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November 23, 2004

FILED[2]

NOV 24 2004

Missouri Public Service Commission

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

Re: Northeast Missouri Rural Telephone Company, et al., v Southwestern Bell Telephone Company, et al.
Case No. TC-2002-57 (consolidated)

Dear Secretary:

Enclosed for filing please find an original and eight copies of the Reply Brief of Petitioners in the above referenced case.

Thank you for seeing this filed.

Sincerely,

Craig S. Johnson

CSJ:lw

Encl.

CC: General Counsel, Office of Public Counsel
General Counsel, Missouri Public Service Commission
All Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

Reply Brief of Petitioners

Come now the Petitioner MITG Companies, and submit the following Brief in Reply to the Initial Briefs of Staff, SBC, T-Mobile, and US Cellular:

Introduction

Telecommunications traffic should not be tramsmitted between companies without known and enforceable compensation in place. State tariffs are known and enforceable. Reciprocal compensation is not known or enforceable unless a written and signed agreement is approved by the Missouri Public Service Commission.

The Missouri Court of Appeals has held[1] that state tariffs can lawfully be applied to wireless traffic until the wireless carrier invokes the preemptive

[1] See the April 29, 2003 "***Sprint***" Opinion, State ex rel Sprint Spectrum LP, et al., v MoPSC, 112 SW3d 20 (Mo app WD 2003); and the October 5, 2004 "***Alma***" Slip Opinion in WD 62961, State of Missouri ex rel. Alma Telephone Co., et al., v MoPSC.

application of the Act's reciprocal compensation procedures and pricing standards. The Court of Appeals recognized that it is only the wireless carrier's who are empowered, and therefore have the burden, to invoke reciprocal compensation. The Court held that until the wireless carriers do so, the rural companies have no option but to pursue state tariffs.

That is this case in a nutshell: Petitioners pursue their access tariffs or their wireless termination tariffs. They do so because T-Mobile and US Cellular have failed to invoke reciprocal compensation.

Until there is an approved agreement, there is no reciprocal compensation between T-Mobile or US Cellular and Petitioners. Until there is an approved agreement, the distinction between intraMTA and interMTA traffic is of no consequence. The claim of T-Mobile, US Cellular, and SBC that access cannot apply to intraMTA traffic is a fair description of what *would be* impermissible *if there were* an approved agreement. Until then, it is permissible to apply state tariffs to intraMTA traffic. In fact this Commission has entered three Orders doing so, and for years SBC's wireless interconnection tariff was applied to intraMTA traffic.

T-Mobile and US Cellular have refused to abide the requirements imposed by this Commission, and of the SBC agreements directing them to obtain approved agreements with Petitioners. If they had complied, this dispute would not have arisen.

The best way to resolve this dispute is to apply state tariffs to traffic terminating before an approved agreement. This result will assure Petitioners are compensated for use of their networks pursuant to an effective tariff. This result will provide the incentive for T-Mobile and US Cellular to obtain approved agreements, as Cingular and Sprint PCS have already done. This is the result most likely to preclude future litigation before the Commission.

Recent Court of Appeals Opinion

The October 5, 2004 ***Alma*** Opinion of the Court of Appeals recognized that ILECs such as the MITG have no power to compel reciprocal compensation agreements, but that the wireless carriers do:

> "The rural companies had no alternative but to pursue tariff options under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act. *Sprint*, 112. S.W.3d at 25. To avoid the tariffs, all the wireless companies have to do is engage in rate negotiations with the rural companies, and, thereby, invoke preemptive application of the Act's reciprocal compensation procedures and pricing standards."

It is the wireless carriers that are empowered to complete reciprocal compensation. T-Mobile and US Cellular have the burden of completing reciprocal compensation in order to end the application of state tariffs. If the Commission awards compensation pursuant to state tariffs here, T-Mobile and US Cellular will still have a remedy. They can complete the agreements the Act has authorized since 1996. They can complete the agreements that the Commission

ordered them to complete in 1997. If they complete the agreements, state tariffs will not apply to intraMTA traffic.

If the Commission does not confirm continued applicability of state tariffs, the MITG companies will be left in "no man's land". All parties agree the MITG companies are entitled compensation. But under the position of T-Mobile, US Cellular, Staff, and SBC, no lawful compensation will be paid. T-Mobile and US Cellular will have every incentive to continue to refuse to complete reciprocal compensation.

T-Mobile and US Cellular's suggestion that the MITG companies were paid pursuant to "defacto" bill and keep should be rejected. There is no such thing as "defacto" reciprocal compensation. Reciprocal compensation must be in a written agreement, and the agreement must be approved by the Commission. In both ***Sprint*** and ***Alma*** the Court of Appeals ruled that there is no reciprocal compensation until the agreement is approved. This behavior of T-Mobile and US Cellular, in refusing to complete agreements but then claiming a "defacto" agreement exists, is the same "calculated inaction" that the Court of Appeals has twice rejected.

"Subordination Language"

Respondents attempt to interpret the ***Alma*** Opinion to mean that access tariffs can only be applied to the intraMTA traffic at issue if, at the time the traffic terminated, the access tariff contained "subordination" language recognizing the

access tariff was subject to being superseded by an approved reciprocal compensation agreement.

Respondents and Staff go too far. This is not a correct statement of the law. Section 251(g) of the 1996 Act specifically provided for the continued enforcement of existing access and interconnection until reciprocal compensation agreements are approved. Section 252 of the Act specifically set forth the procedures wireless carriers must follow to complete reciprocal compensation agreements.

The ***Alma*** Opinion clearly held that it is the wireless carriers' *invocation* of the reciprocal compensation procedures--not the absence of "subordination" language--that preempts application of state tariffs:

> "To avoid the tariffs, all the wireless companies have to do is engage in rate negotiations with the rural companies and, thereby, invoke preemptive application of the Act's reciprocal compensation procedures and pricing standards. Id. At 25-26. Until that happens, the wireless companies should not be heard to complain that access tariffs must be rejected under federal law."

Access tariffs were applied to wireless traffic under three prior Commission decisions.[2] There was no "subordination" language in those tariffs. Likewise, SWBT's wireless interconnection tariff had no "subordination" language when

[2] See the Report and Orders in the complaints of United, TC-96-112 (April 11, 1997), Chariton Valley, TC-98-251 (June 10, 1999), and Mid-Missouri, TC-98-340 (June 11, 1999), all awarding access compensation for wireless traffic terminating to these three ILECs.

that tariff was applied to wireless traffic, either before or after the structure was changed effective February 5, 1998 to a "transiting" function.[3] Wireless carriers invoked the reciprocal compensation procedures with respect to SWBT and obtained reciprocal compensation agreements. By doing so they ended the application of SWBT's tariff.

The wireless carriers were in exactly the same position with respect to the rural companies' access tariffs as they were with respect to SWBT's tariff. But the wireless carriers chose not to obtain agreements with the rural companies. Instead, they chose not to complete agreements, and in the process violated the Commission's prohibition against sending the traffic without agreements.

In ***Sprint*** the Court of Appeals affirmed the Commission's approval of a new wireless termination service tariff. The presence of subordination language was merely one factor cited for the proposition that application of state tariffs prior to approved agreements did not conflict with federal law. The Court's ultimate rationale in ***Sprint*** was that the wireless carriers failed to follow Commission orders, pursue their rights under the Telecommunications Act, and establish reciprocal compensation agreements. Having failed to do so, the wireless carriers should not be heard to claim that only reciprocal compensation agreements could apply.

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[3] See the December 23, 1997 Report and Order in TT-97-524, SWBT's Filing to revise its Wireless Interconnection Service Tariff.

The application of state tariffs was held to be a reasonable and lawful means to secure compensation in this interim created by the wireless carriers. To end the application of state tariffs the wireless carriers could invoke the procedures of the Act, just as they could have done anytime since the Act became effective in 1996. This was just as true between 1998 and 2001, the time period at issue here, as it was after 2001, the time period at issue in ***Sprint***. Indeed a number of other wireless service providers have employed the methods required by the Act and established agreements that supersede both the access tariffs and the wireless termination tariffs.

Because it is the approval of an agreement that preempts application of tariffs, there is no need for the preempted tariff to have contained a subordination clause.

State Tariffs were not preempted by the 1996 Act, they can be preempted by an approved agreement.

The ***Sprint*** Opinion held:

> The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. ***The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements***.

The same reasoning applies here. The access tariffs provide a reasonable and lawful means for compensation in the absence of an agreement, yet

they do not prevent T-Mobile and US Cellular from obtaining negotiated agreements.

