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November 23, 2004

Via Federal Express

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

FILED
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Missouri Public Service Commission

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

Dear Mr. Roberts:

Please find enclosed for filing the original and nine copies of the Reply Brief of T-Mobile USA, Inc. in the above-captioned case. Please return a filed-stamped copy of the Reply Brief to me in the enclosed return envelope provided.

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

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

Very truly yours,

Mark P. Johnson
Mark P. Johnson by lsc

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

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Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

REPLY BRIEF OF T-MOBILE USA, INC.

T-Mobile USA, Inc. ("T-Mobile") submits this Reply Brief in response to the September 21, 2004 Order Setting Briefing Schedule.

I. INTRODUCTION

The Complainants open their the initial brief with a factual misstatement: "All parties, including T-Mobile . . . , agree that the MITG companies are entitled to compensation for this [1998-2001] traffic."[1] If by that statement the Complainants imply they are due compensation in addition to what they have already received, they are wrong.

- For T-Mobile's intraMTA intrastate traffic, the Complainants have already been compensated pursuant to a bill-and-keep arrangement, just as T-Mobile is compensated under the same arrangement for land-to-mobile traffic. T-Mobile acknowledges that the Complainants could seek cash compensation for call termination – *if* they had followed federal requirements, which they

[1] Revised/Substituted Initial Brief of Petitioners at 1 (Oct. 22, 2004)("Complainants' Brief").

did not. Rather, Complainants chose not to follow federal requirements, as discussed in Part II below.

- For T-Mobile's interMTA intrastate traffic, T-Mobile recognizes it must pay Complainants' access rates. The problem here is that Complainants have failed to meet their burden of establishing what traffic during the complaint period was interMTA, as discussed in Part VI below.
- Finally, the Complainants cannot use intrastate tariffs to recover compensation for terminating T-Mobile's interstate calls – whether interMTA or intraMTA.

The Complainants concede that T-Mobile "made interconnection requests of Petitioners."[2] However, the Complainants refused to engage in negotiating with T-Mobile by, among other things, imposing unreasonable (and unlawful) preconditions on the commencement of negotiations.[3] Staff agrees that the Complainants, by imposing unreasonable preconditions on the commencement of negotiations "failed in this [statutory] duty" to "establish reciprocal compensation arrangements" under Section 251(b)(5).[4]

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[2] Complainants' Proposed "Report and Order" at 15 ¶ 16.

[3] *See* T-Mobile's Brief at 9-12; T-Mobile's Proposed Findings at 4-5 ¶¶ 21-27; 15-17 ¶¶ 92-99; and 20-21 ¶¶ 10-17; *see also id.* at ¶ 3 ¶¶ 12-14. *See also* Staff Brief at 23 ("The Petitioners replied they wanted direct connection and brought up the possibility of a rural exemption to the duties of interconnecting."); SBC Brief at 32 ("There is also no dispute that the MITG Companies rejected those overtures, insisting that the wireless carriers establish direct interconnection with the MITG Companies as a prerequisite to negotiations.").

The Complainants' reliance on the Section 251(f) rural exemption demonstrates their bad faith. The statute provides that the exemption applies only to "Subsection (c) of this section," 47 U.S.C. § 251(f)(1)(A), and thus this statute has nothing to do with reciprocal compensation duties with indirect interconnection. *See id.* §§ 251(a)(1), 251(b)(5); *Number Portability,* 11 FCC Rcd 7236, 7303 ¶ 117 (1996) ("Section 251(f)(1) does not exempt rural LECs from the requirements of Section 251(b)."). Staff's statement to the contrary, unsupported by any authority (*see* Brief at 24-25), is mistaken.

[4] Second Initial Staff Brief at 24 (Oct. 22, 2004) ("Staff Brief"). However, Staff is incorrect in stating that "CMRS providers do not have to establish reciprocal compensation arrangements." In fact, the FCC rules are very clear that a CMRS carrier "*shall pay* reasonable compensation to a [LEC] in connection with terminating traffic that originates on the facilities of the [CMRS] provider." *See* 47 C.F.R. § 20.11(b)(2) (emphasis added).

