BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

NORTHEAST MISSOURI RURAL TELEPHONE COMPANY and MODERN TELEPHONE COMPANY,

Petitioners,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY, SOUTHWESTERN BELL WIRELESS (CINGULAR), VOICESTREAM WIRELESS (WESTERN WIRELESS), AERIAL COMMUNICATIONS, INC., CMT PARTNERS (VERIZON WIRELESS), SPRINT SPECTRUM, LP. UNITED STATES CELLULAR CORP., and AMERITECH MOBILE COMMUNICATIONS, INC.,

Respondents.

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

SUPPLEMENTAL POST-HEARING BRIEF OF UNITED STATES CELLULAR CORPORATION

FILED
OCT 22 2004
Missouri Public Service Commission

Since the parties initially filed proposed findings and conclusions more than two years ago (on July 12, 2002) and initial post-hearing briefs almost exactly two years ago (October 18, 2002), there have been significant legal developments regarding the issues raised by the exchange of traffic between wireless (or "CMRS") carriers and rural incumbent local exchange carriers ("RLECs") who are indirectly interconnected. The overwhelming majority of these developments favor the positions which the wireless carriers have consistently taken in this proceeding. While United States Cellular ("USCC") reiterates and maintains the positions it set forth in the July 12 and October 18, 2002, filings, USCC asked for additional briefing to provide the Commission with updated information as it pertains to the issues in this docket.

As an initial matter, it is important for the Commission to know that while USCC disagrees with the use of Wireless Termination Tariffs, since the time this Commission gave that option to RLECs wherever an RLEC has properly filed such a tariff USCC has paid in accordance with that tariff. USCC comes to this proceeding with "clean hands." USCC is also uniquely situated in that Issue 11, regarding Southwestern Bell's Wireless Interconnection Tariff is not relevant to USCC, which has a separate negotiated interconnection agreement with SWBT that covers SWBT's handling of the traffic at issue in this proceeding.

What remains before the Commission, then, are primarily claims from carriers who refused to follow the guidance this Commission provided as to how they could be compensated for terminating wireless traffic. That decision to disregard the clear path created by the Commission is not USCC's fault – it is the fault of each carrier who willingly made that choice. The choice resulted in a situation where there is no legal basis to charge USCC for termination of traffic; the default compensation regime is therefore bill-and-keep.

From this basic background, the numerous issues that have been listed at various points in this proceeding really all address three topics of continuing dispute: (1) in the absence of a negotiated or arbitrated agreement for the exchange of traffic, can a tariff be used unilaterally to set the terms of exchange for intraMTA traffic; (2) if a tariff can be used, can it result in the application of access charges on intraMTA traffic (stated alternatively, in the absence of a contractual agreement, what is the appropriate compensation regime for the exchange of intraMTA traffic); and (3) what, if anything, should the state commission's response be where such issues have not been resolved successfully through negotiations or requests for arbitration. Each of these topics have been the subject of additional legal developments since the last round of briefing in 2002.

I. **Unilateral Tariffs Are Not Appropriate to Govern IntraMTA Traffic To or From a Wireless Carrier.**

While USCC has paid the tariffed rate to LECs that have filed approved Wireless Termination Tariffs in the interest of goodwill and out of respect for this Commission, USCC reiterates its position that tariffs are not appropriately applied to traffic exchanged with wireless carriers. This is true of the Wireless Termination Tariffs approved by this Commission and upheld by the state court in *Sprint*; and even more true with regard to general access tariffs that are used by LECs who have not adopted Wireless Termination Tariffs.

