

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

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NORTHEAST MISSOURI RURAL	:	CASE NO. TC-2002-57 ET AL
TELEPHONE COMPANY and MODERN	:	CONSOLIDATED
TELECOMMUNICATIONS COMPANY,	:	
	:	
Petitioners,	:	
	:	
vs.	:	
	:	
SOUTHWESTERN BELL TELEPHONE	:	
COMPANY, SOUTHWESTERN BELL	:	
WIRELESS (CINGULAR), VOICESTREAM:	:	
WIRELESS (WESTERN WIRELESS),	:	REPLY BRIEF
AERIAL COMMUNICATIONS, INC., CMT:	:	
PARTNERS (VERIZON WIRELESS),	:	
SPRINT SPECTRUM LP, UNITED STATES:	:	
CELLULAR CORP., and AMERITECH	:	
MOBILE COMMUNICATIONS, INC.,	:	
	:	
Respondents.	:	

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**FILED**

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Missouri Public  
Service Commission

Respondent United States Cellular Corporation (hereafter "USCC") submits the following Reply Brief in response to the supplemental post hearing briefs and proposed findings of fact and conclusions of law submitted by the Petitioners (hereafter, "Petitioners" or "MITG") and the Staff of the Missouri Public Service Commission (hereafter "Staff").

**I. PETITIONERS ARE NOT ENTITLED TO COMPENSATION AT THEIR ACCESS RATES FOR INTRAMTA WIRELESS TRAFFIC.**

- A. Alma, Choctaw, and Moka are not entitled to compensation at their access rates from USCC for traffic originating prior to the effective dates of their Wireless Termination Tariffs because such traffic was 100% intraMTA traffic.**

Alma, Choctaw and Moka urge this Commission to find that, for USCC wireless traffic terminating at their exchanges from February 5, 1998 through February 2001, they should be compensated at their intraLATA access tariff rates.<sup>1</sup> The Petitioners cannot be compensated as they propose, however, because the traffic at issue is 100% intraMTA traffic. *See MITG Proposed Report and Order, Findings of Fact ¶¶ 22(a), 22(c), 22(d)*. Under federal law, intraMTA traffic is local traffic and cannot be subject to access charges. *See In The Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, ¶ 1033, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499 (Released August 8, 1996, Adopted August 1, 1996) (hereafter "*First Report and Order*"). The Petitioners assert that the recent Missouri Court of Appeals Decision in *State of Missouri, ex rel. Alma Telephone Co. v. PSC of the State of Missouri*, WD 62962, 2004 Mo. App. LEXIS 1450 (Mo. Ct. App. Oct. 5, 2004) (hereafter "*Alma*"), allows them to apply access charges to intraMTA traffic. *See MITG*

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<sup>1</sup> The Petitioners assert they should be compensated by SBC, who in turn, should be indemnified by USCC. It is USCC's position that, while it does not believe any compensation is owed, any compensation should come from the originating carrier (USCC) and not the transiting carrier (SBC). USCC's position differs from Staff's position in that, while Staff also believes SBC should not be held liable for USCC's traffic, it advocates granting SBC the authority to block traffic where the CMRS provider does not pay for traffic. USCC objects to Staff's position on public policy grounds. Blocking should not be used as a means of forcing action in a commercial dispute. *See Order Continuing Temporary Injunction*, Docket No. FCU-04-42, p. 8 (1a. Utils. Bd., Sept. 14, 2004). Complaint proceedings before the Commission, such as this one, is a more reasonable alternative to blocking that would allow reasoned consideration of the disputed issues without causing unnecessary disruption of the public interest. *Id.*

*Proposed Report and Order, Conclusions of Law* ¶¶ 11, 12, 17. According to the Petitioners, the Court of Appeals decision in *Alma* allows them to apply their intraLATA access tariffs to wireless intraMTA traffic, despite the fact that the FCC and other state commissions have overwhelmingly determined that access charges are not applicable to intraMTA traffic.