The ***Alma*** Opinion explains that tariffs are the only mechanism for obtaining compensation available to Petitioners:

> We disagree that federal law is controlling in this situation where the wireless companies have not taken the necessary steps to invoke reciprocal compensation procedures under the Telecommunications Act of 1996. The rural companies had no alternative but to pursue tariff options under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act.[4]

As this excerpt recognized, it was the burden of the wireless carriers to take the necessary steps to invoke reciprocal compensation. Until they do so, it is permissible for state tariffs to continue to be applied. There is no need for state tariffs to contain "subordination" language.

Case law interpreting the preemptive impact of the Telecommunications Act of 1996 is consistent. In *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Svcs, Inc.*,[5] the Sixth Circuit stated, "When a state law is not expressly preempted, courts must begin with the presumption that the law is valid."[6] The Sixth Circuit explained:

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[4] Alma Opinion, p. 10.
[5] 323 F.3d 348 (6th Cir. 2003).
[6] *Id.* at 358.

> ***When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition***, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of [the Act]." 47 U.S.C. § 261. Additionally, ***Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).***[7]

The Sixth Circuit held, "According to the Federal Communications Commission, ***as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.***"[8]

The MITG companies' access tariffs, like the wireless termination tariffs of Alma, Choctaw, MoKan, and other small rural ILECs, did not prevent the wireless carriers from taking advantage of Sections 251 and 252 of the Act. Thus, they were not preempted by federal law. The absence of "subordination" language did not prevent the wireless carriers from pursuing Sections 251 and 252.

This is precisely the same result that applied to the small company wireless termination service tariffs. Even after they were approved, the wireless termination tariffs were subject to being preempted by subsequent approved

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[7] *Id.*
[8] *Id.* at 359.

agreements, even though the wireless tariffs did contain subordination language. Several wireless carriers, including Cingular, Sprint PCS, and Verizon Wireless, have invoked preemption of the wireless termination tariff by completing agreements with Alma, Choctaw, MoKan, Mid-Missouri, and other companies within the STCG.

This Case does not involve "retroactive" application of tariffs.

The wireless carriers mischaracterize the tariff language at issue here as an attempt to *extend* switched access charges to wireless traffic. Such a mischaracterization is necessary in order to raise the "retroactive" rate argument. But the wireless carriers' argument is fundamentally wrong because it ignores the line of cases in which the Commission had already determined that access tariffs do apply to the traffic.

The Missouri Supreme Court has defined retroactive ratemaking as "the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate of return with the rate actually established." *State ex rel. Utility Consumers Council v. Mo. Public Serv. Comm'n*, 585 S.W.2d 41 (Mo. banc 1979). Thus, retroactive ratemaking is the attempt to apply "new" rates determined in a rate proceeding to a period before the final ratemaking action.

This case does not involve "new" tariffs or an attempt to ***redetermine*** rates already established and paid. Rather, this case involves the MITG companies'

access tariffs that had been approved by the Commission and were in use by the MITG companies long before the 1998 - 2001 period in question here.

The rural companies' access rates had been established in rate proceedings concluded before this case was initiated. This case was not a rate proceeding, and there was no change in rates, terms, or conditions of service proposed in this proceeding. Rather, the tariff language at issue in the ***Alma*** case was designed simply to clarify that the existing tariff – which had applied to wireless traffic both before and after the enactment of the Telecommunications Act of 1996 – would continue to apply to wireless traffic that was delivered in the absence of an agreement. This case does not involve Section 392.220.2 RSMo's prohibition against charging compensation not contained in a rate schedule in effect at that time because the MITG companies' access tariffs were in effect and had been applied to wireless traffic terminating *prior* to February of 1998 by virtue of previous Commission decisions.

The terms, conditions, and rates contained in the MITG companies' existing access tariffs are presumed to be lawful and reasonable, which was previously recognized in ***Sprint*** Opinion:

> ***The rural carriers' access rates had been approved by the Commission in prior proceedings and were, therefore, presumed lawful and reasonable.***

What is at issue in this case is the *applicability* of those access tariffs, and the tariff rates, to wireless traffic terminated in the absence of reciprocal compensation agreements.

Access tariffs, without subordination language, had already been applied by the Commission in prior cases. The ***Alma*** Opinion recognized this:

> In a series of cases during the 1990's, ***the Commission found SWBT liable to the rural companies....***[9]

Accordingly, rural companies were compensated for wireless traffic in accordance with their existing access tariffs and rates.

The tariff amendment under consideration here did not seek to "extend" access tariffs to this traffic. Instead the amendment was to ***clarify*** that the access tariff continued to apply until superseded by an approved agreement. The ***Alma*** Opinion correctly recognizes that tariff language at issue in this case was designed to ***clarify*** the MITG access tariffs ***continue to apply*** until agreements were approved:

> When no compensation agreement was reached by 1999, the rural companies filed an amendment to their existing switched access tariffs to ***clarify*** that they were applicable to the wireless traffic.[10]

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[9] Footnote 3 of the ***Alma*** Opinion cites the Commissions decisions upholding the application of access tariffs of United Telephone Company of Missouri, Chariton Valley Telephone Corporation, and Mid-Missouri Telephone Company.

[10] ***Alma***, pp. 4-5.

It was the wireless carrier's refusal to complete reciprocal compensation which made this clarification necessary. The Commission expressly prohibited wireless traffic from being sent to Respondents unless there was an approved agreement.[11] But the wireless carriers violated this prohibition. After February of 1998, the traffic at issue terminated without the reciprocal compensation agreements necessary to displace the continued application of access tariffs. If the wireless carriers had not violated the prohibition, and obtained the agreements as directed, neither the ***Alma*** case, nor the ***Sprint*** case, nor this complaint proceeding would have come before the Commission.

Contrary to the implications of T-Mobile, US Cellular, SBC, and Staff, the Commission in February of 1998 did not direct wireless carriers to simply "seek" agreements with the rural companies. The *Order* ***expressly prohibited*** sending any traffic to the rural companies without obtaining agreements. The ***Alma*** Opinion recognizes this:

> Effective in February of 1998, the Commission approved tariff revisions that eliminated SWBT's obligation to pay for wireless traffic delivered to the rural companies. However, the revisions also ***expressly prohibited*** wireless companies from sending calls through SWBT to the rural companies absent an agreement by the wireless

[11] At footnote 4, the *Opinion* cites the Commission's December 23, 1997 *Report and Order* in Case No. TO-97-524; 7 Mo. P.S.C. 3d 38 (SWBT's revised tariffs "expressly prohibited wireless companies from sending calls through SWBT to the rural companies absent an agreement by the wireless companies to compensate the rural companies.")

companies to compensate the rural companies. The wireless companies failed to negotiate such an agreement, but SWBT continued to transmit the wireless calls to the rural companies' networks without compensation and in violation of the Commission's order.

The wireless carriers should not be allowed to ignore the Commission *Order* prohibiting the delivery of this traffic without agreements. The wireless carriers should not be rewarded for their "calculated inaction" in refusing to obtain the reciprocal compensation agreements necessary to end application of access tariffs. The access tariff rates had been approved by the Commission and were in effect during the time period that the wireless carriers unlawfully delivered the traffic, so the bar against retroactive ratemaking does not apply in this case.

The Commission cannot compel the MITG and wireless carriers to enter into reciprocal compensation agreements.

The MITG Petitioners agree with Staff and SBC that the Commission cannot compel the MITG or the wireless carriers to enter into reciprocal compensation agreements. The Court of Appeals has twice recognized the MITG companies are not themselves empowered to compel agreements. It would do no good for the Commission to order the MITG to do something they are not empowered to do. The Commission has no supervisory jurisdiction over wireless carriers, so it has no jurisdiction to Order them to enter into agreements.

The 1996 Act gave the wireless carriers the discretion to compel reciprocal compensation, and the means to do so. Because the Act left this discretion to the

wireless carriers, it would be inconsistent for the Commission to attempt to take this discretion away.

Staff Exhibits 303 HC and 308HC, and the supposed "Discrepancy" between CTUSR minutes and traffic study minutes.

Staff says there is a "discrepancy" between CTUSR volumes and the volumes in the traffic studies of Northeast and Chariton Valley. Staff attempts to use this alleged "discrepancy" to persuade the Commission to accept Staff's proposed interMTA factor between T-Mobile and Northeast, and between T-Mobile and Chariton Valley. Staff's attempt is based upon a fundamental misunderstanding, and should be rejected.

The traffic volumes for which compensation is claimed is based upon the CTUSR reports of SBC, not the switch volumes recorded by Northeast or Chariton Valley. When the Commission required the record to be reopened for further evidence as to interMTA and intraMTA traffic proportions, traffic had to be studied to produce a factor. The CTUSR's failed to provide sufficient information from which interMTA and intraMTA traffic could be separated. Neither SBC nor the wireless carriers could produce information from which interMTA and intraMTA traffic could be determined. Thus, the only information available to Northeast and Chariton Valley to study was that traffic information recorded by their switches.