As an initial matter, such a unilateral device is simply unjust. When two wireline companies exchange traffic in the absence of an agreement, there is a deterrent against unreasonable tariff terms: the other wireline carrier can promptly file its own tariff pages to "reciprocate." Wireless services, however, are not merely freed from the filing of tariffs. Wireless carriers are prohibited from filing tariffs. As a result, the use of unilateral tariffs provides an extraordinary "stick" to the LECs.[1]

In its initial brief in 2002, USCC argued that this Commission should look to its neighboring commission, the Iowa Utilities Board, which has just completed a case on nearly identical facts. *See In re Transit Traffic*, SPU-00-7, Proposed Decision and Order, Nov. 26, 2001. In that proceeding, the Iowa Board looked at these and other arguments and determined that for a terminating LEC, a

[1] While USCC will discuss principles of reciprocal compensation in more detail in Section II, below, it should also be obvious that the inability of wireless carriers to file tariffs (or for that matter of states to set wireless rates, see 47 U.S.C. § 332(c)(3)) means that a unilateral tariff setting only the rates for termination on the LEC network will never be reciprocal. This is yet another violation of the federal framework created by the use of one-sided tariffs.

tariff would be "unnecessary and inappropriate." *In re Transit Traffic*, SPU-00-7, Order Affirming Proposed Decision and Order, March 18, 2002 at p. 7.[2]

It is a similar set of concerns that has motivated numerous federal appeals courts to find tariffs preempted under the 47 U.S.C. §§ 251-252 regime in other contexts involving interconnection terms. Even without the imbalance caused by wireless detariffing, the Seventh Circuit found the impact of a tariff akin to a "thumb on the negotiating scales." *See Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003). In that case, the "thumb" worked against the incumbent by setting an artificial ceiling for price negotiations. In the present case, the thumb works very much against the wireless carriers by imposing a penalty against only one side of the negotiations for the lack of success of both sides in reaching agreement. The *Bie* Court went on note that "[a]t the very least, the tariff requirement complicates the contractual route by authorizing a parallel proceeding." *Id.* Such is the case before this Commission. The existence of tariffs with unilaterally-set rates has a provided the LECs with a "parallel" path that relieves them of the incentive to negotiate in good faith. Accordingly, the Sixth Circuit determined that an "interconnection tariff" is "'inconsistent with the provisions of [the federal Telecommunications Act],' and therefore invalid, because it completely ignores and bypasses the detailed process for interconnection set out by Congress. . ." *Verizon North, Inc. v. Strand*, 309 F.3d 935, 944 (6th Cir. 2002).

It is noteworthy in this regard that in other states such attempted tariffs have been withdrawn. In Iowa, for example, both Z-Tel and CenturyTel attempted to file wireless termination tariffs. In

---

[2] In the same paragraph the Board specifically contrasts the position of a terminating LEC with a transit provider – Qwest in Iowa, SWBT in the present case – which the Iowa Board held could use a tariff. As a factual matter, however, Qwest had an actual agreement with each of the wireless carriers who were parties to the Iowa proceeding.

both cases the Iowa Utilities Board issued an Order to Show Cause noting that in *In re Transit Traffic* the Board had already determined that tariffs were not appropriate devices to govern traffic exchanged with wireless carriers. *See, e.g., In re CenturyTel of Postville*, TF-03-165, Order Docketing Tariff and Requesting Response (Iowa Utils. Bd., June 27, 2003). Z-Tel and CenturyTel each voluntarily withdrew its tariff.

In Colorado, a slightly different scenario developed. CenturyTel filed a wireless termination tariff and, after numerous interventions and objections by wireless carriers, CenturyTel and the wireless carriers were able to make significant progress in negotiating agreements. As a result, CenturyTel withdrew its proposed tariff and reached agreements instead. *See Re: The Investigation and Suspension of Tariff Sheets Filed by CenturyTel of Colorado, Inc.*, R03-0925, Recommended Decision of ALJ, 2003 Colo. PUC LEXIS 900 (Colo. PUC, Aug. 15, 2003).

In light of the strong anti-tariff decision on precisely the same facts reached by the Iowa Utilities Board, and the growing number of federal circuits that have interpreted §§ 251-252 of the federal Telecommunications Act to preempt the use of tariffs to establish interconnection terms, this Commission should revisit the use of tariffs and find them inappropriate for the exchange of traffic with wireless carriers, whether called Wireless Termination Tariffs or access tariffs.

