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December 11, 2002

Secretary
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P. O. Box 360
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FILED³

DEC 11 2002

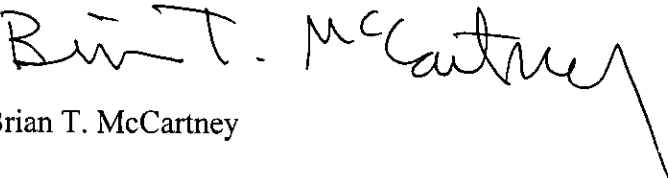
Re: Case No. TC-2002-1077

Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing please find an original and eight copies of 1) Initial Complainants' Brief of the Small Missouri Local Exchange Companies and 2) Complainants' Proposed Findings of Fact and Conclusions of Law. Please see that these filings are brought to the attention of the appropriate Commission personnel. If there are any questions, please give me a call. I thank you in advance for your attention to and cooperation in this matter.

Sincerely,



Brian T. McCartney

BTM/da
Enclosures
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

BPS Telephone Company,)
Cass County Telephone Company,)
Citizens Telephone Company of Higginsville,)
Missouri,)
Craw-Kan Telephone Cooperative, Inc.,)
Fidelity Communication Services I, Inc.,)
Fidelity Telephone Company,)
Grand River Mutual Telephone Corporation,)
Green Hills Telephone Corporation,)
Holway Telephone Company,)
Iamo Telephone Company,)
Kingdom Telephone Company,)
K.L.M. Telephone Company,)
Lathrop Telephone Company, and)
Mark Twain Rural Telephone Company,)

Complainants,)

vs.)

VoiceStream Wireless Corporation,)
Western Wireless Corporation and)
Southwestern Bell Telephone Company.)

Respondents.)

FILED³
DEC 11 2002
Missouri Public
Service Commission

Case No. TC-2002-1077

**INITIAL COMPLAINANTS' BRIEF
OF THE SMALL MISSOURI LOCAL EXCHANGE COMPANIES**

INTRODUCTION

In Case Nos. TT-2001-139, TT-2001-646, and TT-2002-127, the Missouri Public Service Commission ("the Commission") approved wireless termination service tariffs for a number of Missouri's small local exchange companies (LECs). These tariffs established the rates, terms, and conditions for wireless traffic that is delivered to the small companies' exchanges over an indirect connection and in the absence of a

compensation or interconnection agreement. Once the wireless tariffs became effective, the small companies began billing the wireless carriers for terminating intraMTA wireless traffic (i.e. within a Major Trading Area) at their respective wireless termination tariff rates. Complainants' intrastate access tariffs apply to interMTA traffic (i.e. between two MTAs) that is delivered in the absence of an agreement.

There is no dispute as to the facts in this case. VoiceStream and Western Wireless originate wireless traffic that is delivered by Southwestern Bell Telephone Company (SWBT) to the small companies. Neither VoiceStream nor Western Wireless have Commission-approved agreements with the small companies that address the delivery of or compensation for this traffic. Therefore, the small companies have billed VoiceStream and Western Wireless for this wireless traffic pursuant to Commission-approved tariffs (the "wireless tariffs"). Although it is undisputed that VoiceStream and Western Wireless are sending wireless-originated traffic to the small companies, VoiceStream and Western Wireless have refused to pay the bills for this traffic.

The dispute in this case is purely a legal one. The only defense for nonpayment offered by VoiceStream and Western Wireless is that the tariffs are unlawful, but VoiceStream and Western Wireless did not bother to appeal the Commission *Orders* approving the tariffs or seek to stay the tariffs. VoiceStream and Western Wireless have not followed Missouri's appeal procedure, and they cannot resort to "self-help" in this case. Under Missouri law, Complainants' Commission-approved tariffs are in force, and they are deemed *prima facie* lawful and reasonable until proven otherwise.

Section 386.270 RSMo 2000.

STATEMENT OF FACTS

The Parties

The Complainants in this case are BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communication Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, K.L.M. Telephone Company, Lathrop Telephone Company and Mark Twain Rural Telephone Company (hereinafter collectively "Complainants"). Complainants are "telecommunications companies" providing "basic local telecommunications services" and "exchange access services," as those terms are defined by §386.020,¹ to customers located in their service areas pursuant to certificates of public convenience and necessity issued by the Commission.

Respondents VoiceStream Wireless Corporation (VoiceStream) and Western Wireless Corporation (Western Wireless) are providers of commercial mobile radio service (CMRS) within the state of Missouri.