The factors produced by Northeast and Chariton Valley's studies were applied to the CTUSR volumes for which compensation is sought. The traffic

study volumes did not replace the CTUSR volumes as the traffic total for which compensation is sought. The traffic study factors were taken against the CTUSR volumes to produce interMTA and intraMTA subtotals for the CTUSR traffic volumes.

The traffic volumes Northeast and Chariton Valley studied in their study period were actual traffic volumes. Their traffic studies would have been subject to criticism if they had attempted to somehow change the actual traffic volumes to match the corresponding CTUSR volumes. The testimony of William Biere and Gary Godfrey pointed out that the CTUSR traffic volumes reported were not always accurate, as SBC sometimes failed to report wireless traffic, and SBC sometimes reported the wireless traffic in periods later than when the traffic actually terminated.[12]

The actual traffic volumes Chariton Valley and Northeast studied were "real time" switch recordings of the traffic as it terminated. They are indisputed accurate records of actual traffic. It is the CTUSR volumes that could be susceptible to inaccuracies. The CTUSRs are merely "summaries" of actual traffic recordings made at multiple locations, processed, screened, combined, batched, and later reduced to a single summary report.

[12] See pages 12-13 of Exhibit 302, Surrebuttal testimony of William Biere; and examination of Gary Godfrey, TT. 1551-1553.

Staff suggests that the supposed "discrepancy" set forth in Exhibits 303 HC and 308 HC 308 is justification for Staff's proposed T-Mobile / Northeast interMTA factor. It should not. Staff's factor methodology is flawed.

On cross-examination (T. 1558- 1563) Mr. Scheperle admitted his factor method did not attempt to measure the jurisdiction of any call that actually terminated. Instead, his method computed a factor based upon tower counts. His method only counted towers in Missouri. It did not include all towers in the MTAs encompassing portions of Missouri. It assumed no wireless traffic would originate from a wireless tower outside of Missouri.

Mr. Scheperle's last assumption—that T-Mobile would not send traffic from distant MTAs to SBC for termination to Chariton Valley and Northeast—is proved untrue by the uncontradicted evidence in the record. Chariton Valley's T-Mobile traffic study, Revised Schedule 3 to Ex. 302, shows that T-Mobile calls originating from Colorado, Kansas, Nebraska, Texas, Iowa, Oklahoma, Florida, and Hawaii terminated over the SBC common trunks to Chariton Valley. Northeast's T-Mobile traffic study, Schedule 4 to Ex. 307, shows that T-Mobile calls originating from Kansas, Oklahoma, Texas, Arizona, Iowa, Minnesota, and Colorado terminated over the SBC common trunks to Northeast.

Petitioners' Proposed Conclusions of Law 2 through 14.

Rather than repeat the language of the Act, FCC decisions, and rules in support of the lawfulness of applying state tariffs until an agreement is approved, Petitioners direct the Commission to their proposed conclusions of law 2 through

14. These conclusions succinctly set forth this legal reasoning. For ease of reference, those conclusions are attached hereto.

T-Mobile continues to mischaracterize the case law regarding the applicability of state tariffs.

T-Mobile mischaracterizes the case law pertinent to these issues. Its brief mirrors similar mischaracterizations it has made in ex parte presentations to the FCC. These arguments were thoroughly responded to by the August 17, 2004 letter to the FCC from Brydon, Swearengen, & England, a copy of which is atttached hereto and incorporated by reference herein.

In short, the case law has interpreted federal preemption to prevent state Commissions from inhibiting or "placing thumbs" on the negotiation process. The case law does not prohibit the application of state tariffs to wireless traffic prior to the effectuation of a reciprocal compensation agreement, because the state tariff is subject to being preempted by approval of the reciprocal compensation itself.

In conclusion, the Petitioners respectfully request that their complaints be sustained in accordance with the findings of fact and conclusions of law accompanying the October 22, 2004 Initial Brief.

Respectfully Submitted,

ANDERECK EVANS MILNE PEACE
& JOHNSON, LLC

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ATTORNEYS FOR MITG

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, via U.S. Mail, postage prepaid, this 24 day of October, 2004, to all attorneys of record in this proceeding.

_____
Craig S. Johnson MO Bar No. 28179

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August 17, 2004

VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Missouri Small Telephone Company Group Written *Ex Parte* Communication Wireless Termination Service Tariffs, CC Docket No. 01-92

Dear Ms. Dortch:

On July 8, 2004, T-Mobile USA, Inc. (T-Mobile) filed a written *ex parte* communication in this matter to renew its opposition to the use of wireless termination service tariffs by small rural local exchange companies (LECs). In addition, the *ex parte* presents new arguments regarding: (1) "opt in" tariffs; and (2) the right for rural LECs to compel negotiations. The majority of the arguments in T-Mobile's *ex parte* have already been addressed by the Initial and Reply Comments filed in this case by the Missouri Small Telephone Company Group (Missouri STCG).[1] The Missouri STCG's prior Comments are hereby incorporated by reference, and this letter will focus on the recent cases and new arguments included in T-Mobile's *ex parte* communication.

[1] The Missouri STCG member companies are listed in Attachment A.

INTRODUCTION AND SUMMARY

Before the wireless tariffs were approved in Missouri, wireless carriers were sending traffic to small rural exchanges without an agreement and without paying for it. T-Mobile used its indirect interconnection with the small companies to sidestep the federal Telecommunications Act's preference for negotiated compensation and interconnection agreements and ignore the Missouri Public Service Commission's (Missouri PSC) express requirement that wireless carriers negotiate agreements prior to delivering traffic to Missouri's small companies. The Missouri PSC approved the Missouri STCG wireless tariffs that apply to this traffic only in the absence of an agreement under the Act. The Missouri STCG tariffs are lawful, and they do not conflict with the small companies' duties to negotiate under the Act. Therefore, the Federal Communications Commission (Commission) should deny T-Mobile's *Petition* and reject T-Mobile's efforts to legitimize its unlawful actions.

T-Mobile's July 8, 2004 written *ex parte* renews T-Mobile's request for the Commission to declare that the Missouri STCG wireless tariffs are unlawful. In addition, T-Mobile's written *ex parte* now for the first time asks the Commission to: (1) declare that small rural carriers can initiate interconnection negotiations; and (2) offer an alternative that would allow small rural carriers to file "opt in" interconnection tariffs. T-Mobile's *Petition* and *ex parte* suggestions should be rejected for the following reasons.

First, as a matter of law, the federal Telecommunications Act of 1996 (the Act) provides T-Mobile with a clear procedure to request an agreement with small rural companies if that is what T-Mobile truly wanted to achieve. Many of the other wireless carriers in Missouri have negotiated agreements with small rural carriers, including Verizon Wireless, Sprint PCS, Cingular, ALLTEL Wireless, Dobson Wireless and Mid-Missouri Cellular. Indeed, T-Mobile's arguments are belied by the fact that T-Mobile has negotiated agreements with three small Missouri companies that have been approved by the Missouri PSC.[2]

Second, T-Mobile's new requests for the Commission to approve "opt in" tariffs and declare that the small companies have the right to compel negotiations are simply efforts to distract this Commission from the law that is already crystal clear. The Act provides that state tariffs may be enforced where they do not conflict with the Act's provisions. Thus, state law tariffs may apply to wireless traffic that is delivered without an agreement so long as the tariffs do not prevent a wireless carrier from exercising its rights under the Act and obtaining an agreement. The fact that T-Mobile has negotiated agreements with three small carriers in Missouri after the tariffs were approved dispels any argument that the tariffs prevent negotiated agreements. And if T-Mobile truly wanted to establish agreements with the remaining small rural carriers in Missouri, then T-Mobile could have done so years ago using the procedures set forth in the Act.

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[2] *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Ozark Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0166, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Seneca Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0167, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

DISCUSSION

1. History of Wireless Tariffs in Missouri

Up until 1997, when a large incumbent LEC (ILEC) delivered wireless traffic to the Missouri STCG companies, the large ILEC was responsible for compensating the Missouri STCG company for the use of its facilities and services to complete the call. This arrangement changed in 1997 when the Missouri PSC relieved Southwestern Bell Telephone Company (now SBC) of this payment responsibility and placed the burden on the originating wireless carriers. Under the new system put into place in 1997, wireless carriers were supposed to establish agreements with the small carriers before sending traffic to small company exchanges.

In response to small company concerns about the possibility of uncompensated traffic, the Missouri PSC clearly and unequivocally stated that wireless carriers were not to send calls until they had agreements with the small companies:

> **Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement** with such Other Telecommunication Carriers to directly compensate that carrier for the termination of such traffic.[3]

Unfortunately, the wireless carriers failed to comply with the Missouri PSC's directive and continued to send traffic to the Missouri STCG companies without an agreement and without compensating them for that traffic. As a result, the Missouri STCG companies filed their wireless tariffs.