The Petitioners reliance on *Alma* for support is flawed in two respects. *First*, the *Alma* decision is not yet final; the wireless carriers have filed post-decision motions seeking rehearing or transfer. As the Staff correctly noted, “until the [Alma] decision becomes final, the existing principles remain in place.” *See Second Initial Brief of Staff*, p. 17 (hereafter “*Staff PH Brief*, p. \_\_\_\_). The “existing principles” which are currently in place are the principles that intraMTA calls are local and that such calls cannot be subject to access tariffs. *See In the Matter of Alma Telephone Co.’s Filing to Revise its Access Service Tariff*, Case No. TT-99-428, “Report and Order” (Mo. PSC Jan. 27, 2000) and *In the Matter of Alma Telephone Co.’s Filing to Revise its Access Service Tariff*, Case No. TT-99-428, “Report and Order” (Mo. PSC April 9, 2002) (hereafter “*PSC’s Alma Decisions*”). This is not just the law as it currently stands in Missouri, but it is also the position of the majority of courts and commissions who have addressed this issue. The overwhelming consensus is that, under federal law and FCC rulings, access charges are never applicable to intraMTA wireless traffic. *See, e.g., Atlas Telephone Company v. Corporation Commission of Oklahoma*, 309 F. Supp.2d 1299 (W.D. Ok. 2004) (hereafter “*Atlas*”); *3 Rivers Tel. Coop. v. U.S. West Communications, Inc.*, CV 99-80-GF-CSO, Order, 2003 U.S. Dist. LEXIS 24871 (D. Mt., Aug. 22, 2003); *In re Transit Traffic*, SPU-00-7, “Proposed Decision and Order” (Iowa Utilities Board Nov. 26, 2001) and *In re*

*Transit Traffic*, SPU-00-7, "Order Affirming Proposed Decision and Order" (Iowa Utils. Bd. March 18, 2002) (hereafter "*Transit Traffic*").

*Second*, even if the *Alma* decision does become final, it will not subject the intraMTA traffic in dispute here to the Petitioner's access tariffs, as the Petitioners suggest. In *Alma*, the Court of Appeals held that access tariffs may be applied to intraMTA traffic *only if* such tariffs are expressly subordinate to the TCA's requirements. *Alma*, 2004 Mo. App. LEXIS 1450, \* 13-14. While the proposed amended tariffs at issue in *Alma* contained such language, the tariffs (with the amended language) have not yet been approved by this Commission. If this Commission does approve the amended tariffs, such tariffs would not become effective until approved by the Commission. See *State ex re. Kansas City v. Public Service Commission*, 228 S.W.2d 738, 741 (Mo. 1950). Therefore, the tariffs in effect for the duration of the traffic at issue (February 5, 1998 through February 2001) did *not* contain language that expressly made such tariffs subordinate to the TCA and cannot subject intraMTA wireless traffic to the Petitioner's access tariffs. Any decision to the contrary would violate the well-established prohibition against retroactive rate-making.

**B. Petitioners Northeast and Chariton Valley are not Entitled to Compensation from USCC for intraMTA traffic.**

USCC has entered into stipulations with Northeast and Chariton Valley concerning the appropriate proportions of intra- and interMTA traffic at issue in this proceeding. Under such stipulations, USCC and Northeast have agreed that 77.5% of the USCC traffic terminated by Northeast during the time in dispute was intraMTA traffic. USCC and Chariton Valley have agreed that 74% of the USCC traffic terminated by

Chariton Valley during the time in dispute was intraMTA traffic. No other party has objected to these stipulations.

Despite the fact that the traffic at issue is largely intraMTA traffic, Petitioners seek compensation at Northeast's and Chariton Valley's access rates for 100% of the traffic terminating at those exchanges. Such an outcome is impermissible because, as explained above, intraMTA traffic is not subject to access rates. As a result, Petitioners Northeast and Chariton Valley cannot be compensated at their access rates for 77.5% and 74% of their traffic at issue, respectively.

**C. In the Absence of An Applicable Tariff or a Negotiated Interconnection Agreement, the Appropriate Compensation Mechanism is Bill and Keep.**

Because the Petitioners cannot apply their access tariffs to intraMTA traffic in dispute, the appropriate default compensation for such traffic is bill-and-keep. *See USCC PH Brief*, p. 9-11. Bill-and-keep is an FCC-approved compensation mechanism that has been adopted in other jurisdictions as a default compensation regime in similar disputes. *See Atlas*, 309 F. Supp.2d 1299; *Transit Traffic*, SPU-00-7. In the case of the present dispute, bill-and-keep compensation is the only logical solution because there is no legally valid alternative. Moreover, the Petitioners, as LECs, have not been paying USCC for any land-to-mobile traffic they originate. *See, e.g. Tr. 419* (Biere acknowledging that Chariton Valley pays its own wireless affiliate termination rates but that it does not pay any other CMRS carrier for calls originating on Chariton Valley's network and terminating on CMRS carrier's network). In fact, then, all parties have been operating on a bill-and-keep basis. For the reasons discussed above, access charges cannot be applied as urged by the Petitioners. And for the reasons discussed below, the

Staff's proposed compensation scheme also fails to provide a valid alternative for this Commission.