Respondent Southwestern Bell Telephone Company (SWBT) is a telecommunications company providing "basic local telecommunications services," "basic interexchange telecommunications services" and "exchange access services," as those terms are defined in §386.020, within the state of Missouri.

¹ Unless otherwise indicated, all references to Missouri statutes are to RSMo 2000.

The Nature of the Dispute

Complainants provide telecommunications service in rural areas of Missouri. As a part of this service, Complainants provide the facilities and services necessary to complete wireless-originated calls to customers in Missouri's rural exchanges. VoiceStream and Western Wireless originate wireless telecommunications traffic from their end-user customers ("wireless-originated traffic") which is terminated to customers in Complainants' service areas via the "transit" services or facilities of SWBT. SWBT provides these "transit" services or facilities pursuant to interconnection agreements entered into between SWBT and VoiceStream in Case No. TO-2001-489, and between SWBT and Western Wireless in Case No. TO-98-12.

The wireless-originated traffic is terminated to Complainants over common trunk groups owned by SWBT. SWBT commingles this wireless-originated traffic with other wireline interexchange (i.e. toll) traffic destined for termination to Complainants' end-user customers. As a result, Complainants are not able to distinguish the wireless-originated traffic from other interexchange traffic. Complainants are unable to unilaterally block or otherwise prevent the wireless-originated traffic from terminating to Complainants' facilities, even in those circumstances where the wireless carriers refuse to pay for the terminating service which Complainants provide.²

² Beier/FCS Direct p. 3 (lines 26-27), p. 4 (1-2); Beier/FTC Direct p. 3 (22-25); Boyd Direct p. 3 (21-24); Copsey/Holway Direct p.3 (21-24); Copsey/KLM Direct p. 3 (22-25); Cornelius Direct p. 6 (15-18); Cotton/Grand River Direct p. 4 (13-16); Cotton/Lathrop Direct p. 4 (9-12); Faircloth Direct p. 3 (25-27); Matzdorff Direct p. 3 (24-26); Reeter Direct p. 3 (16-19); Rohde Direct p. 5 (7-9); Wilbert Direct p. 3 (4-6); Winberry Direct p. 3 (23-26).

After the wireless-originated traffic is delivered by SWBT to Complainants' facilities, it is transported over Complainants' wire/cable facilities to Complainants' central offices where the traffic is switched and directed to individual customers. In addition to owning the switches, Complainants also own the distribution facilities that carry the calls throughout their exchanges before the calls are ultimately terminated over the cable pair or loop which serves each individual customer's residence or place of business.³

The wireless traffic at issue in this Complaint originates and terminates either within the same Major Trading Area (i.e., intraMTA traffic) or between various MTAs (i.e. interMTA traffic). Complainants have Commission-approved tariffs on file at the Commission's offices which apply to both types of traffic.

IntraMTA Traffic

In Case Nos. TT-2001-139, TT-2001-646, and TT-2002-127, the Commission approved Complainants' Wireless Termination Service Tariffs which contain the rates, terms, and conditions for the termination of intraMTA wireless-originated traffic delivered to Complainants via the transit services or facilities of an intermediate LEC such as SWBT. These tariffs apply unless and until they are superceded by a Commission-approved compensation or interconnection agreement.

³ Beier/FCS Direct p. 4 (lines 4-9); Beier/FTC Direct p. 4 (1-5); Boyd Direct p. 3 (26-27), p. 4 (1-4); Copsey/Holway Direct p.3 (26-27), p. 4 (1-4); Copsey/KLM Direct p. 4 (1-5); Cornelius Direct p. 6 (20-22), p. 7 (1-3); Cotton/Grand River Direct p. 4 (18-22); Cotton/Lathrop Direct p. 4 (14-19); Faircloth Direct p. 4 (3-8); Matzdorff Direct p. 4 (1-5); Reeter Direct p. 3 (21-26); Rohde Direct p. 5 (11-16); Wilbert Direct p. 3 (8-12); Winberry Direct p. 4 (1-6).

InterMTA Traffic

Complainants' intrastate access tariffs on file with and approved by the Commission contain the rates, terms, and conditions for the termination of interMTA wireless-originated traffic delivered to Complainants via the access tandem facilities of an intermediate LEC, such as SWBT.

Undisputed Facts

There is no dispute as to the facts in this case. VoiceStream and Western Wireless filed no testimony, so the only questions to be resolved are questions of law.

ARGUMENT

Complainants' Initial Brief will follow the proposed list of issues filed by Staff on behalf of the parties.

