit traffic. Under this compensation arrangement, SWBT can charge market rates, charging enough from the originating wireless carrier to keep the costs of the call the responsibility of that carrier, and maintaining the trunking obligations of SWBT to Petitioners. Furthermore, with the FCC's determination that ILECs such as SWBT are not required to transit traffic, SWBT can limit the amount of traffic it is willing to transit.

Enforcing termination pursuant to the Petitioners tariffs also resolves the issues pertaining to call blocking and secondary liability. Termination pursuant to Petitioners' access tariffs requires SWBT to be liable, and SWBT has its own remedies with wireless carriers pursuant to the interconnection arrangements that they have negotiated. Petitioners' wireless termination service tariffs have provisions Petitioners can enforce if wireless carriers are noncompliant with the tariff's terms, including call blocking.

<u>The 'Filed-Tariff' Doctrine applies until there is an approved interconnection agreement and reciprocal compensation arrangement, and filed tariffs are to be interpreted when analyzing party obligations under the Act</u>

Under the "filed tariff doctrine", the MITG companies' tariffs (i.e. wireless termination service tariffs or access tariffs) are the exclusive source of terms and conditions applicable to SWBT, Sprint, and the CMRS providers as customers[30]. Unless an approved reciprocal

[29] SWBT's obligations to Petitioners are pursuant to the Wireless Termination Service Tariffs, or to the Access Tariffs for those Petitioners without Wireless Service Termination Service Tariffs.
[30] *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568 (Mo. App. E.D. 1997). The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of published tariffs. *Id.* at 570. "Neither a customer's ignorance nor a utility's misquotation of the applicable tariff provides refuge from the terms of the tariff." *Id.* Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the exclusive source of the terms and conditions governing the provision of service of a carrier to its

compensation arrangement applies, the MITG tariffs apply to traffic delivered by SWBT or Sprint. In *Three Rivers Telephone Cooperative v. U.S. West Communications*, the Ninth Circuit Court of Appeals explained:

> Because the Independents' tariffs form the **exclusive** source of the obligations between the independents and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, 47 U.S.C. § 251-52, without interpreting the tariffs themselves.[31] (emphasis added)

The MITG companies have no approved interconnection agreements with Respondents. The state tariffs of the MITG provide the exclusive source of the terms, conditions, and rates for the completion of wireless-originated calls. The Commission must interpret and apply the MITG companies' tariffs when analyzing the parties' obligations. Non-existent "transit" concepts cannot be considered.

Cases cited by Respondents do not preclude Access Charges in this Matter

Respondents cite *Mid-Rivers Telephone Cooperative, Inc. v. Qwest Corporation*[32], and *3-Rivers Telephone Coop., Inc, v. U.S. West Communications, Inc.*[33], for their position that access charges do not apply to intraMTA traffic. The District Court deciding these two cases stated "[t]he 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

---

customers. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002).

[31] 2002).*Three Rivers Telephone Cooperative v. U.S. West Communications*, (9th Cir. 2002), No. 01-35065, D.C. No. CV-99-00080-RFC, *Memorandum Opinion*, filed August 27, 2002. (emphasis added)

[32] *Mid-Rivers Telephone Cooperative, Inc. v. Qwest Corporation*, (D. Mont. April 3, 2002)
[33] *3-Rivers Telephone Coop., Inc, v. U.S. West Communications, Inc.*, 125 F.Supp.2d 417 (D. Mont. 2000)

417 (D. Mont. 2000), which was previously decided by this Court."[34] The Court used the same analysis in *Mid-Rivers* as that used in the *3-Rivers* case to reach a similar conclusion. As cited above, the *3-Rivers* case was remanded by the 9th Circuit Court of Appeals due to the lower court's failure to analyze the Independents' tariffs. Thus, *Mid-Rivers* and *3-Rivers* are insufficient authority due to their lack of analysis for the proposition that tariffed access or wireless termination rates cannot apply to intraMTA traffic in the absence of an agreement between the parties.

Similarly, Iowa Utility Board Docket No. SPU-00-7 et al.[35], and the *Oklahoma Arbitration Order*[36] were determined prior to the 9th Circuit's holding in *3-Rivers*. Both the Iowa Utility Board's determination and the *Oklahoma Arbitration Order* were based on the Commissions' interpretation of the Act, without interpreting the ILEC's tariffs.