II. Regardless of Whether Tariffs Are Appropriate, Access Charges May Not be Applied to IntraMTA Calls To or From a Wireless Carrier.

This point seems only logical: if the FCC has determined that intraMTA calls to and from a wireless carrier are jurisdictionally local calls, and access is not a form of local compensation, access cannot be applied to intraMTA calls. Accordingly, it is not surprising that at least two federal courts have reached this conclusion since the prior briefing in 2002.

The most compelling authority is *Atlas Telephone Company v. Corporation Commission of Oklahoma*, 309 F. Supp.2d 1299 (W.D. Ok. 2004). Just this year, in a case with nearly identical facts, the federal district court in Oklahoma upheld a decision by the Oklahoma Commission that, like the earlier Iowa Board decision in *Transit Traffic*, ruled that access charges are not applicable to intraMTA traffic. In a thoroughly reasoned decision interpreting federal law, the federal court specifically held that the FCC's Local Competition First Report and Order at ¶ 1036 defines intraMTA traffic to or from a wireless carrier as jurisdictionally local. *Atlas*, 309 F. Supp.2d at 1303. As a result, the court not only finds that access charges are not applicable, the *Atlas* court finds that bill and keep is the appropriate compensation mechanism where the parties cannot agree to an alternative.

The federal district court for the District of Montana has similarly held that access charges are an improper form of compensation for intraMTA traffic. *See 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).[3] In the Order, the district court engaged in a step-by-step analysis looking at the interaction of five separate paragraphs of the Local Competition First Report and Order. *See 3 Rivers*, 2003 U.S. Dist. LEXIS 24871 at * 61-67. As the *3 Rivers* court notes, ¶ 1043 provides in relevant part:

> We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.

---

[3] There are numerous *3 Rivers* decisions. A prior ruling of the district court was appealed to the Ninth Circuit, which remanded the case for further development in an unpublished opinion. *See 3 Rivers Tel. Coop., Inc. v. U.S. West Communs. Inc.*, 45 Fed. Appx. 698. The decision cited herein is the district court's final decision following the remand from the Ninth Circuit.

Id. The 3 Rivers court finds that ¶ 1043

> supports the conclusion that traffic between a LEC and CMRS network that originates and terminates in the same MTA is local and, therefore, subject to reciprocal compensation rather than access charges. The FCC order makes no distinction between such 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. . . .
>
> Based on the foregoing discussion, the Court concludes that 47 U.S.C. § 251(b), as implemented by the FCC's 1996 Local Competition Order, preempts the tariffs in this case to the extent that the reciprocal compensation scheme applies to CMRS traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination.

Id. at *67-68. Because of the nature of federal supremacy and preemption, this is not a result that the state can change to suit a local policy interest.

Petitioners may argue that there is no choice but to apply access charges because there are no agreements in place based on prior state court precedents that local reciprocal compensation rates do not supplant access charges until an agreement is reached. First, this ignores that the FCC's definitions in ¶ 1043 reach a jurisdictional conclusion. Second, the FCC has held that § 252 and the rules thereunder are "self-executing." *See In the Matter of TSR Wireless LLC v. U.S. West Communs. Inc.*, "Memorandum Opinion and Order," Docket E-98-13 et al., Release FCC 00-194, 15 FCC Rcd. 11166 (June 21, 2000) at ¶¶ 27-29. At note 97, the FCC appears to further foreclose unilateral action by LECs, noting that "CMRS carriers may agree to forgo rights established by section 251 and the Commission's rules, for instance, *in return for other consideration from the ILEC.*" (Emphasis added). The most telling aspect of the *TSR Wireless* case, however, is the dissent. Writing in dissent, then-Commissioner Furcthgott-Roth makes ***precisely*** the arguments that the Missouri LECs have made in the present case, and states the question this way:

> This case presents the question of whether the statutory duties of section 251 apply generally to all LECs, even where the complaining party has not sought to secure the performance of those duties in an interconnection agreement as provided in section 252. . . I think the answer is no.