1. **Since February 19, 2001 (for all Complainants excluding Grand River Mutual and Fidelity Communication Services), since September 20, 2001 (for Grand River), and since November 23, 2001 (for Fidelity Communication), has VoiceStream terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SWBT?**
2. **Since February 19, 2001 (for all Complainants excluding Grand River Mutual and Fidelity Communication Services), since September 20, 2001 (for Grand River), and since November 23, 2001 (for Fidelity Communication), has Western Wireless terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SWBT?**

It is undisputed that VoiceStream and Western Wireless are sending wireless-originated calls to Complainant's Missouri exchanges.⁴ Each month, Complainants receive from SWBT cellular transiting usage summary reports (CTUSRs) which identify, by carrier, the wireless carriers who have transited wireless originated traffic over SWBT's facilities for termination to Complainants' exchanges.⁵ The CTUSRs show that VoiceStream and Western Wireless have terminated traffic to Complainants, and

⁴ Beier/FCS Direct p. 5 (lines 3-5); Beier/FTC Direct p. 4 (26-27), p. 5 (1); Boyd Direct p. 4 (25-27); Copsey/Holway Direct p. 4 (25-27), p. 5 (1-4); Copsey/KLM Direct p. 4 (26-27), p. 5 (1-2); Cornelius Direct p. 8 (2-5); Cotton/Grand River Direct p. 5 (22), p. 6 (1-2); Cotton/Lathrop Direct p. 5 (18-20); Faircloth Direct p. 5 (2-5); Matzdorff Direct p. 4 (23-24); Reeter Direct p. 4 (20-23); Rohde Direct p. 6 (13-16); Wilbert Direct p. 3 (27), p. 4 (1); Winberry Direct p. 5 (2-4).

⁵ The CTUSRs do not distinguish between interMTA and intraMTA wireless-originated traffic. The CTUSRs simply show, in total, for each month, the amount of traffic a particular CMRS provider has terminated to Complainants' exchanges.

specific amounts of VoiceStream and Western Wireless traffic are shown on the copies of CTUSRs which are attached to Complainants' Direct Testimony.

As of May 13, 2002 (the date the Complaint was filed) VoiceStream's total amount owing and outstanding was \$159,726.21, representing 2,568,015 minutes of use (MOU).⁶ Western Wireless' total amount owing and outstanding was \$36,384.87, representing 622,530 MOU.⁷ Neither of these amounts include interest, late fees, or attorneys' fees as permitted by Complainants' tariffs. The amounts owed to Complainants are growing at a fast pace. As of August 26, 2002 (the date Complainants' Direct Testimony was filed) the CTUSRs show that VoiceStream has terminated 4,149,944 MOU to Complainants, or an additional 1,581,929 MOU since the Complaint was filed.⁸ Western Wireless has terminated 2,130,690 MOU to Complainants, or an additional 1,508,160 MOU since the Complaint was filed. These amounts are unchallenged, and Respondents VoiceStream and Western Wireless concede that "[t]hey do not have the records to dispute the traffic data contained in the Complainants' direct testimony."⁹

⁶ See Complaint, Exhibit 15(HC).

⁷ See Complaint, Exhibit 16(HC).

⁸ Beier/FCS Direct, Schedule 1(HC); Beier/FTC Direct, Schedule 1(HC); Boyd Direct, Schedule 1(HC); Copsey/Holway Direct, Schedule 1(HC); Copsey/KLM Direct, Schedule 1(HC); Cornelius Direct, Schedule 1(HC); Cotton/Grand River Direct, Schedule 1(HC); Cotton/Lathrop Direct, Schedule 1(HC); Faircloth Direct, Schedule 1(HC); Matzdorff Direct, Schedule 1(HC); Reeter Direct, Schedule 1(HC); Rohde Direct, Schedule 1(HC); Wilbert Direct, Schedule 1(HC); Winberry Direct, Schedule 1(HC).

⁹ *VoiceStream and Western Wireless' Motion to Cancel Hearing and for Commission to Decide Complaint on the Pleadings*, filed Sept. 23, 2002.

The amounts owed by VoiceStream and Western Wireless are ongoing, and they have increased substantially since the Complaint was filed last spring. Complainants have continued to send bills for the traffic, but despite Complainants' efforts to collect these amounts, the bills remain unpaid.