The Complainants chose not to negotiate in good faith with T-Mobile. Had they negotiated, as they readily concede, "we would have had a reciprocal compensation [agreement], the [interMTA] factors would have been there, the rate would have been there, and we wouldn't have had the compensation dispute that we have today."[5] It is not T-Mobile's fault that the Complainants chose not to negotiate in good faith;[6] after all, as Complainants acknowledge, T-Mobile has negotiated and reached agreement with those rural LECs that were willing to negotiate in good faith.[7] In the end, the predicament the Complainants find themselves in is of their own making – and this predicament is a direct result of their continued refusal to comply with governing federal law and their refusal to negotiate in good faith with T-Mobile. As Staff observes, "one who has engaged in inequitable activity regarding the very matter for which he seeks relief will find his action barred by his own misconduct."[8]

II. THE COMPLAINANTS' POSITION IS INCONSISTENT WITH GOVERNING FEDERAL LAW

The Complainants' entire case rests on the theory that, as incumbent carriers with a dominant position in their respective markets, they can exempt themselves from federal law requirements simply by preparing and filing a piece of paper (state tariffs) containing terms that violate federal law. Actually, the Complainants' position is even more outrageous. They assert that federal law does not apply because T-Mobile "failed to complete interconnection agreements

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5 Tr. 1383 l. 19-22 (Sept. 8, 2004).

6 Staff suggests that after the Complainants refused to negotiate in good faith, T-Mobile should have "actively pursued the issue," presumably referring to a request for arbitration. Staff Brief at 23. But carriers are not required to pursue arbitration – especially when the costs of arbitration may exceed the economic value of the traffic at issue. And, after all, it is the party wanting to change the *status quo* that has the burden to pursue negotiations or arbitrations if negotiations fail.

7 See Complainants' Brief at 6.

8 Staff Brief at 23 (citations omitted).

with the Petitioners."[9] But the reason T-Mobile "failed to complete" an agreement is because the Complainants refused to negotiate with T-Mobile in good faith. It was the Complainants who imposed unlawful preconditions to negotiations. In other words, the Complainants here claim that they can ignore their obligations under federal law because they refused to negotiate in good faith!

Federal law, which this Commission must apply,[10] is very clear: any intercarrier compensation between a LEC and a wireless carrier **must** be reciprocal.[11] The *de facto* bill-and-keep arrangement that the parties have been using is one form of reciprocal compensation that the Communications Act explicitly sanctions.[12] In contrast, the tariffs the Complainants want the Commission to apply do not provide for reciprocal compensation (because they require T-Mobile to compensate the Complainants for terminating T-Mobile's intraMTA mobile-to-land traffic, but relieve the Complainants from having to compensate T-Mobile when it terminates their intraMTA land-to-mobile traffic.) Commission enforcement of the non-reciprocal tariffs, as the Complainants are requesting, would violate federal law.

Thus, any compensation scheme must be reciprocal. In addition, federal law requires that the rates an incumbent LEC charges for call termination must comply with the FCC's TELRIC rules.[13] The Complainants here have made no attempt to demonstrate that their access charges

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9 Complainants' Proposed "Report and Order" at 36 ¶ 18. *See also* Complainants' Brief at 3 ("T-Mobile . . . failed to get the necessary agreements.").

10 Insofar as intercarrier interconnection and compensation is concerned, this Commission acts as "a deputized federal regulator." *MCI v. Illinois Bell,* 222 F.3d 323, 343-44 (7th Cir. 2001). Thus, this Commission is required to follow federal law as interpreted by the FCC and the federal courts – and not a state court that has misunderstood and misapplied federal law (and even got the facts wrong).

11 *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 20.11(b), § 51.703(a).

12 *See* 47 U.S.C. § 252(d)(2)(B)(1).

