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October 22, 2004

Via Hand-Delivery & Federal Express

Mr. Dale Hardy Roberts
Executive Secretary
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street, Suite 100
Jefferson City, Missouri 65102-0360

RE: Case No. TC-2002-57, et al.

Dear Mr. Roberts:

Please find enclosed for filing the original Post-Hearing Brief of Respondent T-Mobile USA, Inc. and the original Proposed Findings of Fact and Conclusions of Law of Respondent T-Mobile USA, Inc. in the above-captioned case. I am sending to you under separate cover the necessary copies to complete the filing and a return envelope for your convenience in returning a filed-stamped copy of each pleading to me.

A copy of the above-named pleadings are being served on all parties of record via U.S. mail on this date.

Thank you for your attention to this matter. Please give me a call if you have any questions.

Very truly yours,

Mark P. Johnson

MPJ/rgr
Enclosures
cc: All Parties of Record (w/enclosures) (via U.S. mail)

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company and Modern Telecommunications Company,	)	
Petitioners,	)	
v.	)	**Case No. TC-2002-57**
Southwestern Bell Telephone Company, et al.,	)	
Respondents.	)	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF T-MOBILE USA, INC.

T-Mobile USA, Inc. ("T-Mobile") submits these Proposed Findings of Fact and Conclusions of Law in compliance with the September 21, 2004 Order Setting Briefing Schedule. Unless it otherwise states to the contrary, T-Mobile's Proposed Findings of Fact and Conclusions of Law apply to T-Mobile only and not to other respondents.

FINDINGS OF FACT

The Parties

1. Complainant Northeast Missouri Rural Telephone Company ("Northeast") is a telecommunications carrier as that term is defined in 47 U.S.C. § 153(44), a local exchange carrier ("LEC") as that term is defined in 47 U.S.C. § 153(26), and an incumbent LEC (or "ILEC") as that term is defined in 47 U.S.C. § 251(h).

2. Complainant Modern Telecommunications Company ("Modern") had been a wholly-owned incumbent LEC subsidiary of Northeast, but the two companies merged shortly following the Commission's approval order in TM-2002-465.

3. Complainant Chariton Valley Telephone Company ("Chariton") is a telecommunications carrier as that term is defined in 47 U.S.C. § 153(44), a LEC as that term is defined in 47 U.S.C. § 153(26), and an ILEC as that term is defined in 47 U.S.C. § 251(h).

4. Chariton, either directly or indirectly through an affiliate, provides commercial mobile radio services under the name, Chariton Valley Wireless Services. www.cvalley.net/CVWS/wireless.htm.

5. The other two ILECs that had filed complaints against T-Mobile in this consolidated proceeding – MoKan Dial, Inc. ("MoKan") and Alma Telephone Company ("Alma") – have withdrawn their complaints against T-Mobile. Hereinafter, T-Mobile uses "Complainants" to refer to those two ILECs – Northeast and Chariton – that have been unwilling to negotiate a reasonable settlement with T-Mobile.

6. VoiceStream Wireless Corporation is the former name of T-Mobile.

7. T-Mobile (then, VoiceStream) acquired Respondent Aerial Communications, Inc. in 2000 shortly after the FCC approved transfer of control of Aerial's radio licenses. *See Aerial/VoiceStream Transfer of Control Approval Order*, 15 FCC Rcd 10089 (March 30, 2000).

8. T-Mobile, through subsidiaries it owns and controls, holds radio licenses issued by the Federal Communications Commission ("FCC") that authorize it to provide commercial mobile radio services ("CMRS") throughout much of Missouri, as well as throughout most of the nation.

9. T-Mobile is a telecommunications carrier as that term is defined in 47 U.S.C. § 153(44), a provider of commercial mobile service as defined in 47 U.S.C. § 332(d), and a provider of commercial mobile radio service as defined in 47 C.F.R. § 20.9.

Procedural History

10. On August 1, 2001 Northeast and Modern filed a complaint against SBC (TC-2002-57) seeking an order requiring SBC to block mobile-to-land traffic originating on wireless networks, including calls made by T-Mobile's customers to customers served by the Complainants.

11. On August 11, 2001 Chariton filed a complaint against SBC (TC-2002-167) seeking an order requiring SBC to block mobile-to-land traffic originating on wireless networks, including calls made by T-Mobile's customers to customers served by Chariton.

12. On August 23, 2001, SBC proposed the parties mediate their differences, but the Complainants rejected this request on August 28, 2001.

13. On September 24, 2001, the Complainants amended their complaints to add certain wireless carriers, including T-Mobile, as additional respondents. In response, some of the new respondents also requested mediation

14. On October 18, 2001, the Commission "strongly urged" the parties to "participate in voluntary mediation of this dispute." On October 23, 2001, Complainants advised the Commission that they would refuse to participate in voluntary mediation.

15. On January 14, 2002, the Commission consolidated all of the pending complaints with TC-2002-57 designated as the lead case.

16. Pursuant to a procedural schedule adopted on January 22, 2002, direct testimony was filed on April 10, 2002, rebuttal testimony was filed on June 11, 2002, and a hearing was scheduled for August 5-9, 2002. The hearing closed on August 8, 2002.

17. Opening post-hearing briefs were filed on October 18, 2002, and reply briefs were filed on November 22, 2002.

18. On June 3, 2003, the Commission advised parties of its decision to reopen the record and to accept additional testimony on the so-called interMTA factor – the portion of traffic that is interMTA as opposed to intraMTA.