2. The Missouri Wireless Tariffs are Subordinate to the Act.

The Missouri STCG tariffs establish the rates, terms, and conditions for wireless traffic that is delivered in the absence of an agreement, and the Missouri STCG tariffs expressly state that they will be superceded by an approved compensation or interconnection agreement. Specifically, the tariff language provides:

> This tariff applies except as otherwise provided in 1) an interconnection agreement between a [wireless] provider and the Telephone Company approved by the Commission pursuant to the Act; or 2) a terminating traffic agreement between the [wireless] provider and the Telephone Company approved by the Commission.

Thus, the wireless tariffs are not interconnection agreements or reciprocal compensation arrangements under the Act, and the tariffs are expressly subordinate to approved

[3] *In the Matter of Southwestern Bell Telephone Company*, MoPSC Case No. TT-97-524, *Report and Order*, issued December 23, 1997. (Emphasis added.)

agreements under the Act. The tariffs only apply in situations where there is no interconnection agreement yet a wireless carrier is using the small companies' facilities in the absence of any agreement or payment.

A number of wireless carriers (but not T-Mobile) opposed the Missouri STCG tariffs, but the Missouri PSC approved the tariffs. The Missouri PSC held that the tariffs were lawful under the Act. On appeal, the Missouri Court of Appeals agreed and held, "**The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements**."[4]

Since they were approved, the Missouri STCG wireless termination tariffs have not prevented any wireless carrier from negotiating a compensation or interconnection agreement. Indeed, many wireless carriers have come to the table and reached agreements with Missouri's small companies after the tariffs were filed. Specifically, Verizon Wireless, Sprint PCS, Cingular, ALLTEL Wireless, and even T-Mobile have negotiated agreements after the tariffs were approved.[5] After Sprint PCS (the wireless carrier) entered into agreements with Missouri's small companies, Sprint Missouri, Inc. (the ILEC) subsequently filed its own wireless termination service tariff.

Wireless termination tariffs are neither unlawful nor unreasonable; rather, they were necessary in Missouri to ensure that small rural ILECs are compensated for the use of their facilities. The rural ILECs have a constitutional right to a fair and reasonable return on their investment, and the Missouri PSC did not allow the wireless calls to continue terminating for free because this is potentially confiscatory.[6] In Missouri, the wireless tariffs led to negotiated agreements with wireless carriers because the tariffs provide an appropriate incentive to wireless carriers to pursue the negotiations envisioned by the Act and required by the Missouri PSC.

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[4] *Sprint Spectrum v. Missouri Public Serv. Comm'n*, 112 S.W.2d 20, 25 (Mo. App. 2003).

[5] *See e.g. Application of BPS Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. IO-2003-0207, *Order Approving Traffic Termination Agreement*, issued Feb. 3, 2003 (**Verizon Wireless**); *Application of Citizens Telephone Co. of Higginsville, Missouri for Approval of a Traffic Termination Agreement*, Case No. TK-2003-0533, *Order Approving Interconnection Agreement*, issued Aug. 20, 2003 (**Sprint PCS**); *Application of Fidelity Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TO-2004-0445, *Order Approving Interconnection Agreement*, issued April 6, 2004 (**Cingular**); *Application of Grand River Mututal Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TO-2002-0147, *Order Approving Interconnection Agreement*, issued Oct. 16, 2001 (**ALLTEL Wireless**); *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003 (**T-Mobile**).

[6] *Sprint Spectrum v. Missouri Public Serv. Comm'n*, 112 S.W.2d at 26 (*citing Smith et al. v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92, 70 L.Ed. 747, 46 S.Ct. 408 (1946)).

3. The Missouri Wireless Tariffs are Consistent with the Act.

T-Mobile argues that wireless tariffs "are inconsistent with, and therefore preempted by, federal law,"[7] but this claim is simply not true. Small company wireless tariffs are not inconsistent with the Act, and they do not prevent interconnection. State commissions may impose requirements or prescribe regulations that are not inconsistent with the Act.[8] In fact, the Act preserves state commission authority to enforce any regulation, order, or policy that establishes access and interconnection obligations so long as it is consistent with the Act.[9] Therefore, if wireless-originated traffic is being delivered to small rural ILECs in the absence of an approved compensation or interconnection agreement under the Act, then state commissions may enforce existing wireless termination tariffs or approve new wireless termination tariffs.

If T-Mobile dislikes the wireless tariffs, then the Act provides T-Mobile with a mechanism to obtain reciprocal compensation agreements to establish terms, conditions, and rates for the exchange of local traffic. Specifically, the Act requires incumbent LECs to negotiate and, if necessary, arbitrate such agreements with requesting carriers.[10] In fact, this is exactly what the vast majority of the wireless carriers have done with the large ILECs in Missouri, and many wireless carriers including T-Mobile have now established agreements with Missouri's small companies as well. The Missouri STCG recognizes its duties and responsibilities to negotiate and arbitrate reciprocal compensation arrangements with wireless carriers, and it has done so. The Missouri PSC has approved agreements between Missouri STCG member companies and wireless carriers such as Verizon Wireless, Sprint PCS, Cingular, ALLTEL Wireless, and even T-Mobile.

T-Mobile complains that after the wireless tariffs were approved, the small companies have "no incentive to agree to different terms during negotiations because tariffs 'place a thumb on the negotiating scales.'"[11] First of all, this is simply not true, as demonstrated by the numerous agreements that have been approved between Missouri STCG companies and wireless carriers such as ALLTEL Wireless, Cingular, Dobson Wireless, Sprint PCS, Verizon Wireless, and T-Mobile, all of which contain rates lower than the wireless tariff rates. Second, T-Mobile confuses the necessary incentives. As long as T-Mobile gets a free ride on the small company networks, it will have no incentive to enter into an agreement with the small companies. The Missouri PSC and the Missouri Court of Appeals both recognized the inherent unfairness of this situation and approved the tariffs. The tariffs are expressly subordinate to any negotiated agreement under the Act. The Court recognized, "**The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements**."[12]

[7] T-Mobile written *Ex Parte*, July 8, 2004 ("T-Mobile *Ex Parte*") p. 2.
[8] 47 U.S.C. § 261.
[9] 47 U.S.C. § 251(d)(3).
[10] *See* 47 U.S.C. §§ 251 and 252.
[11] T-Mobile *Ex Parte*, p. 6.
[12] *Sprint Spectrum v. Missouri Public Serv. Comm'n*, 112 S.W.2d 20, 25 (Mo. App. 2003).

The Missouri STCG's tariffs do not bypass the Act. Rather, the tariffs are expressly subordinated to any approved agreement under the Act. It is T-Mobile that has failed to comply with its responsibilities under the Act and failed to comply with the specific requirements of the Missouri PSC by sending traffic without an agreement. If T-Mobile is allowed to deliver traffic for free over an unlawful indirect interconnection, then what incentive does T-Mobile have to negotiate? The history in Missouri has shown that until the wireless tariffs were approved, T-Mobile, along with most of the other wireless carriers, sidestepped the obligations under the Act as long as possible in order to receive free call termination. The Commission should reject T-Mobile's efforts to make an end-run around the Act's requirements.

4. The Missouri Wireless Tariffs are Not Preempted by the Act.

The Supreme Court explains that courts recognize preemption by express provision, by implication, or by a conflict between a state and federal law.[13] In the absence of explicit statutory language, state law is preempted where there is a scheme of federal legislation that is "so pervasive as to make reasonable the inference that Congress left no room for states to supplement it."[14] State law is preempted to the extent that it actually conflicts with federal law, but the Supreme Court has emphasized that preemption is the exception, not the rule. The Supreme Court states, "[W]e have worked on the 'assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[15]

T-Mobile argues that the wireless tariffs are inconsistent with and therefore preempted by the Act.[16] However, recent federal court cases hold that state tariffs may continue to apply when they do not conflict with the Act.

In *Michigan Bell v. MCI,*[17] the U.S. District Court for the Eastern District of Michigan explained the differences and the relationships between state tariffs and interconnection agreements. The District Court held that states "cannot enforce a tariff in a manner that violates a party's rights under a negotiated interconnection agreement."[18] The District Court explained, "**State tariffs are obviously not agreements approved under the Act. Further, tariffs are inherently different from interconnection agreements**."[19] The District Court concluded, "pursuant to the Act, **the State may impose and enforce tariff provisions**, but cannot enforce a tariff in a manner that violates a party's rights under negotiated interconnection agreement."[20] Because the Missouri STCG wireless tariffs only

[13] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).
[14] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).
[15] *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).
[16] T-Mobile *Ex Parte*, p. 2.
[17] 128 F.Supp.2d 1043 (E.D. Mich. 2001).
[18] *Id.* at 1054.
[19] *Id.* at 1060. (Emphasis added.)
[20] *Id.* at 1054. (Emphasis added.)

apply in the absence of a negotiated compensation or interconnection agreement, the wireless tariffs do not conflict with the Act.