13 *See Verizon Communications* v. *FCC,* 535 U.S. 467 (2002)(Supreme Court affirms the TELRIC rules). The Act does provide one exception – where both parties agree in negotiations to use non-

comply with the FCC TELRIC rules – and it is obvious they could never meet this burden given the unreasonably high rates they want to impose. Once again, if this Commission applies non-TELRIC-based rates as the Complainants are requesting, it would be in violation of federal law.

T-Mobile discussed in its initial brief FCC and federal court decisions demonstrating that the Complainants' position is incompatible with federal law, and T-Mobile will not repeat that discussion here.[14] The Commission should understand, however, that the Complainants' position is not only inconsistent with federal law, but is also internally inconsistent. Specifically, Complainants concede that the FCC's "MTA rule" applies in this complaint proceeding.[15] The FCC adopted this rule to implement the reciprocal compensation statute.[16] It is not surprising that the Complainants never explain why some FCC reciprocal compensation rules apply (the MTA rule), while other FCC reciprocal compensation rules should not apply (the TELRIC rule). Incumbent monopolists do not have the right to "pick-and-choose" what federal laws they will follow. They cannot follow federal law where it is to their advantage, and ignore federal law where it is not.

This complaint case involves issues of federal law, even if the Commission expressly chooses not to address these federal issues in its order. Because federal law is involved, federal courts have the power to review any order that the Commission issues in this proceeding.[17] The

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TELRIC-based rates. *See* 47 U.S.C. § 252(a)(1). Here, T-Mobile has never agreed that the Complainants may charge non-TELRIC-based rates.

14 *See* T-Mobile Brief at 5-6 (Oct. 22, 2004).

15 *See* 47 C.F.R. § 51.701(b)(2); Complainants' Proposed "Report and Order" at 9 ¶ 4.

16 *See* 47 U.S.C. § 251(b)(5).

17 *See, e.g., Rural Iowa Independent Telephone Ass'n v. Iowa Utilities Board*, 362 F.3d 1027 (8th Cir. 2004)(district court erred in dismissing a complaint challenging the lawfulness under federal law of a state commission declaratory order); *Verizon North* v. *Strand,* 367 F.3d 577 (6th Cir. 2004)(state call termination tariffs are unlawful under federal law); *Indiana Bell* v. *Indiana Utility Regulatory Comm'n,* 359 F.3d 493 (7th Cir. 2004); *Wisconsin Bell v. Bie,* 340 F.3d 441 (7th Cir. 2003); *Illinois Bell v. Wright,* 2004 U.S. Dist. LEXIS 16575 (N.D. Ill., Aug. 23, 2004).

Commission should carefully consider whether the legal position the Complainants are asking this Commission to endorse – i.e., the incumbent carriers can exempt themselves from federal law simply by refusing to negotiate in good faith – can survive federal court review.

III. THE COMPLAINANTS CONCEDE THAT T-MOBILE IS NOT A CUSTOMER UNDER THEIR ACCESS TARIFFS

In their brief, the Complainants acknowledge that T-Mobile is not an access customer, which creates significant problems for their cases. The Complainants even concede that they are not seeking relief from T-Mobile:

> Under Petitioners' access tariffs, it is the access customer that pays. This would be SBC. Neither T-Mobile nor US Cellular have ordered access and made themselves subject to Petitioners' access tariffs.[18]

Similarly, in their proposed findings, the Complainants seek compensation only "by SBC,"[19] conceding that "CMRS carriers are not access customers of Petitioners subject to their access tariff."[20]

If T-Mobile is not a "customer" under the Complainants' access tariffs, it necessarily follows that the Complainants are entitled to no relief from T-Mobile under their access tariffs. This alone is grounds to enter judgment against the Complainants and in favor of T-Mobile.