19. A hearing to address the interMTA factor was conducted on September 8, 2004.

20. In this complaint proceeding, the Complainants seek compensation for traffic originating on T-Mobile's network from February 5, 1998 through December 31, 2001 (hereinafter, "the complaint period").

Intercarrier Negotiations

21. At all times relevant, T-Mobile has been willing to negotiate, in good faith, an interconnection agreement with each of the Complainants. Tr. 1540 (Sept. 8, 2004); Tedesco Rebuttal Testimony, Ex. 21, at p. 6 (June 11, 2002)(hereinafter "Tedesco Rebuttal").

22. In contrast, the Complainants were unwilling to negotiate with T-Mobile based in part on the assertion that they were not obligated to negotiate with T-Mobile until such time as T-Mobile established a direct interconnection with their networks. Tr. 1487-88 (Sept. 8, 2004).

23. Only recently have the Complainants apparently abandoned their prior demand that wireless carriers interconnect directly with their networks. Tr. 1541 (Sept. 8, 2004). Specifically, Complainants' agreements with Sprint and Cingular recognize that wireless carriers can interconnect indirectly with their networks.

24. Under long-standing industry practice, compensation for traffic exchanged is generally done on a *de facto* bill-and-keep basis, because the costs of recording traffic exchanged, rendering bills, performing audits of bills submitted by the terminating carrier and processing checks often exceed the value of the traffic that the two carriers exchange. However, either car-

rier which is party to a *de facto* bill-and-keep arrangement may ask that the other carrier convert to a calling-party's-network-pays (cash exchange) arrangement.

25. In ordinary commercial relationships, it is the party wanting to change the *status quo* that initiates negotiations to change the relationship.

26. The Complainants have never asked T-Mobile to negotiate an interconnection contract. Tedesco Rebuttal, at p. 5; Tr. 1503 (Sept. 8, 2004).

27. Indeed, as the Complainants readily acknowledge, had they requested negotiations with T-Mobile (say in 2000), "we would have had a reciprocal compensation [agreement], the [interMTA] factors would have been there, the rate would have been there, and we wouldn't have had the compensation dispute that we have today." Tr. 1383 (Sept. 8, 2004).

Complainants' Intrastate Access Tariffs

28. Northeast originally filed its intrastate access tariff during the 1980s. The tariff originally was limited in scope to "intrastate interexchange customers," and Northeast concurred in the access tariffed maintained by Oregon Farmers Mutual Telephone Company. *See* Northeast Tariff P.C.S. Mo. No. 2, § 12.B.

29. On June 10, 2002 Northeast filed revisions to its access tariff, including proposed tariff language adding the following sentence to its access tariff:

> The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, direct or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended.

Id. at § 12.A, 1st Revised Sheet No. 12-1.

30. This tariff revision became effective on January 1, 2003.

31. Northeast would not have filed this tariff revision if the traffic generated by wireless carriers were already subject to its access tariff.

32. Chariton originally filed its intrastate access tariff during the 1980s. The tariff originally was limited in scope to "intrastate interexchange customers," and Chariton concurred in the access tariffed maintained by Oregon Farmers Mutual Telephone Company. *See* Chariton Tariff P.C.S. Mo. No. 1, First Revised Sheet No. 14.

33. On March 9, 1999 Chariton proposed a tariff revision, adding the following sentence to its access tariff, with a proposed effective date of April 9, 1999:

> The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, direct or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended.

Id. at § 12.A, 1st Revised Sheet No. 12-1.

34. Chariton would not have filed this tariff revision if the traffic generated by wireless carriers were already subject to its access tariff.

35. The Commission rejected Chariton's proposed tariff revision on January 27, 2000 and again on April 9, 2002 in TT-99-428.

36. T-Mobile is not an intrastate interexchange carrier.

37. The FCC has ruled that CMRS carriers provide local exchange service. *See, e.g., First Local Competition Order,* 11 FCC Rcd 15499, 15998-99 ¶ 1012 (1996).

38. With their "one rate" plans, where the same airtime rate applies whether the customer calls across the street or on the other side of the country, CMRS carriers do not even provide toll service as defined in the Communications Act. *See* 47 U.S.C. § 153(48).

39. The Complainants have acknowledged that T-Mobile is not a customer as that term is used in their access tariffs. Surrebuttal Testimony of William Briere, Ex. 301, p. 26 l. 22 - p. 27 l. 1 (Sept. 8, 2004).

40. The rates contained Complainants' access tariffs include a contribution to Complainants' loop costs.

41. The Complainants did not use or follow the FCC's TELRIC rules, 47 C.F.R. § 51.505, *et seq.*, in developing the rates contained in their access tariffs.

Complainants' Wireless Termination Tariffs

42. On March 5, 2003, Northeast filed proposed wireless termination tariffs. Northeast initially proposed a "default interMTA factor" of 97.7 percent, but it later "agreed to reduce this factor to 49%." Northeast Suggestions in Opposition to Tariff Suspension, Case No. IT-2003-374, at 3 ¶ 8 (April 2, 2003).

43. The Commission suspended Northeast's proposed tariff on April 3, 2003, and on May 7, 2003 it directed Northwest to advise whether its tariffed rates included the $0.02 "adder" designed to recover non-traffic sensitive loop costs Two days later, before it filed a response to the Commission's question, Northeast withdrew its proposed wireless termination tariffs.