The *Oklahoma Arbitration Order* was a determination reached in arbitrating an Interconnection Agreement between CMRS Providers (Cingular, Western Wireless, Sprint PCS, and AT&T Wireless) and The Rural Independent Local Exchange Carriers. The MITG's position has been that their tariffs apply until an interconnection agreement and reciprocal compensation arrangement has been reached and approved by the Commission. This case is not an arbitration of an interconnection agreement and reciprocal compensation arrangement. The *Oklahoma Arbitration Order* is not on point. In Oklahoma the small companies were the subject of a request, negotiation, and arbitration. This has never happened in Missouri. This is a complaint case in which the Petitioners' tariffs form the exclusive source of obligations between the parties,

---

[34] *Mid-Rivers Telephone Cooperative, Inc. v. Qwest Corporation*, p. 7 (D. Mont. April 3, 2002)
[35] Iowa Utility Board Docket No. SPU-00-7 et al., *In Re: Exchange of Transit Traffic*. (Iowa Utils. Bd. March 18, 2002)

and therefore must be analyzed when determining party obligations. There is no request to approve or arbitrate a reciprocal compensation agreement in this case.

Direct interconnection obligations do not 'gut' any Congress or FCC expectation that intraMTA wireless calls be treated as local under the Act

Direct interconnection obligations do not 'gut' any Congress or FCC expectation that intraMTA wireless calls be treated as local under the Act.[37] The FCC has clarified that an incumbent LEC's interconnection obligations fall under section 251(c)(2) of the Act.[38] The wireless carriers have exercised their rights to request direct interconnection with the large ILECs of Missouri pursuant to section 251(c)(2), and have obtained direct interconnection to the vast majority of access lines served by large ILECs SWBT, GTE/Verizon/Spectra/CenturyTel, and Sprint. It can hardly be said that the provisions of the Act enabling wireless carriers to have intraMTA traffic treated as local traffic have been 'gutted'.

Congress and the FCC also expected that, under section 251(f), rural telephone companies would be exempt from the obligations of section 251(c):

251(f)(1)(A) Exemption

> Subsection (c) of this section shall not apply to a rural telephone company until
>
> (i) such company has received a bona fide request for interconnection, service, or network elements, and
> (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). (emphasis added)

---

[36] Interlocutory Order *In the Matter of AT&T Wireless Services, Inc. For Arbitration Under the Telecommunications Act of 1996*, Case No. PUD 200200149 consol. (Aug. 1, 2002)("*Oklahoma Arbitration Order*")
[37] Cingular, p. 28
[38] FCC Verizon-Virginia Order, fn. 200.

This exemption does not have to be *raised* by the Petitioners, it is already in place[39]. Wireless carrier/MITG interconnections have been determined by the FCC to be § 251 interconnections. As such § 251(f) makes the MITG companies exempt until the process and determinations required by §251's subsections have been made. As there exists no MoPSC decision addressing these determinations, the exemption is in place. There can be no interconnection/reciprocal compensation arrangements approved for the MITG absent compliance with this subsection. Again, the claims of the wireless carriers of "defacto" arrangements contradict controlling federal statutes.

Compensation under the Act

As Staff pointed out at page 10 of their Initial Brief, the FCC has recently set forth the three means by which intercarrier compensation may be charged: (1) Commission Rule, (2) Tariff, or (3) Contract.[40] The wireless carrier's imposed 'de facto' bill and keep do not fall within any of these categories. Respondent's initial reliance on 'de facto' bill and keep was based on their misunderstanding that SWBT was required to 'transit' wireless traffic to Petitioners' networks, and that Petitioners, in turn, were required to negotiate from this 'transit' point. The FCC determined that this is not so in it's *Verizon-Virginia Order.* Given the FCC's recent clarification that an incumbent LEC's duty under the Act is to negotiate pursuant to section 251(c), not 251(a), it cannot be said that Petitioners' request to negotiate for direct interconnection is illegal or in bad faith as suggested by Respondents. This duty also comports

[39] Cingular p. 23, Sprint, pp. 25, 27; Staff p. 5. (Respondents are incorrect to the extent they suggest the rural exemption must be 'raised' or 'imposed' by Petitioners.)
[40] In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, WT Docket No. 01-316 (2002).

with establishing the "transport and termination" under which reciprocal compensation arrangements are to be negotiated.