Which is to say the position of the dissenting Commissioner Furcthgott-Roth – which is also the position of the Petitioners here (as well as the position of the Missouri Court of Appeals in the *Sprint* and *Alma* cases) was expressly rejected by a majority of the FCC. Even without the completion of an interconnection agreement, the law as set forth in § 251 and in ¶¶ 1033-1036 and 1043 of the *Local Competition First Report and Order* applies: access charges cannot be assessed on calls to or from a wireless carrier that begin and end in the same MTA.

Notably, two federal courts and the public utilities commissions of thestates north and south of Missouri have all ruled in the wireless carriers' favor on this issue. Indeed, in Minnesota, even though the state commission permitted Wireless Termination Tariffs, the commission required that the tariffs "contained the following features:

- cost-based rates
- a rate that is not otherwise discriminatory
- a statement that the tariff does not eliminate reciprocity for termination rates, and
- a provision for offsetting the amount of traffic that a wireless carrier terminates on CenturyTel's network by the amount of traffic that CenturyTel terminates to the wireless carrier's network.

See In the Matter of Wireless Local Termination Tariff, Docket No. P-551/M-03-811, 2004 Minn. PUC LEXIS 101 (July 12, 2004) at *1-2. The Minnesota restrictions essentially require the tariff to implement reciprocal compensation, including features of local – as opposed to access – charges such as the need for the rate to be cost-based. The overwhelming majority of courts and commissions who have looked at this issue agree that, under federal law and FCC rulings, access charges are never applicable to intraMTA calls to or from wireless carriers.

III. The Default Compensation System Should Be Bill-and-Keep.

That tariffs and access charges are improper does not mean that the Complainants are not being compensated. What the LECs do not mention is that over the time period at issue in this case, their customers have been calling wireless customers – and neither the LECs nor anyone else has been paying the wireless carriers when those calls terminate on the wireless network. The LECs are being compensated by the in-kind termination provided by wireless carriers – that is, both the LECs and wireless carriers are exchanging traffic and billing only their own customers. This is simply bill-and-keep, a perfectly legitimate and FCC-approved compensation mechanism. In fact, the LECs are actually getting compensated twice: they are compensated through bill-and-keep, but they also are sending most of their jurisdictionally local intraMTA calls over Interexchange Carriers ("IXCs"), and receiving originating access charges from the IXCs for what is, in fact, a local call under FCC rules. Accordingly, the Commission should be wary when the LECs argue that bill-and-keep fails to provide incentive for wireless carriers to negotiate – it is the LECs, not the wireless carriers – who are being compensated twice.

Both Iowa and Oklahoma have adopted bill-and-keep as the default compensation regime in similar cases involving rural LECs and wireless carriers. In Oklahoma, this decision was appealed to federal court, where it was found to be proper under federal law. Not only is it proper - it is arguably the only compensation regime that states can impose on a wireless carrier in the absence of a negotiated agreement. This is because federal law specifies reciprocal compensation for local traffic. *See* 47 U.S.C. § 251. "Reciprocal" compensation generally requires a rate for each carrier – the LEC and the wireless carrier. But states are prohibited from regulating the rates of wireless companies. 47 U.S.C. § 332(c)(3). Accordingly, the only reciprocal compensation the Commission can approve is, essentially, "in kind" compensation – bill-and-keep.

It is true, of course, that the Missouri Court of Appeals Western District recently issued a non-final opinion which finds even unilateral access tariffs to be an acceptable way of governing intraMTA wireless traffic. This is, however, a question of federal law, and a state court is not the final word on federal law. This Commission should look for guidance to federal courts that have reviewed federal law as it applies to the issues in this case. The Court of Appeals unfortunately believed that wireless carriers would have no incentive to negotiate absent the pressure of tariff charges. The experience in Iowa, however, disproves this theory. In Iowa, the Board in *In re Transit Traffic* ordered bill-and-keep, but instructed the parties to negotiate forward-looking agreements. To date, more than 60 such agreements have been filed, and more are filed every week. The CenturyTel experience in Colorado also suggests that wireless carriers are willing to negotiate. In fact, the issues in this case often come up in the context of arbitrations of issues that remain open at the conclusion of good faith negotiations between wireless carriers and LECs – as was the case in Oklahoma.