44. The rates in Northeast's proposed wireless termination tariff were lower than the rates in its access tariff.

45. On March 5, 2003, Chariton filed proposed wireless termination tariffs. Chariton initially proposed a "default interMTA factor" of 81.1 percent, but it later "agreed to reduce this factor to 40%." Chariton Suggestions in Opposition to Tariff Suspension, Case No. IT-2003-375, at 3 ¶ 8 (April 2, 2003).

46. The Commission suspended Chariton's proposed tariff on April 3, 2003, and on May 7, 2003 directed Chariton to advise whether its tariffed rates included the $0.02 "adder" designed to recover non-traffic sensitive loop costs Two days later, before it filed a response to the Commission's question, Chariton withdrew its proposed wireless termination tariffs.

47. The rates in Chariton's proposed wireless termination tariff were lower than the rates in its access tariff.

48. The Complainants did not use or follow the FCC's TELRIC rules, 47 C.F.R. § 51.505, *et seq.*, in developing the rates contained in their proposed wireless termination tariffs.

49. If the Complainants believed that they could use their intrastate access charges to recover compensation for terminating T-Mobile's intraMTA traffic, they would have never incurred the time and expense of preparing wireless termination tariffs.

Complainants' Prices for Call Termination

50. The Complainants incur the same economic costs to terminate a call, whether the incoming call is local or toll, intrastate or interstate, intraLATA or interLATA, or intraMTA or interMTA. Tr. 1493 (Sept. 8, 2004).

51. Complainants' current rate for interstate access is approximately two cents ($0.021) per minute. Tr. 1527-28 (Sept. 8, 2004).

52. Northeast proposes to charge T-Mobile approximately 15 cents ($0.15) per minute for traffic T-Mobile sent to Northeast during the complaint period. Tr. 1527 (Sept. 8, 2004).

53. Northeast has taken the position that it is reasonable for it to charge 15 cents ($0.15) per minute to terminate a local call that is made across the street, Tr. 1543 (Sept. 8, 2004), when it charges only two cents ($0.021) to terminate a call originating on the east or west coasts.

54. Chariton proposes to charge T-Mobile from six to eight cents ($0.06 - $0.08) per minute for traffic T-Mobile sent to Chariton during the complaint period. Tr. 1482 (Sept. 8, 2004).

55. The Complainants readily acknowledge that their intrastate access charge rates are "too high" and "need to come down." Tr. 1492-93, 1544 (Sept. 8, 2004).

56. Complainants' attorney has acknowledged that under FCC rules, access charges are not appropriate for intraMTA traffic:

> [T]he FCC has said that wireless to land line calls that originate and terminate within the same MTA, or local, [are] eligible for this new form of compensation, reciprocal compensation.

Tr. 1388 (Sept. 8, 2004).

57. Although the Complainants seek relief solely under their intrastate access tariffs, they have also conceded that "wireless carriers [are] not access customers under the MITG access tariff." Tr. 1438 (Sept. 8, 2004).

58. The Complainants have made no attempt to demonstrate that their respective intrastate access charge rates comply with the FCC's TELRIC rules.

59. In this proceeding, Commission Staff agreed that access charges are not appropriate for intraMTA traffic. *See, e.g.,* Staff Reply Brief at 7 (Nov. 22, 2002)("Staff argues that the FCC's First Report and Order removed the ability of the MITG companies to charge full access for intraMTA traffic originated by a wireless carrier.").

60. Nevertheless, Staff has taken the position that that the local switching and transport components of the Complainants' access rates could be used for intraMTA traffic. Tr. 1555, 1573 (Sept. 8, 2004); *see also* Staff's Proposed Findings of Fact and Conclusions of Law, at 4 ¶ 2 (July 12, 2002).

61. Commission Staff has made no attempt to demonstrate that the local switching and transport components of the Complainants' access rates comply with the FCC's TELRIC rules.

62. The FCC has recognized that LEC access charge rates have "traditionally exceeded the forward-looking economic costs of providing access." *Unified Intercarrier Compensation,* 16 FCC Rcd 9610, 9114 ¶ 7 (2001).

63. Complainants have told the Commission that "Staff's suggestion to retroactively apply a rate not in existence is unworkable." MITG Initial Brief at 3 (Oct. 18, 2002).

64. The Complainants state they need to charge high, non-cost based rates for intrastate access because they serve high-cost areas. Tr. 1544 (Sept. 8, 2004). However, the Complainants neglect to advise the Commission that they receive substantial federal universal service subsidies for high cost service, and that these subsidies have been growing at a fast pace:

(a) Chariton:

	1998	2004	Actual Gain	Percent Gain
Total USF Support	$3,674,504	$5,176,554	$1,502,050	40.9%
Loops	8,184	8,581	397	4.9%
USF per Loop	$448.97	$603.26	$154.29	34.4%

(b) Northeast:

	1998	2004	Actual Gain	Percent Gain
Total USF Support	$1,864,930	$3,425,122	$1,560,192	83.7%
Loops	8,376	9,175	799	9.5%
USF per Loop	$222.65	$373.31	$150.66	67.7%

Federal-State Joint Board Staff, *Universal Service Monitoring Report,* CC Docket Nos. 96-45, 98-202, at Table 3.29, pp. 3-140 and 141, Table 3.33, pp. 3-235 and 246(2004).