On appeal, the Sixth Circuit Court of Appeals also explained the relationship between state law tariffs and interconnection agreements. In *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Svcs, Inc.*,[21] the Sixth Circuit stated, "When a state law is not expressly preempted, courts must begin with the presumption that the law is valid."[22] The Sixth Circuit explained:

> **When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition**, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of [the Act]." 47 U.S.C. § 261. Additionally, **Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3)**.[23]

The Sixth Circuit held, "According to the Federal Communications Commission, **as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted**."[24] The Missouri STCG wireless tariffs meet this test because they do not prevent T-Mobile from taking advantage of Sections 251 and 252 of the Act.[25]

In *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm'n*,[26] the Seventh Circuit stated that "**the Act recognizes and specifically preserves state authority to regulate locally, as long as the regulations promote, and do not conflict with, the stated goals and requirements of the Act on its face or as interpreted by the FCC**."[27] The Seventh Circuit quoted Section 261(c) of the Act:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.[28]

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[21] 323 F.3d 348 (6th Cir. 2003).
[22] *Id.* at 358.
[23] *Id.*
[24] *Id.* at 359.
[25] Indeed, T-Mobile has subsequently negotiated agreements with three small Missouri companies after the wireless tariffs were approved. These three agreements were approved by the Missouri PSC. *See e.g. Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.
[26] 362 F.3d 348 (7th Cir. 2004).
[27] *Id.* at 392. (Emphasis added.)
[28] 47 U.S.C. §261(c).

The *Indiana Bell* court added, "Conversely, the FCC, in implementing regulations animating the Act, cannot scuttle state regulations consistent with the Act." Because the wireless tariffs do not prevent T-Mobile from establishing an agreement, the tariffs are not precluded by the Act.

In *U.S. West Communications v. Sprint et al.*,[29] the Tenth Circuit explained that there is an incentive for carriers to negotiate prices and terms that are more favorable than those set forth in a local exchange companies' existing tariffs.[30] In that case, the parties agreed that **carriers have "the right to purchase services from an ILEC pursuant to an ILEC's tariffs without negotiating an interconnection agreement."**[31] Thus, the Tenth Circuit allowed tariffs to be used in conjunction with the interconnection provisions of the Act.

In *BellSouth Telecommunications v. Cinergy Communications Co.*,[32] the United States District Court for the Eastern District of Kentucky found that the 1996 Act prohibits the Commission from precluding enforcement of state regulations that establish interconnection and are consistent with the Act.[33] The *BellSouth* court stated, "**According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.**"[34]

Thus, federal courts recognize that state law tariffs may exist in concert with the Act, and the decisions discussed above all demonstrate that the Missouri STCG wireless termination service tariffs have not been preempted by the Act. Wireless carriers need simply to request interconnection agreements if they want to supercede these lawful state tariffs.

5. The Missouri Court of Appeals Decision was Properly Decided.

T-Mobile argues that the Missouri Court of Appeals erred in upholding the Missouri wireless tariffs.[35] T-Mobile complains, "LECs cannot use the absence of interconnection contracts as an excuse not to comply with their explicit statutory obligations under Section 251(b)."[36] T-Mobile's argument misses the point and tries to shift the blame for its "calculated inaction" and unlawful use of small company facilities and services.

The Missouri Court of Appeals recognized that the wireless carriers were using the small companies' facilities without payment, and it concluded that the tariffs were not preempted by the Act:

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[29] 275 F.3d 1241(10th Cir. 2002).
[30] *Id.* at 1250.
[31] *Id.* at note 10. (Emphasis supplied.)
[32] 297 F.Supp.2d 946.
[33] *Id.* at 953.
[34] *Id.*
[35] T-Mobile *Ex Parte*, pp. 8-9.
[36] T-Mobile *Ex Parte*, p. 9.

> To supercede the tariffs, all the wireless companies have to do is initiate negotiations with the rural carriers and, thereby, invoke the Act's mandatory procedures for reciprocal compensation arrangements and pricing standards. The wireless companies have failed to follow prior Commission orders to establish agreements with the rural carriers before sending wireless calls to their exchanges. The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. **The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction**. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.[37]

The Missouri Court of Appeals properly interpreted the Act, the existing federal case law, and the facts presented to the Missouri PSC. The *Sprint Spectrum* case correctly held that the wireless tariffs were not preempted by the Act.

6. FCC and State Commission Decisions Recognize that Tariffs are Lawful When They do not Conflict with the Act.

a. Federal Communications Commission Decisions

In the 2001 *Airtouch Cellular* case, the Commission observed that the *CMRS Second Report and Order* states that the Commission "will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time."[38] Accordingly, the Commission concluded that its intent "was to mandate mutual compensation for the termination of traffic that originates on the LEC's network, but to **not preempt state regulation of the actual rate paid by CMRS carriers for intrastate interconnection**."[39] Thus, tariffs that establish the rates and terms for indirect interconnection in the absence of agreements under the Act are not preempted.

This Commission has also recognized that tariffs are an appropriate method for carriers to receive compensation. For example, in 2002 the Commission recognized that traffic to wireless carriers may be delivered pursuant to either an agreement or a tariff. In a decision that addressed intercarrier compensation arrangements between wireless carriers and interexchange carriers (IXCs), the Commission explained:

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[37] *Sprint Spectrum v. Missouri PSC*, 112 S.W.2d 20 at 25. (Internal citations omitted.)
[38] *In the Matter of Airtouch Cellular*, FCC 01-194, *Memorandum Opinion and Order*, 16 FCC Rcd. 13502; 2001 FCC LEXIS 3594 (rel. July 6, 2001), ¶14.
[39] *Id.* (Emphasis added.)

> There are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; **(2) tariff**; or (3) contract.[40]

Thus, it is both appropriate and lawful for the Missouri STCG to use tariffs that apply to traffic that is delivered in the absence of an agreement or contract. As a result, T-Mobile has the choice of either: (a) sending traffic via the Missouri STCG wireless tariffs; or (b) establishing an agreement pursuant to the Act. What T-Mobile may not do, however, is to unlawfully send wireless calls without compensation and in the absence of an agreement.

b. Other State Commission Decisions

Other state commissions are reaching the same conclusion as the Missouri PSC did about the need for wireless termination tariffs that apply to traffic delivered in the absence of an agreement. For example, the Minnesota Public Utilities Commission recently observed, "The fact that many wireless carriers have chosen to cooperate in arranging mutual compensation is not proof that all carriers will do so. And if a carrier does not do so, then a tariff provides an appropriate mechanism for securing compensation."[41]

The Alabama Public Service Commission recognized that it has "a legal responsibility to ensure that the facilities in which utilities have invested are not utilized in a manner that is confiscatory to the utility in question."[42] The Alabama Commission noted that wireless carriers "have the clear and unilateral option of invoking the remedies of the Telecom Act to address the issues they have presented, but have chosen not to exercise that option."[43] Accordingly, the Alabama Commission stated:

> Based on the foregoing, we find that this Commission has an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act's provisions.[44]

The Alabama Commission concluded that strict enforcement of tariffs with respect to indirect wireless traffic would ensure that the rural LECs receive compensation for the use of their networks until such time as the wireless carriers employ the provisions in the Act for negotiated agreements.[45]

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[40] *In the Matter of the Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT No. 01-316, *Declaratory Ruling*, July 3, 2002. (Emphasis supplied.)
[41] *In the Matter of Wireless Termination Tariff*, Docket No. P-551/M-03-811, 2004 Minn. PUC LEXIS 101, *Order Affirming Prior Order and Inviting Revised Filing*, July 12, 2004.
[42] *Petition for Declaratory Ruling by Alabama's Rural Incumbent Local Exchange Carriers*, Docket 28988, 2004 Ala. PUC LEXIS 27, 232 P.U.R.4th 148, *Declaratory Order*, issued Jan 26, 2004 (Citations omitted.)
[43] *Id.*
[44] *Id.*
[45] *Id.*

7. The Cases Cited by T-Mobile are Legally and Factually Distinguishable.

a. Federal Court Cases

T-Mobile argues that several federal court decisions issued since T-Mobile's petition was filed "confirm that 'default interconnection tariffs' are unlawful and preempted" by the 1996 Act.[46] The cases cited by T-Mobile are not on point. For example, *Wisconsin Bell v. Bie*[47] involves a court preempting a state commission order that required an ILEC against its will to offer interconnection terms by a tariff. The Seventh Circuit found that this requirement "places a thumb on the negotiating scales by requiring one of the parties to the negotiation...to state its reservation price, so that bargaining begins from there."[48] Thus, the *Wisconsin Bell* case does not involve an incumbent that is affirmatively requesting a tariff.