3. **Has VoiceStream terminated such traffic in the absence of an agreement with Complainants regarding compensation?**
4. **Has Western Wireless terminated such traffic in the absence of an agreement with Complainants regarding compensation?**

Yes. Neither VoiceStream nor Western Wireless have compensation agreements with Complainants.¹⁰

5. **Has VoiceStream violated the terms of its Commission-approved interconnection agreement with SWBT by sending traffic to SWBT for termination in Complainant's exchanges without first obtaining a compensation or interconnection agreement?**
6. **Has Western Wireless violated the terms of its Commission-approved interconnection agreement with SWBT by sending traffic to SWBT for termination in Complainant's exchanges without first obtaining a compensation or interconnection agreement?**

¹⁰ Beier/FCS Direct p. 4 (lines 18-20); Beier/FTC Direct p. 4 (14-16); Boyd Direct p. 4 (13-15); Copsey/Holway Direct p. 4 (13-15); Copsey/KLM Direct p. 4 (14-16); Cornelius Direct p. 7 (12-14); Cotton/Grand River Direct p. 5 (10-12); Cotton/Lathrop Direct p. 5 (6-8); Faircloth Direct p. 4 (17-19); Matzdorff Direct p. 4 (12-14); Reeter Direct p. 4 (8-10); Rohde Direct p. 6 (1-3); Winberry Direct p. 4 (16-18);

Q: Does VoiceStream or Western have an agreement with your Company to terminate or otherwise exchange intraMTA traffic?

A: No.

By sending their wireless traffic to Complainants' exchanges, VoiceStream and Western Wireless have violated the terms of their interconnection agreements with SWBT. The Commission-approved interconnection agreement between SWBT and VoiceStream contains the following language regarding Traffic to Third Party Providers, such as Complainants:

Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider, as specified in Appendix PRICING. **The Parties agree to enter into their own agreements with Third Party Providers.** In the event that Carrier sends traffic through SWBT's network to a Third Party Provider with whom Carrier does not have a traffic interchange agreement, then Carrier agrees to indemnify SWBT for any termination charges rendered by a Third Party Provider for such traffic.

Interconnection Agreement between SWBT and VoiceStream Wireless Inc., §3.1.3, MoPSC Case No. TO-2001-489 (emphasis added).

The Commission-approved interconnection agreement between SWBT and Western Wireless contains the following language regarding Traffic to Third Party Providers, such as Complainants:

Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider, as specified in Appendix PRICING. **The Parties agree to enter into their own agreements with Third Party Providers.** In the event that Carrier sends traffic through SWBT's network to a Third Party Provider with whom Carrier does not have a traffic interchange agreement, then Carrier agrees to indemnify SWBT for any termination charges rendered by a Third Party Provider for such traffic.

Interconnection Agreement between SWBT and Western Wireless, §3.1.3, MoPSC Case No. TO-98-12 (emphasis added).

Respondents VoiceStream and Western Wireless have violated the terms of their Commission-approved interconnection agreements with SWBT insofar as Respondents VoiceStream and Western Wireless have sent traffic to SWBT for termination in Complainants' exchanges without first obtaining a compensation or interconnection agreement for the termination of such traffic. The terms of the interconnection agreements state that SWBT, VoiceStream, and Western Wireless will "enter into their own agreements with Third Party Providers," yet none of the Respondents have entered into agreements with Complainants.¹¹

The Telecommunications Act of 1996 provides that interconnection agreements, reached either by negotiation or arbitration, must be submitted to state commissions for approval, and state commissions may reject negotiated agreements that discriminate against non-parties to the agreement. 47 U.S.C. § 252(e). "This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement." *Southwestern Bell Tel. Co. v. Connect Communs. Corp.*, 225 F.3d 942 (8th Cir. 2000). Therefore, this Commission has the authority to enforce the terms of SWBT's agreements and ensure that the agreements do not discriminate or harm non-parties to those agreements. The Commission should enforce the terms of these agreements and ensure that Complainants are compensated for the facilities and services they provide.

¹¹ To the extent that Complainants' tariffs apply in the absence of such agreements, Respondents have failed (or consciously refused) to abide by the rules, terms, and conditions of such tariffs.

7. **Does VoiceStream owe compensation to Complainants for such traffic terminated during this time? What are the legal and factual bases for such compensation?**
8. **Does Western Wireless owe compensation to Complainants for such traffic terminated during this time? What are the legal and factual bases for such compensation?**

VoiceStream and Western Wireless owe compensation for the use of Complainants' facilities and services in completing wireless calls. The basis for this compensation is Complainants' lawfully-approved tariffs which are on file with the Commission. Complainants should be compensated for intraMTA traffic based upon the rates contained in their wireless termination service tariffs. Complainants should be compensated for interMTA traffic based upon the rates contained in their access tariffs.¹² Complainants are also entitled to interest, late fees, and attorneys' fees as permitted by those tariffs. By violating Complainants' Commission-approved tariffs, the Respondents in this case have breached Missouri law, the filed tariff doctrine, and recent federal decisions.