At some point, the question must be "if wireless carriers are negotiating in other surrounding states, why wouldn't they do so in Missouri?" The wireless carriers are the same – the difference is the LECs. The LECs in Missouri are fighting to maintain extraordinary rates. In Iowa, the small rural LECs and the wireless carriers reached an agreement on a reciprocal termination rate of 2-cents per minute. In Nebraska, the Public Service Commission arbitrated an agreement between rural LECs and wireless carriers and established a fully-litigated rate at 2.08-cents per minute. *See Petition of Great Plains Communications Inc.*, No. C-2872, Interconnection Agreement Approved as Modified (NE PSC, Sept. 23, 2003). Although these states are similar to Missouri in their rural nature, the Complainants have not offered wireless carriers rates anywhere near these levels – and their access rates are much, much higher still. USCC would be pleased to reach a negotiated agreement and bring the lengthy litigation here to an end, but Complainants have no incentive under the present system to negotiate in good faith.

SUMMARY AND CONCLUSION

The basic dispute in this case arises over the desire of certain RLECs to continue to obtain maximum access revenues on jurisdictionally local calls through the use of access tariffs. This is contrary to the Commission's instruction to file Wireless Termination Tariffs, contrary to clear federal policy against the use of unilateral tariffs to govern wireless traffic, and is unlawful in that federal law prohibits the application of access charges to intraMTA (i.e. local) traffic. Accordingly, the Commission should find for those carriers who have refused to file Wireless Termination Tariffs that they have been compensated under a default bill-and-keep mechanism and have no right to further compensation.

Submitted this 22nd day of October, 2004.

Bret Dublinske by Paul H. Gardner

Bret A. Dublinske
Krista K. Tanner
DICKINSON, MACKAMAN, TYLER & HAGEN, P.C.
1600 Hub Tower, 699 Walnut Street
Des Moines, Iowa 50309-3986
Telephone: (515) 244-2600
Facsimile: (515) 246-4554
Email: bdublins@dickinsonlaw.com

And

Paul H. Gardner

Paul H. Gardner
GOLLER, GARDNER & FEATHER, P.C.
131 East High Street
Jefferson City, MO 65101
Telephone: (573) 635-6181
Facsimile: (573) 635-1155

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing SUPPLEMENTAL POST-HEARING BRIEF OF UNITED STATES CELLULAR CORPORATION and THE PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW OF UNITED STATES CELLULAR CORPORATION (REVISED AND SUBSTITUTED) HAS BEEN HAND-DELIVERED, MAILED, First Class mail, postage prepaid; or e-mailed this 22nd day of October, 2004.

Dana K.Joyce, General Counsel
David Meyer, Asst. Gen. Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Michael Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Paul G. Lane
Leo Bub
Southwestern Bell Telephone Company

One Bell Center, Room 3520
St. Louis, MO 63101

Craig S. Johnson
Lisa Chase and Joseph M. Page
Andereck Evans Milne Peace & Johnson LLC
P.O. Box 1438
Jefferson City, MO 65102

Mark P. Johnson
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 12100
Kansas City, MO 64111

Monica Barone
6160 Spring Parkway, 4th Floor
MS: KSOPH10414
Overland Park, KS 66251

Lisa Creighton Hendricks
Sprint
6450 Spring Parkway
MS: OSPHN0212-2A253
Overland Park, KS 66251

Jospeh D. Murphy
Meyer Capel PC
306 West Church Street
Champaign, IL 61820

Paul S. DeFord
Lathrop & Gage LC
2345 Grand Blvd. Suite 2800
Kansas City, MO 64108

William R. England, III
Brian T. McCartney
Brydon, Swearengen & England
Jefferson City, MO 65102

Thomas E. Pulliam
Ottsen Mauze Leggat & Blez LLC
112 S. Hanley Road
St. Louis, MO 63105-3418

Paul H. Gardner