The Missouri STCG tariffs are distinguishable because they were filed voluntarily by the Missouri STCG companies in order to put terms, conditions, and rates in place that would apply to wireless traffic that was delivered in the absence of negotiated agreements. The Missouri STCG companies have voluntarily stated their "reservation prices" and to the extent they may have inhibited further negotiations, they have done so only to themselves by placing a "ceiling" on the rate they can charge. The wireless carriers are free to argue for any price below that ceiling.

The *Wisconsin Bell* case is further distinguishable because it does not address a tariff that would cease to have effect upon the approval of a compensation or interconnection agreement. Moreover, the *Wisconsin Bell* case does not involve the exchange of traffic between wireline and wireless carriers, nor does the *Wisconsin Bell* case involve "efforts to remedy one party terminating traffic to another without an interconnection agreement."[49] In this case, the tariffs are expressly superceded by an agreement under the Act, and T-Mobile is presently paying nothing for its use of many of the Missouri STCG member companies' facilities. Thus, both the law and the facts distinguish the line of cases cited by T-Mobile.

b. FCC Cases and Sections 201 and 332

T-Mobile continues to cite FCC *Orders* issued in the 1980's and argue that a landline company's filing of a tariff before an interconnection agreement has been negotiated indicates a lack of good faith.[50] Neither the law nor the facts support T-Mobile's argument. The 1987 and 1989 FCC *Orders* cited by T-Mobile are inapplicable to the present case because they pre-date the 1996 Telecommunications Act which establishes the Missouri STCG's duty to negotiate.[51] If T-Mobile truly wants an agreement, then the 1996 Act

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[46] T-Mobile *Ex Parte*, pp. 3-5.
[47] 340 F.3d 441 (7th Cir. 2003).
[48] *Id.* at 444.
[49] *In the Matter of Wireless Local Termination Tariff*, Minnesota PUC Docket No. P-551/M-03-811, *Order Affirming Prior Order and Inviting Revised Filing*, issued July 12, 2004.
[50] T-Mobile *Ex Parte*, pp. 6-7.
[51] The Minnesota Commission recently stated, "Indeed, given the support for state regulation of rates paid by CMRS providers for intrastate interconnection expressed in the *Local Competition Order* and the *AirTouch Cellular* order, it would be hard to reconcile these orders with the tariff preclusion language from the 1980s." *In*

provides T-Mobile with a clear mechanism to obtain one.[52] Indeed, the tariffs did not prevent T-Mobile from negotiating agreements with three Missouri STCG member companies that were approved by the Missouri PSC in November of 2003.[53]

T-Mobile cites Section 332 of the Act as an additional argument against the small company tariffs.[54] T-Mobile's analysis of Section 332 is erroneous and inapplicable to the facts in Missouri. First, Section 332 (c)(1)(B) applies only where a carrier requests *interconnection, not where a carrier avoids interconnection obligations.*[55] *Second, Section* 332 applies to direct interconnection, not indirect interconnection:[56]

> Upon reasonable request of any person providing commercial mobile radio service, the Commission shall order a common carrier to **establish physical connections** with such service pursuant to the provisions of section 201 of this title.[57]

Thus, Section 332 offers no basis for the FCC to assert jurisdiction and mandate terms for the indirect interconnection between T-Mobile and small rural ILECs. Section 332 clearly addresses direct interconnection, but T-Mobile seeks to void the Missouri tariffs which only address indirect interconnection.

What T-Mobile really wants is something quite different from direct interconnection: T-Mobile wants to send wireless calls to rural ILECs over indirect interconnections with RBOCs and skirt paying its fair share of connecting with rural America. The provisions cited by T-Mobile provide no authority for the improper relief that T-Mobile requests.

8. T-Mobile's new "Opt In" Argument Does Not Solve the Problem.

T-Mobile argues that rural carriers may use "opt in" tariffs, but this is just a smokescreen to cover T-Mobile's efforts to continue its free ride. At this point it should be clear to the Commission that T-Mobile will not "opt in" to any agreement with a small rural carrier as long as T-Mobile can receive free termination on small carrier networks through its calculated inaction. Under the Act, T-Mobile already has three clear choices: (1) "opting in" to the Missouri STCG's existing wireless tariffs; (2) "opting in" to one of the many other negotiated agreements between the STCG companies and other wireless carriers such as Verizon Wireless, Sprint PCS, ALLTEL Wireless, Dobson Wireless, or Mid-Missouri Cellular;

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the Matter of Wireless Termination Tariff, Docket No. P-551/M-03-811, 2004 Minn. PUC LEXIS 101, *Order Affirming Prior Order and Inviting Revised Filing*, July 12, 2004.

[52] Specifically, ILECs are required to negotiate, and if negotiations fail, then they are subject to mandatory arbitration. *See* 47 U.S.C. §§251 and 252.

[53] *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Ozark Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0166, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Seneca Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0167, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

[54] T-Mobile *Ex Parte*, p. 6.

[55] *See* Alliance of Incumbent Rural Independent Telephone Companies Comments, pp. 19-20.

[56] *See* Missouri STCG Initial Comments, pp. 20-21.

[57] 47 U.S.C. § 332(c)(1)(B). (Emphasis added.)

or (3) negotiating (and, if necessary, arbitrating) an agreement with the STCG companies. The Missouri wireless tariffs do not prevent or prohibit negotiated or arbitrated agreements. Rather, they are expressly subordinate to agreements negotiated under the Act.

9. T-Mobile Has the Right to Compel Both Negotiation and Arbitration.

T-Mobile argues that rural ILECs have the right to "open interconnection negotiations for a reciprocal compensation agreement under Section 251(b)(5)."[58] T-Mobile's new argument is simply another attempt to cloud the issue and shift the blame for T-Mobile's calculated inaction. Although the rights of rural ILECs to compel negotiations are not entirely clear,[59] there is no question that T-Mobile has always had the right to compel negotiations. Indeed, T-Mobile's new proposal contradicts the history of wireless interconnection in Missouri. In 1997, the Missouri PSC issued an order that required wireless carriers to establish agreements before they sent traffic to the small companies.[60] But the agreements never materialized, and wireless carriers were content to send traffic without compensation or agreements. After the wireless tariffs were approved, this problem was solved for all major carriers except T-Mobile.

T-Mobile's argument also defies common sense and traditional business practices. Small rural carriers should not be required to chase wireless carriers across the country to receive compensation for the use of their facilities and services. As a practical matter, businesses should not be forced into a position where they must track down customers that have used services and attempt to negotiate the terms and rates for that use of the service after the fact.

10. T-Mobile's *Petition* Violates the Commission's Procedural Rules.

T-Mobile's *Petition* violates the Commission's procedural rules. On October 18, 2002, the Montana Local Exchange Carriers ("Montana LECs") moved that the Commission dismiss the *Petition* because it seeks to invalidate a state commission order and preempt state law in violation of the Commission's *ex parte* rules. Specifically, T-Mobile seeks to invalidate the Missouri PSC order that approved wireless termination tariffs, as well as the subsequent Missouri Circuit Court and Court of Appeals decisions approving the tariffs. The Missouri STCG concurred with the Montana LECs' motion to dismiss on November 1, 2002, and the Missouri Independent Telephone Company Group (MITG) filed a *Motion to Dismiss* on the same grounds on August 3, 2004.

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[58] T-Mobile *Ex Parte* Comments, p. 13.

[59] T-Mobile claims that a "voluntary" right can be found and offers an unusual analysis of the Act to conclude that rural ILECs have "ample authority" to request interconnection negotiations. T-Mobile *Ex Parte* Comments, p. 13. Other courts and state commissions disagree. See e.g. *Sprint Spectrum v. Missouri Public Serv. Comm'n*, 112 S.W.2d 20, 25 (Mo. App. 2003) ("The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers.")

[60] *In the Matter of Southwestern Bell Telephone Company*, Missouri PSC Case No. TT-97-524, *Report and Order*, issued December 23, 1997. (Emphasis added.)

T-Mobile has repeatedly referred to the Missouri STCG wireless tariffs in its *Petition* and its most recent *ex parte* comments.[61] The Missouri STCG wireless tariffs were approved by the Missouri PSC after notice and hearing.[62] The tariffs have been upheld by Missouri's Cole County Circuit Court[63] and the Missouri Court of Appeals.[64] Thus, T-Mobile's *Petition* seeks to preempt Missouri law.[65]

T-Mobile did not comply with the Commission's *ex parte* rules because T-Mobile failed to serve the Missouri PSC.[66] Therefore, T-Mobile's *Petition* must be dismissed because it fails to comply with the notice and due process requirements of the Commission's rules. Additionally, T-Mobile failed to serve the Missouri STCG companies whose tariffs are at issue. Requests to invalidate tariffs should not be brought as declaratory ruling requests, but as formal complaints served upon each carrier whose tariff is targeted for invalidation.[67] Thus, T-Mobile's *Petition* is procedurally improper and must be dismissed. The Missouri STCG concurs with *Motions to Dismiss* filed by the Montana LECs and the MITG. The Missouri STCG respectfully renews its request that the Commission dismiss T-Mobile's *Petition* because it violates the Commission's *ex parte* rules.