¹² Respondents have provided no jurisdictional data that would allow Complainants to distinguish intraMTA traffic from interMTA traffic. Therefore, the majority of Complainants have assumed that all traffic is intraMTA and applied their wireless termination tariff rates. Boyd Direct p. 5 (lines 17-21); Copsey/Holway Direct p. 5 (15-19); Copsey/KLM Direct p. 5 (15-19); Cornelius Direct p. 8 (20-22), p. 9 (1-2); Cotton/Grand River Direct p. 6 (15-18); Cotton/Lathrop Direct p. 6 (11-15); Faircloth Direct p. 5 (18-22); Matzdorff Direct p. 5 (9-12); Reeter Direct p. 5 (9-13); Rohde Direct p. 7 (8-12); Wilbert Direct p. 4 (13-16); Winberry Direct p. 5 (19-23)). Fidelity Communications and Fidelity Telephone assumed that 95% of the traffic is intraMTA and applied their wireless termination tariff rates; intrastate access tariff rates were applied to the other 5%. (Beier/FCS Direct p. 5 (lines 19-25); Beier/FTC Direct p. 5 (19-25)).

A. Missouri law

Under § 386.270, the Commission's *Orders* are *prima facie* lawful and reasonable:

All rates, tolls, charges, schedules and joint rates fixed by the Commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie* lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

(emphasis added) Thus, Complainants' Commission-approved tariffs are lawful and in effect until a court finds otherwise.

B. The filed tariff doctrine

The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of published tariffs. *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). "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 customers. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002).

In *Laclede Gas v. Gershman*, 539 S.W.2d 574, 577 (Mo. App. E.D. 1976), the court observed that "lawful tariffs are published and are available to the public." The court reasoned, "The shipper must be held to notice of the lawful rate in effect at the

time of shipment. Here, there is no misrepresentation of a lawful rate by the gas company, or a billing based upon an unlawful rate.” *Id.* Accordingly, the court explained that the utility must be compensated for the full amount lawfully due to it under the law and the rates fixed by the Commission. *Id.*

In the instant case, Complainants’ tariffs are the only mechanisms in place that apply to wireless-originated traffic transiting SWBT’s facilities and delivered to Complainants. These tariffs set forth the rates, terms, and conditions for use of the Complainants’ facilities and services. Therefore, Complainants must be compensated for the full amount lawfully due under their Commission-approved tariffs.

C. The Three Rivers Telephone case

Small company tariffs may be applied in the absence of an agreement under the Act. In *Three Rivers Telephone Cooperative*, the Ninth Circuit Court of Appeals recently 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.¹³

In this case, Complainants’ tariffs provide the exclusive source of the terms, conditions, and rates for the completion of calls originated by VoiceStream and Western Wireless.

¹³ *Three Rivers Telephone Cooperative v. U.S. West Communications*, (9th Cir. 2002), No. 01-35065, *Memorandum Opinion*, filed August 27, 2002 (emphasis added) (See Attachment A).

Therefore, until the Commission approves a negotiated (or arbitrated) compensation arrangement for this wireless-originated traffic, the Commission must interpret and apply the small companies' wireless tariffs.

- 9. Has SWBT violated the terms of its Commission-approved interconnection agreements with VoiceStream and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of a compensation or interconnection agreement?**
- 10. Is SWBT secondarily liable for Complainants' wireless tariff charges associated with the traffic VoiceStream and Western Wireless terminated to Complainants?**

Respondent SWBT has violated the terms of its Commission-approved interconnection agreements with VoiceStream and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of an agreement. As explained above in Points 5 and 6, Respondents agreed to "enter into their own agreements with Third Party Providers," but SWBT, VoiceStream, and Western Wireless have not done so. Instead, they have delivered wireless-originated traffic to Complainants' exchanges and failed to pay for it.¹⁴

Pursuant to Commission order and the terms of SWBT's Commission-approved interconnection agreements with VoiceStream and Western Wireless, Respondent SWBT is secondarily liable to Complainants for this traffic. Therefore, if Respondents

¹⁴ Beier/FCS Direct p. 5 (lines 15-17, 26-27), p. 6 (1-3); Beier/FTC Direct p. 5 (13-17, 26-27), p. 6 (1-3); Boyd Direct p. 5 (10-15, 22-26); Copsey/Holway Direct p. 5 (10-13, 20-25); Copsey/KLM Direct p. 5 (11-13, 20-25); Cornelius Direct p. 8 (14-18), p. 9 (3-8); Cotton/Grand River Direct p. 6 (11-13, 19-22); Cotton/Lathrop Direct p. 6 (7-9, 16-21); Faircloth Direct p. 5 (14-16, 23-27); Matzdorff Direct p. 5 (6-7, 13-16); Reeter Direct p. 5 (5-7, 14-19); Rohde Direct p. 7 (1-6, 13-18); Wilbert Direct p. 4 (10-11, 17-20); Winberry Direct p. 5 (14-17, 24-27), p. 6 (1-2).