Major Trading Areas

65. A Major Trading Area ("MTA") is an area originally developed by Rand McNally and adopted by the FCC for the purpose of issuing certain personal communications services

("PCS") radio licenses. *See* 47 C.F.R. § 24.202. As discussed more fully below, the FCC has also determined that its reciprocal compensation rules should apply to intraMTA traffic exchanged between a LEC and CMRS carrier. *See* 47 U.S.C. § 51.701(b)(2).

66. Missouri is principally divided into two Major Trading Areas ("MTAs") that split the State on a roughly north-south line in the middle of the State: the Kansas City MTA (No. 34) on the west, and the St. Louis MTA (No. 19) on the east.

InterMTA Factor

67. In this complaint proceeding, Northeast wants the Commission to adopt an interMTA factor of 100 percent – even though it previously agreed to a default interMTA factor of 49 percent. Northeast wants the Commission to adopt the 100 percent interMTA factor even though it readily concedes its special study contains "theoretical errors." Tr. 1397, 1473 (Sept. 8, 2004).

68. Northeast has acknowledged that the methodology it used in developing its proposed 100 percent interMTA factor did not follow any of the procedures that the FCC has approved and additionally contains "errors." Tr. 1472-73, 1529, 1531 (Sept. 8, 2004). For example, Northeast acknowledges that its special study treats as interMTA calls that are actually intraMTA calls. Tr. 1533-34 (Sept. 8, 2004). In other words, Northeast concedes that its proposed interMTA factor is not based on accurate facts.

69. In this complaint proceeding, Chariton wants the Commission to adopt an interMTA factor of 73 percent – even though it previously agreed to a default interMTA factor of 40 percent.

70. Chariton has acknowledged that the methodology it used in developing its proposed 73 percent interMTA factor did not follow any of the procedures that the FCC has approved and additionally contained "theoretical errors." Tr. 1472-73 (Sept. 8, 2004).

71. Chariton has also conceded that its "theoretical errors" are, in fact, real errors. For example, Chariton acknowledged that under the methodology it utilized, it would have treated as interMTA an intraMTA call made the morning of the hearing from T-Mobile's attorney to Chariton's attorney. Tr. 1477-81 (Sept. 8, 2004). In other words, Chariton concedes that its proposed interMTA factor is not based on accurate facts.

72. In stark contrast to Northeast and Chariton, other small Missouri ILECs such as Alma, Chocktaw and MoKan Dial have decided to use a "zero interMTA factor." Tr. 1390 (Sept. 8, 2004).

73. Other parties to this complaint proceeding, including the transiting carrier SBC and Commission Staff, agree that the Complainants have not adequately supported their proposed interMTA factors. Tr. 1406 (Sept. 8, 2004).

74. Specifically, Staff does not agree that the methodology used by the Complainants is reasonable. Tr. 1556 (Sept. 8, 2004). For example, according to Staff, it is not reasonable to assume that all mobile customers only originate calls in their home MTA (*e.g.*, they never originate calls when they travel outside of their home MTA). Tr. 1568 (Sept. 8, 2004). According to Staff, the data that the Complainants used was "over 100 percent off" the data recorded by the transiting carrier, SBC, which transported the same calls. Tr. at 1575, 1582-83 (Sept. 8, 2004).

75. The Complainants acknowledge that the minutes of use data in their special studies should be the same as the data contained in SBC's CTUSR reports. Tr. 1424 (Sept. 8, 2004).

76. The Complainants acknowledge that the data in SBC's CTUSR reports contain sufficient billing information for them. Tr. 1438 (Sept. 8, 2004).

77. The Complainants make no attempt to explain the enormous discrepancies between their data and SBC's data.

78. Commission Staff, using a different methodology, has proposed that Northeast's interMTA factor for T-Mobile should be 38 percent (vs. the 100 percent claimed by Northeast) and that Chariton's interMTA factor for T-Mobile should be 41 percent (vs. the 73 percent claimed by Chariton). Tr. 1418 (Sept. 8, 2004).

79. Commission Staff has acknowledged that the FCC has not approved the methodology used by Staff to estimate the interMTA factor. Tr. 1570-71 (Sept. 8, 2004).

80. Staff witness Scheperle conceded that regression analyses are used to confirm the reliability of a methodology and the results it yields, but acknowledged that Staff did not perform such an analysis on the using of its alternate methodology and proposed interMTA factors, and that the proposed factors are too high. Tr. 1406, 1572 (Sept. 8, 2004).

81. The Complainants have criticized wireless carriers like T-Mobile because they do not provide cell site information with each call attempt. However, the FCC has found that it is "difficult" for wireless carriers to determine the specific cell site serving the calling mobile customer, *see First Local Competition Order,* 11 FCC Rcd 15499, 16017 ¶ 1044 (1996), and Staff witness Scheperle correctly noted that wireless carriers do not record this information during the course of their ordinary business. Tr. 1578 (Sept. 8, 2004).

82. Wireless carriers affiliated with the Complainants also do not use or record intra/interMTA data during the course of their ordinary business. Tr. 464 (Aug. 6, 2002).

83. The Complainants have also criticized wireless carriers like T-Mobile because they did not "preserve" information concerning the cell site serving each calling customer. Tr. 1397-98 (Sept. 8, 2004). However, the Complainants have made no attempt to demonstrate that wireless carriers like T-Mobile record this data during the course of their ordinary business. (T-Mobile does not.)