CONCLUSION

There is nothing unlawful about wireless termination service tariffs that establish the rates, terms, and conditions for wireless-originated traffic that is delivered in the absence of an approved compensation or interconnection agreement. State tariffs that do not prevent T-Mobile from taking advantage of the Act are not preempted. The Missouri wireless tariffs did not prevent Missouri's other major wireless carriers from establishing agreements with the Missouri STCG companies, and the tariffs did not prevent T-Mobile from establishing agreements with three of the Missouri STCG companies. Nothing in the tariffs prevents T-Mobile from establishing agreements with the remaining Missouri STCG companies. Therefore, the Commission should deny T-Mobile's *Petition*.

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[61] The Missouri wireless tariffs are specifically discussed on pages 5 and 6 of T-Mobile's *Petition* and pages 8 and 9 of T-Mobile's July 8, 2004 written *ex parte* comments.

[62] *In the Matter of Mark Twain Rural Telephone Company,* Missouri PSC Case No. TT-2001-139, *Report and Order*, issued February 8, 2001.

[63] *State ex rel. Sprint Spectrum L.P. v. Missouri PSC*, Case No. 01CV323740. (Decision issued Nov. 26, 2001.)

[64] *Sprint Spectrum L.P. v. Missouri PSC*, 112 S.W.3d 20 (Mo. App. 2003).

[65] *See Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997)(A tariff approved by the MoPSC has "the same force and effect of a statute approved by the legislature.").

[66] 47 C.F.R. § 1.1206, note 1; *In the Matter of Amendment of 47 C.F.R. § 1.1206 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 14 FCC Rcd 18831, 18838, *Memorandum Opinion and Order*, (released November 9, 1999).

[67] *In the Matter of Communique Telecommunications, Inc. d/b/a Logicall*, 14 FCC Rcd 13635, 13649 (released August 9, 1999).

Respectfully submitted,

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ATTACHMENT A

Missouri Small Telephone Company Group

BPS Telephone Company
Cass County Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Fidelity Telephone Company
Goodman Telephone Company, Inc.
Granby Telephone Company
Grand River Mutual Telephone Corp.
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
New London Telephone Company
Orchard Farm Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Co., Inc.
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Company
Stoutland Telephone Company

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

REPORT AND ORDER

Issue Date:

Effective Date:

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

49. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 187,824 minutes of use for interMTA traffic originated by T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from T-Mobile.

50. Petitioner Chariton Valley is entitled to be compensated by SBC at Chariton Valley's intrastate intraLATA terminating switched access rate for 69,210 minutes of use for intraMTA traffic originated by T-Mobile and terminated by SBC to Chariton Valley. Upon payment of such compensation to Chariton Valley, SBC will be entitled to indemnity from T-Mobile.

CONCLUSIONS OF LAW

1. The Commission entered an Order earlier in this proceeding, dated February 14, 2002, denying motions to dismiss for lack of subject matter jurisdiction filed by certain Respondent wireless carriers. In that Order, this Commission determined that it has jurisdiction to determine whether any charges are owed to Petitioners with respect to the traffic in questions and, if so, how the charges are to be calculated. That Order stated, in part:

> A complaint may be brought before this Commission by 'any corporation or person,' including regulated utilities, against 'any corporation, person, or public utility' The language is very broad and is clearly intended to extend to entities not subject to Commission regulation. As long as at least one party, whether a petitioner or a respondent, is a public utility, the Commission has jurisdiction under the law. Thus, for example, the Commission has jurisdiction over disputes between public utilities and their customers and often hears such cases. According to the complaints filed in these cases, the respondents are all customers of the petitioners in that they originate or transport traffic intended for termination on

the petitioners' networks, to petitioners' subscribers. The Commission has jurisdiction over the dealings of a pubic utility with its customers."[10]

2. At page 11 of its April 11, 1997 Order in TC-96-112, United's complaint against SBC for compensation for terminating wireless traffic, this Commission held that:

> "in the absence of some other consensual method of payment, termination of this traffic must be paid for under United's access tariff."

3. In its June 10, 1999 Orders in TC-98-251 and TC-98-340, Mid-Missouri and Chariton Valley's complaints against SBC for compensation for terminating wireless traffic, this Commission held that such traffic terminating between April 1, 1993 and February 4, 1998 was:

> "subject to the terminating access rates prescribed by the approved tariff adopted by each of those companies..."

4. Sections 251(b)(5) and 252(c)(1) of the 1996 Telecommunications Act used the future tense in describing reciprocal compensation. 251(b)(5) created a duty "to establish" reciprocal compensation. 252(c)(1) created a duty "to negotiate". Section 252 of that Act set forth a future process for requesting interconnection, negotiation, arbitration, and state commission approval of the resulting agreements. Respondents' contention that reciprocal compensation for intraMTA traffic was a "default" or "automatic" after the 1996 Act is erroneous. There would have been no need for the provisions set forth above if reciprocal compensation were automatically implemented by the 1996 legislation.

[10] Order, p. 4. Section 386.020(53)(c).

5. The F.C.C. stated in its *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, August 8, 1996 (First Report and Order), at paragraph 1036:

> "we will define the local service area for calls to or from a CMRS network [wireless carrier] for the purposes of applying reciprocal compensation obligations under section 251(b)(5). ... Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation. 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."

Thus, the FCC defined the MTA as the wireless carriers' local service area only for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Until an agreement containing reciprocal compensation provisions was approved pursuant to 47 USC 252, reciprocal compensation did not exist.

6. 47 CFR 51.717(a) recognized that, prior to the 1996 Act, there were prior compensation arrangements between ILECs and CMRS providers. This rule provided that CMRS providers with arrangements with ILECs established prior to August 8, 1996 were entitled to renegotiate these arrangements, without termination liability or contract penalties:

> "Renegotiation of existing non-reciprocal arrangements.
>
> (a) Any CMRS provider that operates under an arrangement that existed with an incumbent LEC that was established before **August 8, 1996** and that provides for non-reciprocal compensation for transport and termination of telecommunications traffic is entitled to **renegotiate** these arrangements with no termination liability or other contract penalties."

This FCC rule also contradicts Respondent's assertion that reciprocal compensation was "automatic" with the 1996 Act.

7. The actions of Respondent wireless carriers in negotiating and having approved agreements between them and SBC contradicts their assertion that reciprocal compensation for intraMTA traffic was automatic under the 1996 Act.

8. Although the agreements between US Cellular T-Mobile and SBC Respondents encompassed compensation between them for traffic destined for Petitioners, those agreements did not determine compensation for Petitioners. As This Commission stated in its December 11, 1998 Arbitration Order regarding the AT&T and MCI arbitration with SWB, TO-97-40/TO-97-67:

> "The independent LECs were not a party to this case and should not be affected by the results of this arbitration. Until such compensation agreements can be developed, the company's intrastate switched access rates should be used on an interim basis. The intrastate switched access rates are currently used when toll traffic is exchanged between the companies and would be appropriate to use on an interim basis. This will avoid forcing the results of this arbitration on companies not a party to the case."

9. In its February 8, 2001 Report and Order in TT-2001-139 the Commission approved small company wireless terminating tariffs. Since approval, these tariffs have applied to the traffic in question until those tariffs were superseded by an approved reciprocal compensation agreement. Wireless termination service tariffs were approved for Alma, Choctaw, MoKan, and many other small rural ILECs. In approving these state tariffs, This Commission concluded that reciprocal compensation was a mandatory feature of agreements, not state tariffs, that it was lawful to apply state tariffs to wireless traffic absent an approved agreement, and if any wireless carrier disliked application of state tariffs all it had to do to terminate their application was to obtain an agreement as provided by the 1996 Telecom Act:

> "However, because the proposed tariff and rates herein at issue are **in the nature of exchange access**, the Commission concludes that it does have jurisdiction over

the proposed tariffs and rates filed by the telephone cooperatives that are parties in this proceeding."

"Thus it is apparent from the Act that **reciprocal compensation arrangements are a mandatory feature of agreements** between the CMRS carriers and the small LECs....**The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs**. Therefore, the Commission concludes that **Section 251(b)(5) of the Act simply does not apply to the proposed tariffs** herein at issue. For the same reason, the Commission concludes that the proposed tariffs are **not unlawful** under Section 251(b)(5) of the Act."