VoiceStream and Western Wireless do not pay for their wireless-originated traffic, then SWBT must pay Complainants for all wireless-originated traffic terminated to Complainants by Respondents VoiceStream and Western Wireless, including interest, late fees, and attorneys' fees where appropriate.

The terms of SWBT's interconnection agreements and the language of the Commission *Orders* approving those agreements both indicate that SWBT is secondarily liable for the uncompensated wireless traffic that it delivers to Complainants' exchanges. Nearly five years ago, the Commission explained SWBT's responsibilities in Case No. TT-97-524:

The wireless carriers are primarily liable to the third-party LECs for reciprocal compensation for the termination of wireless-originating traffic in the exchanges of third-party LECs, and third-party LECs will be required to bill the wireless carriers and make good-faith efforts to collect. **In the event a wireless carrier refuses to pay a third-party LEC for such termination and the wireless carrier does not have a reciprocal compensation agreement with the third-party LEC, SWBT will remain secondarily liable to the third-party LEC for the termination of this traffic, but will be entitled to indemnification from the wireless carrier upon payment of the loss.**¹⁵

The Commission also explained its rationale for imposing secondary liability upon SWBT:

¹⁵ *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff, P.S.C. Mo.- No. 40, Case No. TT-97-524, 7 Mo. P.S.C. 3d 38, issued December 23, 1997 (emphasis added).* Although this case addressed SWBT's wireless tariff rather than specific interconnection agreements, the Commission's reasoning should be analogous.

[I]f SWBT knows it will be secondarily liable to the third-party LECs, it will have an incentive to enforce the provisions of . . . its interconnection agreements, which require wireless carriers to enter into agreements with third-party LECs.¹⁶

In Case No. TO-98-12, the Commission specifically addressed the question of wireless-originated traffic that is delivered by Western Wireless to Complainants over SWBT's facilities. The Commission observed:

With respect to third-party providers, Western and SWBT agree to compensate each other for traffic that transits their respective systems to any third-party provider. The parties also agree to enter into their own agreements with third-party providers. In the event that Western sends traffic through SWBT's network to a third-party provider with whom Western does not have an interconnection agreement, Western will indemnify SWBT for any termination charges rendered by a third-party provider for such traffic.

In the Matter of the Joint Application of SWBT and Western Wireless for Approval of an Interconnection Agreement, Case No. TO-98-12, *Order Approving Interconnection Agreement*, issued Oct. 1997 (emphasis added).

Clearly, the Commission intended that SWBT enforce its interconnection agreements so that third-party LECs are compensated. Unfortunately, SWBT has not followed the Commission's *Order* or enforced the provisions of its interconnection agreements. SWBT should not be allowed to ignore Commission orders and dump uncompensated traffic onto Complainants' networks.

¹⁶ *Id.* (emphasis added).

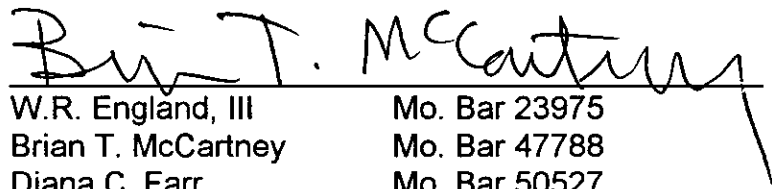
If SWBT continues to transit this wireless-originated traffic for termination to Complainants, and to the extent Respondents VoiceStream and Western Wireless refuse or fail to pay for same, then SWBT should be directed to pay Complainants for the traffic. Alternatively, if Complainants are not compensated by VoiceStream and Western Wireless (or by SWBT on behalf of VoiceStream and Western Wireless) for the wireless-originated traffic that is terminated in the future to Complainants by VoiceStream and Western Wireless, then SWBT should be directed to block VoiceStream's and Western Wireless' wireless-originated traffic in accordance with Complainants' wireless tariffs.

CONCLUSION

Respondents VoiceStream and Western Wireless have violated the terms of their Commission-approved interconnection agreements with SWBT by sending traffic to SWBT for termination in Complainants' exchanges without first obtaining a compensation or interconnection agreement for the termination of such traffic. Complainants should be compensated for this wireless-originated traffic based upon the rates contained in their wireless termination service tariffs for intraMTA traffic or their access tariffs for interMTA traffic, including interest, late fees, and attorneys' fees as permitted by those tariffs.