84. The Complainants seek the recovery of compensation for T-Mobile traffic terminated between February 5, 1998 and December 31, 2001. Tr. 1380 (Sept. 8, 2004). However, they did not file their complaints against T-Mobile until September 2001. The Complainants have never explained how T-Mobile should have been on notice that it should have "preserved" information concerning the originating cell site serving for each call in 1998 when they did not file their complaint until September 2001.

85. The Complainants stated that their special intra/interMTA studies was a "massive" undertaking. Tr. 1513 (Sept. 8, 2004). Yet, in their proposed wireless termination tariffs, they would have required wireless carriers to perform such studies on a regular basis.

86. The Complainants have made no attempt to show that the benefits of performing such special studies would exceed the costs. Indeed, the Complainants have not demonstrated that the value of the traffic at issue exceeds the cost of preparing such special studies.

87. One of the methodologies to estimate the interMTA factor that the FCC has approved is based on the location of the point of interconnection between the LEC and the wireless carrier. *See First Local Competition Order*, 11 FCC Rcd 15499, 16017 ¶ 1044 (1996)("As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.").

88. For calls originated on T-Mobile's network that are delivered to the Complainants' networks, the point of interconnection is at the Complainant's network, specifically, at the meet point between Complainants' networks and SBC's network.

89. It is appropriate to use the SBC-Complainant meet point as the point of interconnection because SBC, in providing transit services to T-Mobile, operates as T-Mobile's agent for calls originating on T-Mobile's network that terminate on Complainants' networks.

90. This T-Mobile-Complainant point of interconnection is located in St. Louis MTA.

91. Under this approved FCC methodology, all calls that T-Mobile delivers to the Complainants would be treated as intraMTA.

Indirect Interconnection and Transit Services

92. When a CMRS carrier enters a geographic market, it generally establishes a connection to a transit carrier's tandem switch (a Type 2A interconnection), which allows the CMRS carrier indirect interconnection to all other networks connected to the tandem. For example, by connecting to the Kansas City LATA tandem switches operated by SBC, T-Mobile can immediately gain indirect access to Complainants' networks because those ILEC networks are also connected to those tandem switches.

93. T-Mobile has an interconnection agreement with Respondent SBC. Tr. 1505-06 (Sept. 8, 2004), Exhibit 36. Under this agreement, SBC provides transiting services between T-Mobile's network and each of the Complainants' networks. Transit is "a normal part of telecommunications." Tr. 1401 (Sept. 8, 2004).

94. A national trade association of rural ILECs told the FCC recently that "[a]s a practical matter the most feasible and cost-effective option for most rural ILECs is to use the RBOC's tandem for transiting functions":

> Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier.

National Telecommunications Cooperative Association, *Bill and Keep: Is It Right for Rural America?,* at 41 (March 2004), *attached to* NTCA Ex Parte, FCC Docket No. 01-92 (March 10, 2004).

95. Complainants recognize that the "logical place" for T-Mobile to deliver traffic to them is though SBC's transit services and use of SBC's Kansas City LATA tandem switches. Tr. 1393 (Sept. 8, 2004).

96. Indeed, there are approximately 700 exchanges in Missouri. Sprint Proposed Findings of Fact, at 2 ¶ 11 (July 12, 2002). If forced to connect to ILEC networks in each exchange, each wireless carrier serving Missouri would be required to acquire approximately 700 dedicated facilities to provide ubiquitous call termination to their customers. Rural ILECs, like the Complainants, would be required to dedicate seven or more of their switch ports to these wireless carrier connections (as opposed to the one switch port currently used for their connection to the Kansas City tandem switch).

97. Mr. Biere, testifying for the MITG, conceded that the value of the traffic traversing a direct interconnection trunk group would have to exceed $6,000 monthly just to cover the distance charges associated with a direct connection. Tr. 667, 669 (Aug. 7, 2002).

98. This Commission has previously recognized that "[g]iven the number of small ILECs, indirect interconnection between CMRS carriers and small LECs, through a large LEC's tandem switch, is the only economically feasible means of interconnection available." *Mark Twain Order*, Case No. TT-2001-139, at 15 (Feb. 17, 2001).

99. Complainants have acknowledged that they demanded that wireless carriers interconnect directly with them even when the monthly cost for establishing a direct interconnection would exceed the value of their claims for compensation. Tr. 431-32 (Aug. 6, 2002).

CONCLUSIONS OF LAW

Burden of Proof

1. The Complainants have the burden of proof to establish their right to the relief sought in their respective complaints. *State ex rel. Tel-Central* v. *Missouri Comm'n*, 606 S.W.2d 432 (Mo. App. 1991); *Aetna Casualty & Surety* v. *General Electric*, 581 F. Supp. 889 (E.D. Mo. 1984)(In Missouri, the burden is on the movant to establish its case by substantial evidence); *Sheldon Margulis* v. *Union Electric*, Docket No. EC-91-88 (March 27, 1997) (Complainant failed to discharge his burden of proof). The Commission requires the Complainants to establish each and every element of their claim by substantial and competent evidence. If they fail to do so, the Commission must deny the relief sought in their complaints.

2. Federal courts have similarly ruled that "the burden of proof is on the RTCs [rural telephone companies] to show that a proposed [intraMTA] rate meets the required standards, a contention which the RTCs do not dispute." *Atlas Telephone* v. *Oklahoma Comm'n*, 309 F. Supp. 2d 1299, 1310 (W.D. Ok. 2004).