Next, Respondents assert that they have imposed 'de facto' bill and keep as a punitive measure due to Petitioners' bad faith negotiations. This is a revisionist explanation to justify their practice of not compensating Petitioners and it is not supported by the evidence. Cingular states that as a result of Petitioners' rejecting the terms of Cingular's request to negotiate, Cingular has not directly compensated any of the Petitioners for calls terminating from Cingular.[42] Cingular states that it entered into an interconnection agreement with SWBT in October of 1997 and that the agreement was approved by the Commission early 1998, however no request to negotiate was provided to Petitioners or their Counsel until August of 1999[43].

Petitioners can hardly be said to have negotiated in bad faith in this two-year period where no negotiation was sought. U.S.Cellular stated that Petitioners refused to negotiate in good faith to establish an interconnection agreement.[44] U.S. Cellular failed to provide any evidence at the Hearing and failed to conduct any cross examination of Petitioners' witnesses. The evidence shows that U.S. Cellular, thanking David Jones for his cooperation, withdrew it's request for an agreement.[45] Similarly, Ameritech, CMT Partners and Verizon Wireless asserted in their initial brief that upon failure to negotiate, Verizon Wireless moved its traffic from transit to an IXC.[46] However, exhibits 72 and 73 indicate that Verizon Wireless' predecessor in interest, GTE Wireless, determined the traffic in the Missouri markets acquired by GTE do not terminate to any SWBT local tandems in the LATAs in which Mid-Missouri's exchanges are located, and as

[41] Cingular p. 27, Western Wireless p. 8, Verizon p. 15.
[42] Cingular p. 4
[43] Cingular p. 2-3.
[44] Initial Brief, U.S. Cellular p. 4.
[45] Exhibit 70; Tr. p. 726 l. 17 – p. 727 l. 5.

such, any traffic originated by GTE would be routed to IXCs for delivery to Mid-Missouri. With that explanation, GTE withdrew its request to negotiate an interconnection agreement.[47]

Western Wireless candidly admits in it's brief that it has not initiated interconnection negotiations with Petitioners because the volumes of traffic weren't there to justify the time and expense required to negotiate an interconnection agreement.[48] This is the type of cost/benefit analysis Congress and the FCC had in mind for CMRS providers sending traffic to rural telephone companies.

'De facto' bill and keep does not occur pursuant to Commission rule, tariff or contract. Such arrangements have not been negotiated or agreed to by the MITG companies. The CMRS providers have no legal authority on which to impose 'de facto' bill and keep. By engaging in this practice, these CMRS providers are in violation of 47 C.F.R. section 20.11(b)(2) which requires that "[a] commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."

Furthermore, these CMRS providers impose 'de facto' bill and keep as an ongoing obligation on rural ILECs with respect to interconnection and reciprocal compensation, stating that this is the 'default' reciprocal compensation mechanism for indirect interconnection. The FCC has recently found "that an agreement that creates an ongoing obligation pertaining to ... reciprocal compensation, interconnection ... is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[49] It has not been the practice of these CMRS providers to file

---

[46] Verizon p. 17
[47] Exhibits 72 and 73.
[48] Western Wireless p. 5
[49] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual*

these 'de facto' bill and keep arrangements with the Missouri Commission. The practice of imposing 'de facto' bill and keep is not in compliance with Federal statutes, regulations or orders.

Perhaps the Respondents have come to realize this as they now assert in their briefs that the Act provides for the Commission to impose bill and keep. However, the authority under the Act provides that the Commission may establish bill and keep only as part of an arbitration order for two interconnecting carriers if the state commission determines the carriers' costs are symmetrical and that the local telecommunications traffic is roughly balanced and is expected to remain so.[50] No such findings exist. Nor can such findings be made here. This is a contested case asserting applicability of state tariffs, not a §251/§252 arbitration between a requesting wireless carrier and an ILEC.

Absence of Approved Interconnection Agreements and Assertions of Bad Faith Negotiations

The Commission has previously determined that section 251(b) of the Act does not apply in the absence of an agreement.[51] The Commissions' determination was upheld by the Cole County Circuit Court.[52] Petitioners and Respondents have no approved interconnection agreements or compensation arrangements. As Staff pointed out, Petitioners "are without power

---

Arrangements under Section 252(a)(1), Memorandum Opinion and Order, WC Docket No. 02-89, para. 8 (released October 4, 2002).

[50] 47 C.F.R. 51.705 and 51.713

[51] *Mark Twain* Report and Order, TT-2001-39, pp. 29-30, Ex. 62.