Respondent SWBT has violated the terms of Commission orders and the Commission-approved interconnection agreements by allowing VoiceStream and Western Wireless to transit wireless-originated traffic to Complainants in the absence of an agreement. Therefore, SWBT is secondarily liable in accordance with its Commission-approved interconnection agreements with VoiceStream and Western Wireless, and SWBT must pay Complainants for all wireless-originated traffic terminated to Complainants by Respondents VoiceStream and Western Wireless.

Respectfully submitted,



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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed or hand-delivered, this 11th day of December, 2002 to:

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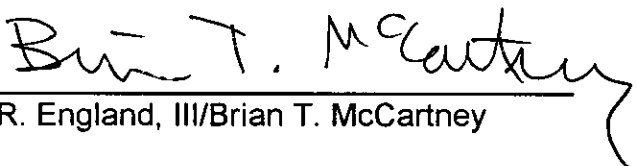
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3 RIVERS TELEPHONE COOPERATIVE INC.; RANGE TELEPHONE COOPERATIVE INC.; BLACKFOOT TELEPHONE COOPERATIVE INC.; NORTHERN TELEPHONE COOPERATIVE INC.; INTERBEL TELEPHONE COOPERATIVE, INC.; CLARK FORK TELECOMMUNICATIONS, INC.; LINCOLN TELEPHONE COMPANY; RONAN TELEPHONE COMPANY; HOT SPRINGS TELEPHONE COMPANY, Plaintiffs-counter-defendants - Appellants, v. U.S. WEST COMMUNICATIONS, INC., Defendant-counter-claimant - Appellee.

No. 01-35065

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2002 U.S. App. LEXIS 18196

July 8, 2002, Argued and Submitted, San Francisco, California

August 27, 2002, Filed

NOTICE:

[*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:

Appeal from the United States District Court for the District of Montana. D.C. No. CV-99-00080-RFC. Richard F. Cebull, Magistrate, Presiding.

3 Rivers Tel. Coop., Inc. v. U.S. West Communs., Inc., 125 F. Supp. 2d 417, 2000 U.S. Dist. LEXIS 20069 (D. Mont. 2000).

DISPOSITION:

REVERSED AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, independent telephone companies (independents), alleged that defendant telephone company (company) breached their filed tariffs by refusing to pay terminating access charges for all company-transported interexchange calls as measured by the independents. The United States District Court for the District of Montana granted summary judgment for the company without interpreting and applying the independents' tariffs.

OVERVIEW: The district court found that federal law as interpreted by the Federal Communications Commission, did not obligate the company to pay terminating charges for traffic for which it was not the originating carrier. The district court also found that the filed tariff doctrine did not apply to the dispute. The appellate court disagreed, and found that under the filed tariff doctrine, also known as the filed rate doctrine, a tariff filed with and approved by a regulating agency formed the "exclusive source" of the terms and conditions governing the provision of service of a common carrier to its customers. A filed tariff obtained the force of law binding the utility and its customers to its terms and was able to be interpreted and enforced by a court in a breach of tariff action. Because the independents' tariffs formed the exclusive source of the obligations between the independents and their customers, the appellate court found that the district court erred in analyzing the parties' obligations under the Federal Communications Commission interpretations of the Telecommunications Act of 1996, 47 U.S.C.S. § § 251-52, without interpreting the tariffs themselves.

OUTCOME: The appellate court reversed and remanded for further proceedings on the independents' claims.

CORE CONCEPTS

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine

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 common carrier to its customers. A filed tariff obtains the force of law binding the utility and its customers to its terms and may be interpreted and enforced by a court in a breach of tariff action.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine

The filed tariff doctrine applies to tariffs filed with both state and federal agencies.

Antitrust & Trade Law > Exemptions & Immunities > Filed Rate Doctrine

If the defendant in a breach of tariff action raises the "sufficient possibility" that a filed tariff is unjust or unreasonable, the court may stay the proceedings until the agency in which the tariff was filed resolves the claim.

COUNSEL:

For 3 RIVERS TELEPHONE COOPERATIVE INC., RANGE TELEPHONE COOPERATIVE INC., BLACKFOOT TELEPHONE COOPERATIVE INC., NORTHERN TELEPHONE COOPERATIVE INC., INTERBEL TELEPHONE COOPERATIVE, INC., CLARK FORK TELECOMMUNICATIONS, INC., LINCOLN TELEPHONE COMPANY, RONAN TELEPHONE COMPANY, HOT SPRINGS TELEPHONE COMPANY, Plaintiffs-counter-defendants - Appellants: William A. Squires, Esq., SQUIRES AND SHONTZ, PLLC, Missoula, MT.