Limits of the Commission's Jurisdiction

3. This Commission does not possess regulatory authority over providers of commercial mobile radio service ("CMRS") like T-Mobile. *See* Ch. 386.020 (51), (52) and (53), and 386.250.2, RSMo.

4. The Commission has "no power to determine damages or aware pecuniary relief." *United Telephone*, TC-96-112, 6 Mo. P.S.C.3d 224, 230 (April 11, 1997); *State ex rel. Fee Fee Trunk Sewer* v. *Litz*, 596 S.W.2d 466, 469 (Mo. App. 1980). Accordingly, the Commission is powerless to grant any monetary relief sought by the Complainants.

Federal Law Governs This Case

5. In 1993, Congress amended the Communications Act to expand FCC authority over wireless carriers and to limit state authority over wireless carriers. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 393 (1993), *amending* 47 U.S.C. §§ 152(b), 332(c). Congress made these changes so the FCC could "establish a Federal regulatory framework to govern the offering of all commercial mobile services." H.R. CONF. REP. NO. 103-213 at. 490 (1993). Congress expanded FCC authority over CMRS to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. REP. NO. 103-111 at 260 (1993). Congress further gave the FCC explicit authority to set the terms of interconnection between LECs and CMRS carriers because "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." *Id.* at 261.

6. Congress enacted the Telecommunications Act of 1996 to "promote competition *and reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Preamble, Pub. L. No. 104-104, 110 Stat. 56 (1996)(emphasis added). To achieve these objectives, "Congress entered what was primarily a state system of regulation of

local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the [FCC]":

> While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act"; it required the participation of the state commissions in the new federal regime be guided by federal-agency regulations.

Indiana Bell v. Indiana Comm'n, 359 F.3d 493, 494 (7th Cir. 2004) (internal citations omitted).

7. In this regard, the U.S. Supreme Court has declared that in the 1996 Act, Congress took "regulation of local telecommunications competition away from the States." *AT&T* v. *Iowa Utilities Board,* 525 U.S. 366, 378 n.6 (1999).

8. Insofar as interconnection is concerned, following the 1996 Act, state regulators now act as "a deputized federal regulator," and their regulation of local interconnection is no longer "otherwise permissible activities for the states." *MCI v. Illinois Bell,* 222 F.3d 323, 343-44 (7th Cir. 2001). *See also Iowa Network Services* v. *Qwest,* 363 F.3d 683, 690 (8th Cir. 2004)("There can be no doubt that in the 1996 Act Congress greatly expanded the federal government's involvement in the telecommunications industry, even into areas such as local exchange service that previously had been left to state regulation.").

9. Because this complaint proceeding involves principally issues within federal court jurisdiction, an appeal of this Commission's order can to taken to federal court. *See Rural Iowa Independent Telephone Ass'n* v. *Iowa Utilities Board,* 362 F.3d 1027, 1030 (8th Cir. 2004) (Federal "district courts have jurisdiction to determine whether a state administrative agency correctly interprets federal law," in this case, the applicability of access charges to intraMTA traffic.).

The Complainants Cannot Demand That T-Mobile Interconnect Directly with Them

10. Section 251(a) of the Act requires "each telecommunications carrier" to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1). T-Mobile and Complainants are telecommunications carriers within the scope of this statute.

11. Under FCC rules and orders, it is the competitive carrier, not the incumbent LEC, which chooses whether to interconnect directly or indirectly. *See, e.g.*, 47 C.F.R. § 20.11(a)("A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier. . . ."); *First Local Competition Order,* 11 FCC Rcd 15499, 15991 ¶ 997 (1996)(Wireless carriers can choose to interconnect indirectly with LECs "based upon their most efficient technical and economic choices."); *Virginia Arbitration Order,* 17 FCC Rcd 27039, 27085 ¶ 88 (2002).

12. The Complainants' reciprocal compensation duty is set forth in Section 251(b)(5) of the Act, which imposes on the Complainants "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under the plain reading of the statute, this reciprocal compensation duty applies whether carriers interconnect directly or indirectly with each other.

13. Federal courts have uniformly recognized that competitive carriers, including wireless carriers, may interconnect indirectly with incumbent LECs and that an ILEC's reciprocal compensation duty applies to indirect interconnection. *See, e.g., MCIMetro* vs. *BellSouth,* 352 F.3d 872 (4th Cir. 2003); *Mountain Communications* v. *FCC,* 355 F.3d 644 (D.C. Cir. 2004); *Southwestern Bell* v. *Texas Comm'n,* 348 F.3d 482 (5th Cir. 2003); *Atlas Telephone* v. *Oklahoma*

Comm'n, 309 F. Supp. 2d 1313 (W.D. Ok. 2004)(interconnection between CMRS carriers and rural LECs).

14. Section 251(c)(2)(B) of the Act, upon which the Complainants rely, has no relevance to this complaint proceeding. First, this statute imposes "*additional* obligations" on certain incumbent LECs, duties in addition to those specified in Sections 251(a) and (b). *See* 47 U.S.C. § 251(c)(emphasis added). Second, as the Complainants have recognized, they are exempt from the obligations that Section 251(c) imposes on other ILECs by virtue of 47 U.S.C. § 251(f).