[52] *State of Missouri ex rel. Sprint Spectrum L.P. d/b/a Sprint PCS v. Missouri Public Service Commission*, Findings of Fact, Conclusions of Law, and Judgment, Case No. 01CV323740, (November 26, 2001).

under the Act to force the CMRS providers to negotiate and interconnect. 47 USC 251(b) & (c)."[53] Under the Act, the incumbent LECs duties are to *requesting* carriers.[54]

Respondents suggest Petitioners have acted in bad faith by not requesting negotiations from the wireless carriers[55]. Petitioners have no obligation to do so. In so suggesting, Respondents turn the obligations to interconnect on their head. Furthermore, Respondents have no legal basis to demand Petitioners negotiate reciprocal compensation on the basis of an indirect interconnection. Absent a contract or an approved interconnection agreement, the only authorized compensation arrangements between the parties are pursuant to Petitioners' tariffs and Commission Rules.

The Commission rules for intraLATA presubscription require Petitioners to direct 1+ traffic to the end user's carrier of choice. This is not an 'option' Petitioners have chosen for themselves, nor a 'unilateral decision' on the part of Petitioners. Until wireless carriers request direct interconnection with Petitioners pursuant to the Act, as anticipated by Congress and the FCC, the 1+ traffic is originated by the end user's carrier of choice, not Petitioners. Once a direct interconnection is established, and an agreement approved, such traffic can be terminated on a reciprocal basis as anticipated by Congress and the FCC.

Some Respondents have asserted that Petitioners acted in bad faith, and illegally, to include in the negotiations discussion of getting compensated for traffic that had terminated

---

[53] Staff p. 19.
[54] 47 U.S.C. 251(c)(2); 47 U.S.C. 252(a); FCC *Verizon-Virginia Order* fn. 200.
[55] Verizon p. 15; Western Wireless p. 4-5
[56] Sprint's statement that Petitioners have requested pay rates 100% higher than access is erroneous. Sprint. p. 24. The basis for Sprint's statement is unclear. The first letter referred to states that Northeast does not have a local rate to propose at this time, and the second letter provides information about the forward-looking rates as developed by Petitioners' consultant, but it does not indicate that these are the requested rates of Petitioners for the purpose of negotiations.

pursuant to Petitioners' access tariffs but which had not been paid.[57] Even SWBT's witness acknowledged at hearing that a settlement of outstanding debt is something SWBT would discuss during negotiations.[58] As discussed above, to the extent Petitioners access tariffs have not been explicitly superceded by their wireless termination service tariffs, they are still in effect. Seeking compensation for services rendered pursuant to those tariffs is not illegal or in bad faith. As more fully set forth in Petitioners' Initial Brief, it would be appropriate for the Commission to clarify its *Alma* tariff decision to reflect that access does apply until superceded by another tariff or interconnection agreement/reciprocal compensation arrangement.

The wireless carriers are obligated under the wireless termination tariffs to monitor the traffic and establish factors with respect to interMTA and intraMTA traffic, whether or not the Petitioners request a report[59]. If Petitioners request a copy of such a report, the wireless carriers are obligated to produce it.

To the extent Staff and Respondents assert that Alma is not billing pursuant to their Wireless Termination Service Tariff[60], they are incorrect. None of the wireless carriers have complied with Alma's wireless termination tariff and provided Alma with information concerning the jurisdiction of the calls the wireless carriers terminate to Alma's network[61]. Alma has no information upon which to conclude any traffic is intraMTA. Alma is justified in

[57] Sprint's statement that Petitioners have requested pay rates 100% higher than access is erroneous. Sprint. p. 24. The basis for Sprint's statement is unclear. The first letter referred to states that Northeast does not have a local rate to propose at this time, and the second letter provides information about the forward-looking rates as developed by Petitioners' consultant, but it does not indicate that these are the requested rates of Petitioners for the purpose of negotiations.

[58] Tr. 965, l. 24 – p. 966, l. 4.

[59] Ex. 11, Schedule 1, section E; Tr. p. 499 l. 6-12 (testimony of Mr. Stowell); p. 590 l. 14-19 (testimony of Mr. Glasco)

[60] Cingular, p. 10-11; Staff, p. 15

[61] p. 590 l. 14-19 (testimony of Mr. Glasco)

presuming all traffic is interMTA for which access is due until it receives contrary information in compliance with its approved tariff.