"Like the obligation to establish reciprocal compensation arrangements considered above, the pricing standards at Section 252(d) simply do not apply to the proposed Wireless Termination Tariffs. Therefore the Commission concludes that the proposed tariffs are not unlawful pursuant to Section 252(d) of the Act or the F.C.C.'s regulations implementing and interpreting the Act."

"The Commission has concluded that the provision of the Telecommunications Act of 1996 do not invalidate the proposed tariffs under consideration here."

"If the CMRS carriers do not like these rates, they have the option of compelling arbitration under the Act."

10. On the wireless carriers' appeal of This Commission's February 8, 2001, *the Court of Appeals for the Western District of Missouri agreed with This Commission's* analysis, stating:

> We disagree that federal law preempts the Commission's authority to approve tariffs in the instant case. The Commission determined that the Act's 'reciprocal compensation arrangements' were inapplicable because no agreements were ever entered into by the wireless companies and rural carriers. The Act requires 'local exchange carriers'—such as the rural carriers—to negotiate in good faith and establish compensation arrangements for the termination of traffic, but it does not impose the same obligations on wireless carriers.....The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers. In the absence of a comprehensive scheme to address the wireless companies' conduct, the Commission did not use its tariff-approval authority to supplant federal law....Although the wireless companies have done nothing to bring themselves within the purview of the Act, they now seek to invalidate the subject tariffs by claiming federal law must be applied. We agree with the Commission's determination that federal law does not preemptively govern under the facts of

> this case...the Commission's action does not prevent the negotiation of reciprocal compensation arrangements or otherwise conflict with the Act's procedural requirements...To supercede the tariffs, all the wireless companies have to do is initiate negotiations with the rural carriers and, thereby, invoke the Act's mandatory procedures for reciprocal compensation arrangements and pricing standards....The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements."

See 112 SW3rd 20, 24-26 (Mo App 2003), the "*Sprint*" Opinion.

11. In its January 27, 2000 Report and Order in TT-99-428, et al., the Commission rejected tariff language that would have clarified Petitioners' access tariff continued to apply until superseded by an approved agreement. It was rejected on the ground it would not be lawful to apply access tariffs to intraMTA traffic.

The Commission's decision in TT-99-428 has been reversed by the October 5, 2004 Opinion of the Missouri Court of Appeals, Western District, in Case WD 62961, et al. (the "*Alma*" Opinion). The Court of Appeals recognized that the Commission's rejection of the proposed access tariff clarification was based on an erroneous interpretation of federal law, and that federal law did not prohibit the application of access tariffs to intraMTA traffic in the absence of a reciprocal compensation agreement. The following four excerpts from the *Alma* Opinion demonstrate:

> "The primary issue now in dispute is whether the switched access tariffs can be applied to intraMTA wireless traffic terminated in the rural companies' networks from February 1998 through February 2001, the three-year period prior to the implementation of the termination tariffs approved in ***Sprint.***"

> "... it is clear the Commission's rejection of the amended tariffs was partially based on an interpretation of the Act's reciprocal compensation provision that is inconsistent with our more recent ruling...."

"The Respondents contend the federal Act and related regulatory rulings support the Commission's conclusion that existing access tariffs cannot be lawfully applied to the wireless intraMTA traffic at issue."

"We disagree that federal law is controlling in this situation where the wireless companies have not taken the necessary steps to invoke the reciprocal compensation procedures under the Telecommunications Act of 1996. The rural companies had no alternative but to pursue tariff options under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act. ***Sprint,* 112 S.W.3d at 25.** To avoid the tariffs, all the wireless companies have to do is engage in rate negotiations with the rural companies and, thereby, invoke preemptive application of the Act's reciprocal compensation procedures and pricing standards. ***Id.* at 25-26.** Until that happens, the wireless companies should not be heard to complain that the access tariffs must be rejected under federal law.

12. This Commission is bound by the Court of Appeals determination of law, and can no longer conclude that it is unlawful for state tariffs to apply to intraMTA wireless-originated traffic terminated in the absence of an agreement. The legal reasoning of the Commission and the Court of Appeals in *Sprint*, as later confirmed in its October 5, 2004 *Alma* Opinion, is applicable here. The access tariffs of Petitioners apply to wireless traffic, whether interMTA or intraMTA, terminated prior to a wireless termination tariff or prior to an approved agreement. The wireless termination tariffs of Petitioners Alma, Choctaw, and MoKan apply in the absence of an approved agreement. If T-Mobile or US Cellular dislike the application of these tariffs, their remedy is to complete the interconnection process set forth in 47 USC 252.

13. The federal reciprocal compensation rules contemplate that ILECs such as petitioners can only be *required* to effectuate reciprocal compensation when two carriers—the originating wireless carrier and the terminating incumbent LEC (ILEC)—are involved in completing the call.[11]

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[11] 47 USC 251(c)(2) imposes the duty upon ILECs to provide, for the facilities and equipment of any requesting telecommunications carrier, **interconnection with the local exchange carrier's network**–(B) at any technically feasible **point within the carrier's network**. 47 USC 252(d)(2)(A)(i) similarly specifies that reciprocal compensation pricing should provide for the **mutual** and reciprocal recovery by each carrier of 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**".

FCC rule 47 CFR 51.5 defines an interconnection as the "**linking of two networks** for the mutual exchange of traffic". 47 CFR 701 specifies the scope of transport and termination contemplates a two-carrier collaboration:

"TITLE 47--TELECOMMUNICATION
PART 51--INTERCONNECTION--Table of Contents
Subpart H--**Reciprocal Compensation for Transport and Termination of Telecommunications Traffic**

Sec. 51.701 Scope of transport and termination pricing rules.
(a) The provisions of this subpart apply to **reciprocal compensation for transport and termination of telecommunications traffic** between LECs and other telecommunications carriers.
(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:
(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or
(2) Telecommunications 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, as defined in Sec. 24.202(a) of this chapter.
(c) **Transport**. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act **from the interconnection point between the two carriers** to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.
(d) Termination. For purposes of this subpart, termination is the

14. In its Interconnection Order, paragraphs 1034 and 1043, the FCC recognized that, where three carriers—the originating wireless carrier, a transporting IXC, and a terminating LEC—collaborated to complete a call, that call was subject to access tariffs, not reciprocal compensation:

> "¶ 1034. Access charges were developed to address a situation in which **three** carriers—typically, the originating LEC, the IXC, and the terminating LEC—collaborate to complete a long-distance call. By contrast, reciprocal compensation for transport and termination of calls is intended for a situation in which ***two carriers*** collaborate to complete a local call. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.
> .....
> ¶ 1043.Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges, ***unless it is carried by an IXC.*** We conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges."

The traffic in dispute is carried by three carriers, the originating wireless carrier, SBC, and the terminating Petitioner ILEC. SBC's role in transporting the traffic is that of an interexchange carrier, or IXC. SBC is not a LEC in Petitioner's exchange service areas. 47 USC 251(h)(1). Petitioners are the only ILECs in their exchange service areas.

> switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.
> (e) **Reciprocal compensation**. For purposes of this subpart, a reciprocal compensation **arrangement between two carriers** is one in which **each of the two carriers receives compensation from the other carrier** for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier."

15. The contention that Petitioners have been compensated pursuant to a "de facto" bill and keep form of reciprocal compensation is rejected. Although bill and keep is a permissible from of reciprocal compensation, it must be contained in an approved interconnection agreement. There is no provision under the 1996 Act, or implementing regulations, providing for an unapproved or "de facto" agreement.

16. Petitioners are incumbent local exchange companies subject to rate of return regulation under §392.240 RSMo. They have a constitutional right to a fair and reasonable return on their investment, and wireless calls should not continue to be permitted to terminate on their facilities for free. Their access or wireless termination service tariffs, as in effect at a particular time, should be applied in the absence of an approved reciprocal compensation agreement.

17. The Commission concludes that Petitioners access tariffs can lawfully be applied to the traffic in dispute, whether interMTA or intraMTA, that terminated prior to the effective date of a wireless termination tariff, and prior to the effective date of an approved interconnection agreement. If T-Mobile or US Cellular are dissatisfied with the application of state tariffs, they can complete the reciprocal compensation process set forth in the 1996 Telecommunications Act, at which time the state tariff will no longer apply to intraMTA traffic. See *Sprint* and *Alma*.

18. The Commission finds that Petitioners have timely and repeatedly asserted their right to payment under effective tariffs against Respondents. They have billed and demanded payment under their tariffs. All Respondents refused to pay. Petitioners have timely implemented access tariff clarification proceedings, have timely prosecuted appeals thereof, have timely implemented wireless termination service tariffs, and timely