15. There is, therefore, no basis in federal law to support the Complainants' arguments that they can demand unilaterally that wireless carriers interconnect directly with them or that such direct interconnection is a condition precedent to their obligation to comply with their reciprocal compensation duties.

16. The Commission notes that the Complainants appear to have abandoned their "direct interconnection" arguments, by entering into interconnection agreements with certain wireless carriers that recognize indirect interconnection and providing testimony that they would not demand direct interconnection from T-Mobile.

17. Accordingly, the Commission concludes that the Complainants' refusal to negotiate with T-Mobile unless T-Mobile first "agreed" to connect directly to each of their networks was a demand made without basis in law and constitutes bad faith under federal law.

This Commission Is Without Authority to Establish IntraMTA Rates Outside of the Arbitration Process

18. Federal law permits three types of compensation arrangements between ILECs and CMRS carriers for intraMTA traffic: (1) bill-and-keep, 47 U.S.C. § 252(d)(2)(B)(i); (2) compensation pursuant to a voluntary agreement set "without regard to the standards set forth in"

the 1996 Act, *id.* § 252(a)(1); and (3) compensation set following arbitration, with the state commission establishing the rate pursuant to federal law standards, *id.* § 252(c)(2). In other words, under federal law, there is only one circumstance where this Commission can itself establish a LEC's rate for intraMTA call termination: in an arbitration proceeding.

19. This Commission therefore lacks delegated authority in federal law to establish or approve intraMTA rates in this complaint proceeding.

The Complainants Have Failed to Demonstrate That Their Proposed Rates for IntraMTA Call Termination Comply with the FCC's TELRIC Rules

20. With regard to the exchange of traffic (whether the interconnection is direct or indirect), Section 251(b)(5) imposes on all LECs, including the Complainants, the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5).

21. Reciprocal compensation is defined as "the mutual and reciprocal recovery by each carrier of the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." *Id.* § 252(d)(2)(A)(i); *see also* 47 C.F.R. § 51.701(e). Reciprocal compensation generally takes one of two forms:

1. Calling-party's-network pays. With CPNP, the calling party's network pays other carriers involved in terminating the call. *See Unified Intercarrier Compensation,* 16 FCC Rcd 9610, 9614 ¶ 9 (2001). Rates are either negotiated voluntarily or set by a state commission using the FCC's TELRIC rules. *See* 47 U.S.C. § 252(a)-(b); 47 C.F.R. §§ 51.505-.515. Rates must be reciprocal, and are generally symmetrical, *i.e.*, both parties charge each other the same rate. *See* 47 C.F.R. § 51.711.
2. Bill-and-keep. With bill-and-keep, no money is exchanged and each carrier "recover[s] the costs of termination (and origination) from its own end-user customers." *Unified Intercarrier Compensation,* 16 FCC Rcd at 9615 ¶ 9; *see also* 47 U.S.C. § 252(d)(2)(B).

22. Congress has determined that an incumbent LEC's rate for call termination shall be based on "the additional costs of terminating such calls," 47 U.S.C. § 252(d)(2)(A)(ii), and the FCC has adopted implementing pricing rules that have been affirmed on appeal. *See Verizon Communications* v. *FCC*, 535 U.S. 467 (2002).

23. Under FCC rules and orders, an incumbent LEC may not include its loop costs in reciprocal compensation. *See, e.g., First Local Competition Reconsideration Order*, 11 FCC Rcd 13042, 13045 ¶ 6 (1996). In addition, unless the competitive interconnecting carrier agrees otherwise in negotiations, an incumbent LEC's rates for reciprocal compensation must be based on its "forward-looking economic costs," with costs determined using "the most efficient tele-communications technology available and the lowest cost network configuration." *See* 47 C.F.R. § 51.505 *et seq.* (FCC TLERIC Rules).

24. Under FCC rules, for traffic exchanged with a wireless carrier, a LEC's reciprocal compensation duty and the FCC's TELRIC pricing rules apply to intraMTA traffic – that is, "traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area." 47 C.F.R. § 51.701(b)(2).

25. The FCC has been very clear that access charges are not appropriate for LEC-CMRS intraMTA traffic:

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

First Competition Order, 11 FCC Rcd 15499, 16014 ¶ 1036 (1996)(emphasis added). *See also Unified Intercarrier Compensation*, 16 FCC Rcd 9610, 9613 ¶ 7 (2001)("CMRS carriers also pay access charges to LECs for CMRS-to-LEC traffic that is not considered local and hence not covered by the reciprocal compensation rules.").

26. The FCC's intraMTA rule has been affirmed on appeal, *see Iowa Utilities Board* v. *FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997). Other federal courts have refused to entertain collateral attacks on this rule. *See Qwest* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001).

27. In *3 Rivers Telephone Cooperative* v. *U S WEST*, No. CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 (D. Mt., Aug. 22, 2003), the federal court invalidated under federal law rural LEC state access tariffs insofar as they purported to apply to intraMTA traffic, stating:

> [T]raffic between an LEC and CMRS network that originates and terminates in the same MTA is local and, therefore, subject o reciprocal compensation rather than access charges. The FCC order makes no distinction between such traffic and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination.

Id. at *67.

28. Complainants have made no attempt to demonstrate that the rates they want to apply to intraMTA traffic comply with the FCC's TELRIC rules.