Some wireless carriers have tried to bootstrap the jurisdictional nature of their calls based on the fact that Choctaw and MoKan have invoiced calls as intraMTA under their Wireless Termination Service Tariffs in the absence of jurisdictional information[62]. Essentially they would punish all MITG companies with wireless termination tariffs because two carriers have not insisted upon compliance with the tariff. It was the wireless carriers' obligation to provide the jurisdictional information. The wireless carriers are not *entitled* to a determination that *all* traffic is intraMTA. The fact remains that the wireless carriers have failed to provide these three Petitioners with *any* jurisdictional information on the calls terminated to their networks, leaving Petitioners in the position of treating the traffic as either all intraMTA or all interMTA.

Respondents' contentions that Petitioners claims are barred by their affirmative defenses are without merit. For collateral estoppel and res judicata to apply, there must have been a final judgment. "Once a final judgment is rendered on the merits, res judicata may apply." *Gardner v. Missouri State Highway Patrol Superintendent*, 901 S.W.2d 107, 119 (Mo.App. 1995). The *Alma* decision in TT-99-428 et al. issued on January 27, 2000 has been appealed, remanded, and currently pends before the Cole County Circuit Court. Remand precludes applying collateral estoppel which requires the prior adjudication to have resulted in a judgment on the merits. *Besand v. Gibbar, et al.*, 982 S.W.2d 808, 810 (Mo.App. 1998). If remand precludes finality for that adjudication, there can be no final judgment on the merits in Case No. TT-99-428 et al. Furthermore, the lack of finality in Case No. TT-99-428 et al. necessarily means the case has no stare decisis status to bar the claims asserted by Petitioners. Petitioners have addressed in more

---

[62] Cingular, p. 38

depth the affirmative defenses raised by Respondents in the *MITG's Reply to Motions to Dismiss, Answers, and Affirmative Defenses Filed by Respondents* filed in this case on February 15, 2002.

Petitioners have stated a cause of action.[63] At the time Petitioners filed this action, Respondents had originated traffic, terminated it onto Petitioners' networks, and failed to compensate Petitioners for their services and the use of their networks. Petitioners stated in their Petitions that the uncompensated traffic was continuing in nature. Petitioners also pointed out that the uncompensated traffic as reported was as of a point in time.[64] Since filing this complaint, some parties have settled, others have paid for some of the traffic terminated, and others have still not paid for any of the traffic terminated. Staff is correct in pointing out that the Commission lacks authority to order payment; any collection action will have to be brought in the Circuit Court. However, before bringing such an action, Petitioners request this Commission to clarify the compensation obligations of Respondents as part of the relief Petitioners have requested.

[63] The FCC has recognized Petitioners are permitted to charge for their services based on Commission Rule, Tariff, or Contract. Respondents have failed to abide by the Commission's Orders and their own agreements to negotiate interconnection agreements with third-party carriers (see Exs. 25-38), they continue to send traffic to Petitioners' networks without complying with this prerequisite as required for approval of this transiting scheme (thus there are no contracts in place), they have failed to compensate Petitioners for their termination services pursuant to Petitioners access tariffs (the only other compensation vehicle available (Exs. 1-10)), they have failed to comply with Petitioners' wireless termination service tariffs (Ex. 11, Schedule 1, section E), they have failed to conduct any of the jurisdictional studies as required by the Commission in its approval of Petitioners' wireless termination service tariffs (Tr. p. 499 l. 6-12; Tr. p. 590 l. 14-19), and they failed to compensate Petitioners pursuant to their wireless termination service tariffs for over a year and a half after the tariffs had gone into effect.

ANDERECK, EVANS, MILNE,
PEACE & JOHNSON, L.L.C.

By Lisa Chase
Craig S. Johnson MO Bar No. 28179
Lisa Cole Chase MO Bar No. 51502
The Col. Darwin Marmaduke House
700 East Capitol
Post Office Box 1438
Jefferson City, Missouri 65102
Telephone: (573) 634-3422
Facsimile: (573) 634-7822
Email: CJohnson@AEMPB.com

ATTORNEYS FOR MITG

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, via U.S. Mail, postage prepaid, this 22nd day of November, 2002, to all attorneys of record in this proceeding.

Lisa Chase
Lisa Cole Chase MO. Bar No. 51502

[64] Ex. 1, p. 4 l. 19- p. 5 l. 2, Schedules 1 & 2; Ex. 2, p. 3 l. 7-14, Schedules 1-3; Tr. p. 299 l. 16 – p. 300 l. 4; Tr. p. 555 l. 24 – p.556 l. 14; Tr. p. 558 l. 8-10.