The Staff, in an apparent attempt to find middle ground, has created its own proposed rates for the termination of wireless traffic. Acknowledging that access tariffs cannot be applied to intraMTA traffic, but finding that the Petitions were entitled to some form of compensation, the Staff recommended the following compensation rates for intraMTA traffic:

- Chariton       \$.0371
- Northeast     \$.0456
- Modern       \$.0464
- Alma          \$.0408
- Choctaw       \$.0306
- Moka          \$.0383

*See Staff PH Brief, p. 26.*

This Commission should reject the Staff's proposed rates for two reasons. *First*, the rates proposed by staff are contrary to the clear trend toward ever-lower transport and termination rates. The most recent regulatory ruling on this issue is from the Nebraska PSC. Nebraska, in an arbitration of an agreement between a wireless carrier and an independent LEC, set a compensation rate of **2.08-cents** per minute. *See Petition of Great Plains Communications Inc.*, Docket No. C-2872, "Interconnection Agreement Approved as Modified" (Neb. PSC, September 23, 2003). In Iowa, Western Wireless and Prairie Wave filed a negotiated agreement at **.5 cents** per minute. *See* Docket No. NIA-03-19 (Ia. Utils. Bd., June 19, 2003). Indeed, it is clear that, throughout the Midwest, where rural carriers are similarly situated to the Petitioners, carriers are negotiating rates far below those proposed by Staff. *See, e.g., In the Matter of the Interconnection and Reciprocal Compensation Agreement Between Ace Telephone Association and United*

*States Cellular*, Docket No. P-401, PT-6252/IC-04-1525 (Minn. PUC, Oct. 19, 2004) (approving interconnection agreement with termination rate of \$.016); *Application for the Approval of Agreement for Reciprocal Compensation for CMRS Local Calling between Mid-Plains, Inc. and United States Cellular Corp.*, Docket No. 5-TI-148 (Wis. PSC, Approved Feb. 14, 2001) (approving interconnection agreement with termination rate of \$.017); *Application for the Approval of an Interconnection Agreement for between Northeast Telephone Co. and United States Cellular Corp.*, Docket No. 5-TI-308 (Wis. PSC, Approved April 13, 2001) (approving interconnection agreement with termination rate of \$.007691).

**Second**, applying the newly-set rates advocated by Staff to the traffic at issue would violate the principle of Missouri public utility law that Commission orders operate prospectively and determine rates to be charged in the future. *Kansas City*, 228 S.W.2d at 741. Interestingly, the Staff defends its proposed rates for Chariton and Northeast against allegations of retroactive rate-making, but is silent on the remaining proposed rates.<sup>2</sup> See *Staff PH Brief*, p. 20; see also *Staff's Proposed Findings of Fact and Conclusions of Law* (including finding that Chariton and Northeast are entitled to rates of \$.0371 and \$.0456 respectively, but excluding any reference to pre-Wireless Termination Tariff payments to Alma, Choctaw, and Moka). Staff created the rates for Chariton and Northeast based on the sum of the switching and transport components from their tariffs that were in effect at the time the disputed traffic was exchanged. Accordingly, Staff reasons, because the rates were derived from components of access rates that were in effect at the time traffic was exchanged, the rates are not retroactive.

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<sup>2</sup> Although it is not clear, Staff appears to suggest that Petitioners Alma, Choctaw, and Moka should be compensated for wireless traffic, delivered prior to the effective date of the Wireless Termination Tariffs, at the rates established by such tariffs even though the tariffs were not in effect at that time.

The Staff's justification analysis is strained at best. One of the driving forces behind the prohibition of retroactive rate making is the principle of due process. *See State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC of the State of Missouri*, 585 S.W.2d 41, 58 (Mo. 1979). Certainly, there is no due process if carriers are required to guess wireless termination rates from a hodge-podge of existing rates contained in another carrier's access tariff (especially when such access tariff is not applicable to the intraMTA traffic in the first place). Unless the rates are specifically identified as applying to intraMTA wireless traffic, the rates cannot be applied to such traffic.

Furthermore, with respect the proposed rates for Alma, Choctaw, and Mokan, if the Staff is suggesting a retroactive application of their wireless termination tariffs to February 1998, such an application would be blatant retroactive rate-making in violation of Missouri law. It is well established in Missouri that the Commission may not retroactively apply tariff rates to traffic occurring prior to the effective date of the tariff. *See Mo. Rev. Stat. § 392.220.2; Marty v. Kansas City Power & Light Co.*, 259 S.W.793, 795 (Mo. 1923). Retrospective operation of the Petitioner's Wireless Termination Tariffs would also violate the prohibition against enactment of retrospective laws contained in Art. I, section 13, of the Missouri Constitution.