29. Complainants' argument that the FCC's rules have no relevance to this complaint proceeding because they and T-Mobile have not negotiated or arbitrated an agreement lacks all merit for two reasons.

30. First, both the FCC and federal courts have rejected Complainants' assertion that they can exempt themselves from federal law requirements simply by filing or maintaining in-compatible state tariffs. *See, e.g., TSR Wireless* v. *U S WEST*, 15 FCC Rcd 11166 (2000), *aff'd Qwest* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001); *3 Rivers Telephone* v. *U S WEST*, CV 99-90-GF-CSO, 2003 U.S. Dist. LEXIS 24871 (D. Mt., Aug. 22, 2003).

31. Second, this Commission has already found that the Complainants' refusal to negotiate with T-Mobile was not made in good faith, and Complainants cannot therefore use the absence of an agreement as an excuse to justify their desire to ignore federal law.

32. Staff's alternative proposed rate is equally flawed because, among other things, there has been no demonstration that Staff's proposed intraMTA rate complies with the FCC's TELRIC rules.

33. In addition, Staff's proposal would require this Commission to engage in retroactive ratemaking, which this Commission may not do under Missouri law.

34. In summary, the Commission concludes that Complainants are entitled to no compensation for terminating T-Mobile's intraMTA traffic subject to the complaint.

35. Federal law provides an adequate remedy and if Complainants are interested in compensation, they should pursue negotiation and, if necessary, arbitration.

36. This Commission further observes that Complainants' claims for intraMTA traffic necessarily are based in federal law. Accordingly, even if Complainants were entitled to compensation, and they are not, their claims would be subject to the federal two-year statute of limitations. *See* 47 U.S.C. § 415.

Claims for Relief Under State Law

37. T-Mobile did not become subject to Northeast's intrastate access tariff until January 1, 2003.

38. Northeast is precluded from recovering any sums from T-Mobile for termination of traffic prior to January 1, 2003.

39. But for the Commission's suspension, T-Mobile would have become subject to Chariton's intrastate access tariffs on April 9, 1999.

40. Chariton is precluded from recovering any sums from T-Mobile for termination of traffic prior to April 9, 1999.

46. Commission Staff has proposed its own set of interMTA factors, but there are problems with this proposal as well. The burden of proof rests with the Complainants, and the Commission Staff cannot aid them in an attempt to overcome deficiencies in their proof.

47. The Commission therefore concludes that the Complainants in this case failed to meet their burden of proof of establishing, by competent and substantial evidence, an accurate interMTA factor that the Commission could apply.

48. The Commission notes, however, that there is an FCC-approved methodology that could be applied in this case – specifically, the point of interconnection for the mobile-to-land traffic at issue in this case. *See First Local Competition Order,* 11 FCC Rcd 11549, 16018 ¶ 1044 (1996).

49. For obvious reasons, T-Mobile has chosen to interconnect indirectly with the Complainants' networks, and it uses (and pays for) SBC's transit services. Accordingly, the point of interconnection for the mobile-to-land traffic that is subject to the complaints is the meet point between the Complainants' networks and SBC, which as a transit carrier, is acting as an agent on behalf of T-Mobile. This meet point is located in the St. Louis MTA, so under this FCC-approved methodology, all of the traffic in this case would be considered intraMTA traffic.

50. In summary, the Commission concludes that Complainants are entitled to no relief on their interMTA claims for three independent reasons: (a) by the Complainants' own admission, T-Mobile was not subject to their intrastate access tariffs during the period in question; (b) the Complainants have utterly failed to establish a reliable interMTA factor; and (c) under the only FCC-approved methodology that is available in this case (given the Complainants' unreasonable refusal to negotiate these issues with T-Mobile), all traffic exchanged by the parties would be considered intraMTA traffic.

InterMTA Factor

41. The Complainants utterly failed to meet their burden of establishing, by competent evidence, an appropriate interMTA factor that the Commission could utilize.

42. First, the underlying data that the Complainants used in their special studies are not reliable. Both the transiting carrier, SBC, and the Complainants were involved in these calls, and Complainants have recognized that the data between the two sets of carriers should be similar, if not the same. Yet the evidence shows that there is over a 100 percent difference in the two sets of data, and Complainants made no attempt to explain these enormous discrepancies.

43. Second, the Complainants concede that the methodology they utilized is not an approach that the FCC has authorized. Complainants' justification – the necessary data was not available – is not convincing. Complainants could have negotiated this issue with T-Mobile and, as the Commission has already found, their failure to negotiate constituted bad faith.

44. Third, a key assumption in Complainants' special studies – wireless customers make and receive calls only in their home MTAs and not in other MTAs – is not reasonable on its face. There is record evidence that wireless customers do use their phone while traveling, that they make intraMTA calls, but that these intraMTA calls would be treated as interMTA in the Complainants' special studies.

45. Finally, it is apparent that the Complainants are overreaching. For example, Northeast claims the Commission should use an interMTA factor of 100 percent even though it had earlier proposed to use an interMTA factor of 49%. Similarly, Chariton claims the Commission should use an interMTA factor of 81.1 percent even though it had earlier proposed to use an interMTA factor of 40 percent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by First Class United States mail, postage prepaid, on this 22nd day of October, 2004, on the following parties of record:

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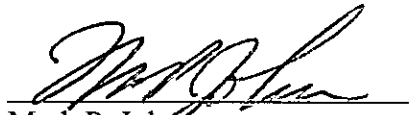

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