For 3 RIVERS TELEPHONE COOPERATIVE INC., RANGE TELEPHONE COOPERATIVE INC., BLACKFOOT TELEPHONE COOPERATIVE INC., NORTHERN TELEPHONE COOPERATIVE INC., INTERBEL TELEPHONE COOPERATIVE, INC., CLARK FORK TELECOMMUNICATIONS, INC., LINCOLN TELEPHONE COMPANY, RONAN TELEPHONE COMPANY, HOT SPRINGS TELEPHONE COMPANY, Plaintiffs-counter-defendants - Appellants: James H. Lister, MCGUIRE WOODS LLP, Washington, DC.

For U.S. WEST COMMUNICATIONS, [*2] INC., Defendant-counter-claimant - Appellee: John Alke, Esq., John L. Alke, Esq., HUGHES, KELLNER, SULLIVAN & ALKE, Helena, MT.

JUDGES:

BEFORE: SCHROEDER, Chief Judge, FISHER and PAEZ; Circuit Judges.

OPINION:**MEMORANDUM ***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

BEFORE: SCHROEDER, Chief Judge, FISHER and PAEZ, Circuit Judges.

The plaintiffs ("Independents") brought this action for breach of tariff and related state law causes of action against the defendant U.S. West Communications Inc., now known as Qwest. The Independents allege that Qwest breached their filed tariffs by refusing to pay terminating access charges for all Qwest-transported interexchange calls as measured by the Independents.

The district court granted summary judgment for Qwest without interpreting and applying the Independents' tariffs, finding that federal law as interpreted by the Federal Communications Commission ("FCC") [*3] does not obligate Qwest to pay terminating charges for traffic for which it is not the originating carrier. The district court concluded that the filed tariff doctrine, also known as the filed rate doctrine, had no application because "this is not a dispute about rates" and "Plaintiffs offer no controlling legal authority - not one case -- that supports this novel proposition that the filed rate doctrine forms the basis for a breach of contract action." We reverse and remand for further proceedings on the Independents' claims.

The district court erred in failing to interpret the tariffs at issue in this case. 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 common carrier to its customers. *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002) (citation and internal quotation marks omitted); see also *Am. Tel. & Telegraph Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222, 227, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998); *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000). [*4] A filed tariff obtains the force of law binding the utility and its customers to its terms and may be interpreted and enforced by a court in a breach of tariff action such as this one. *Brown*, 277 F.3d at 1171-72. n1 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. To interpret the tariffs in this case may also require further development of the record on technology and practices in the telecommunications industry, particularly as it relates to the transmission of calls in Montana. On this record, we therefore reverse the decision of the district court and remand for further proceedings on the interpretation and application of the Independents' tariffs. n2

n1 The filed tariff doctrine applies to tariffs filed with both state and federal agencies. *See Knevelbaard Dairies v. Kraft Foods, Inc.* 232 F.3d 979, 992 (9th Cir.2000); *Cost Mgmt Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 943 n.7 (9th Cir. 1996). [*5]

n2 We note that, given the complexity of the issues raised in this case, the district court may deem it necessary to stay proceedings so that the parties may commence declaratory proceedings before the Montana Public Services Commission ("PSC"). In earlier proceedings, the PSC found that it did not have jurisdiction over a collection

action brought by the Independents against Qwest because the PSC does not have judicial powers and may not entertain actions brought by a utility against its customers. *See* Mont. Code Ann. § 69-3-103. It does, however, appear to be within the PSC's authority and expertise to issue a declaratory ruling with regard to (1) whether the calls for which the Independents seek payment are covered by the Independents' tariffs, and (2) whether a tariff, interpreted to require payment for such calls, is just and reasonable in light of the FCC's interpretation of federal law. *See* Mont. Code Ann. § § 69-3-201, 69-3-305; 69-3-321, 69-3-330; *cf.* Mont. Admin. R. § 38.2.101 (describing process for requesting declaratory ruling); *Milne Truck Lines v. Makita U.S.A., Inc.*, 970 F.2d 564, 569, 571 (9th Cir.1992) (holding that if the defendant in a breach of tariff action raises the "sufficient possibility" that a filed tariff is unjust or unreasonable, the court may stay the proceedings until the agency in which the tariff was filed resolves the claim).

[*6]

REVERSED AND REMANDED.