**II. ALMA, CHOCTAW AND MOKAN ARE NOT ENTITLED TO FURTHER COMPENSATION FROM USCC FOR TRAFFIC ORIGINATING AFTER THE EFFECTIVE DATES OF THE WIRELESS TERMINATION TARRIFFS.**

As USCC explained in greater detail in its "Supplemental Post-Hearing Brief," unilateral tariffs are not the appropriate compensation mechanism for traffic exchanged



with wireless carriers.<sup>3</sup> *See generally USCC PH Brief*, p. 3-5. Nevertheless, USCC recognizes that this Commission approved Wireless Termination Tariffs submitted by Petitioners Alma, Choctaw, and Mokan and that such tariffs were upheld by the Missouri Court of Appeals. *See State ex rel Sprint Spectrum, L.P. v. Missouri Public Service Commission*, 112 S.W.3d 20 (Mo. Ct. App. 2003) (hereafter "*Sprint*"). Although USCC continues to believe such tariffs violate federal law, USCC has compensated Alma, Choctaw, and Mokan for USCC traffic originated since the effective dates of the tariffs out of respect for this Commission and the Missouri Court of Appeals.

Despite the fact that they have already been compensated for such traffic, Alma, Choctaw, and Mokan seek duplicative compensation in this proceeding. The MITG makes the following claims for compensation in its Proposed Report and Order:

- Alma is entitled to compensation from USCC for 2,344 minutes of use terminated during the period after Alma's Wireless Termination Tariff became effective through December 2001. (*See* ¶ 33(a)(4), ¶ 35).
- Choctaw is entitled to compensation from USCC for 7,131 minutes of use terminated during the period after Choctaw's Wireless Termination Tariff became effective through December 2001. (*See* ¶ 33(c)(4), ¶ 39).
- Mokan is entitled to compensation from USCC for 3,398 minutes of use terminated during the period after Mokan's Wireless Termination Tariff became effective though December 2001. (*See* ¶ 33(d)(4), ¶ 41).

These numbers are based on the minutes of use contained in "Schedule 1" that was attached to the direct testimony of all MITG witnesses filed on April 10, 2002. *See, e.g., Direct Testimony of Oral Glasco and Donald Stowell*. Circumstances have since changed and the record, now over two years old, is no longer accurate. Since the initial filing of testimony and hearing in 2002, the use of wireless termination tariffs were

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<sup>3</sup> Contrary to the "Staff's Proposed Findings of Fact and Conclusions of Law," Conclusion of Law ¶ 1, USCC does dispute that the MITG companies are owed their respective wireless termination tariff rates for intraMTA minutes. *See generally USCC PH Brief*, p. 3-5.

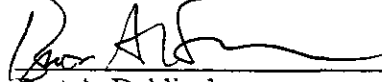
upheld by the Missouri Court of Appeals in *Sprint*. As a result, USCC has been paying Alma, Choctaw, and Mokan pursuant to their Wireless Termination Tariffs since that decision. USCC was surprised to learn through the Petitioners' recent filings that the Petitioners continued to seek compensation for traffic for which it has already been compensated. Unfortunately, USCC is placed at a disadvantage because the record on this issue has been closed for several years and it was only reopened this year to accept evidence regarding the interMTA traffic percentages. Therefore, USCC respectfully requests that the Commission re-open the record for the limited purpose of accepting evidence regarding USCC's payments to Alma, Choctaw, and Mokan under their respective Wireless Termination Tariffs, or deny the requests of these carriers for further compensation.

## CONCLUSION

WHEREFORE, for the reasons set forth in USCC's previous briefs and the reasons set forth above, USCC respectfully requests this Commission to find as follows:

1) that it is a violation of federal law to apply tariffs to wireless traffic; 2) that it is unlawful to apply access charges to intraMTA (i.e. local) traffic; 3) that those carriers who have refused to file Wireless Termination Tariffs have been compensated under a default bill-and-keep mechanism and have no right to further compensation; 4) that under Missouri law, approved rates may not be applied retroactively; and 5) that those carriers who have already been compensated under their filed Wireless Termination Tariffs have no right to further compensation.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document was mailed to the persons listed below at the addresses indicated, stamped with the appropriate postage for ordinary mail and deposited this 24th day of November, 2004, in a United States mail receptacle, in Des Moines, Iowa:

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