IV. THERE IS NO BASIS IN FEDERAL OR STATE LAW TO MAKE A TRANSIT CARRIER SECONDARILY LIABLE

There is no basis in law, equity or policy for the Complainants to seek relief from SBC in this case. The traffic at issue originated on T-Mobile's network, and it was T-Mobile's customers who initiated the calls. T-Mobile utilized SBC's transit services so it could complete its cus-

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18 Complainants' Initial Brief at 3-4.

19 Complainants' Proposed "Report and Order" at 25 ¶ 46, 26 ¶¶ 49-50.

20 *Id.* at 6 ¶ 3.

tomers' calls to persons served by the Complainants. SBC may provide "interexchange" services to its own customers, but for the traffic involved in this case, it was acting solely as a transit carrier.[21]

Federal law is very clear that the terminating carrier must recover its call termination costs from the originating carrier and not the intermediary, transit carrier.[22] In fact, the FCC has squarely rejected the Complainants' argument that terminating carriers can recover their call termination costs from the transit carrier, explaining:

> This result is consistent with section 251(b)(5) of the Act, which requires all LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In a similar context, the Commission has interpreted this provision to apply to reciprocal compensation arrangements between originating and terminating carriers when traffic transits the network of an incumbent or other carrier, such as Verizon.[23]

The Complainants' "let's stick it to the transit carrier" argument is also incompatible with state law. Two theories come to mind: third party benefit from the interconnection agreements and agency. The Complainants fail on both counts.

The interconnection agreements between Southwestern Bell and T-Mobile's predecessors, VoiceStream and Aerial Communications (Exhibits 37 and 33, respectively), expressly disclaim the creation of any third-party beneficiaries, so Complainants cannot argue that they may gain recovery by enforcing the terms of the interconnection agreements. Generally speaking, an entity must be a party to a contract, or a third-party beneficiary of the contract, before it may

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21 Indeed, as Staff recognizes, insofar as wireless calls are concerned, SBC (with explicit Commission authorization) left the interexchange service market and entered the transit market in 1997. *See* Staff Brief at 10-11.

22 *See, e.g. Cavalier Arbitration Order,* 18 FCC Rcd 25887, 25911 ¶ 41 (2003)("[T]here is no requirement that Verizon [a transit carrier] involve itself in the payment of access charges or reciprocal compensation on traffic that it does not originate."); *Id.* at 25917 ¶ 49 ("[W]e agree that Cavalier is the appropriate Party to be billed for calls it originates.").

23 *Virginia Arbitration Order,* 17 FCC Rcd 27039, 27305 ¶ 544 (2002).

seek to enforce the contract. *Aufenkamp v. Grabill*, 112 S.W.3d 455, 458 (Mo.App. 2003). The agreements themselves deny the intent to benefit any third party: "[t]his agreement shall not provide any non-party with any remedy, claim, cause of action or other right." (Ex. 37, Section 18.5; Ex. 33, Section 32). The Complainants clearly were not parties to the interconnection agreements; equally clearly, they cannot attempt to enforce the agreements as third-party beneficiaries. Only third parties for whose benefit the contract in question was entered into may sue to enforce the contract, and the contract must clearly express the contracting parties' intent to confer benefit on the third party. *Id.*; *Kester v. Kester,* 108 S.W.3d 213, 226 (Mo.App. 2003)("a third party may not recover if that party 'is only incidentally, indirectly or collaterally benefited by the contract.'"). The interconnection agreements were intended to govern the relationship between T-Mobile's predecessors and SBC, not to benefit the Complainants.

Similarly, Complainants cannot create a relationship of principal and agent between T-Mobile and SBC in order to recover against the supposed agent, SBC. In the first place, the interconnection agreements expressly disclaim the creation of any agency relationship between T-Mobile and SBC: "[t]his Agreement shall not establish, be interpreted as establishing, or be used by either Party to establish or to represent their relationship as any form of agency. Nothing herein shall be construed as making either Party responsible or liable for the obligations and undertakings of the other Party." (Ex. 37, Section 18.12; Ex. 33, Section 33). Even if SBC were T-Mobile's agent in dealings with Complainants, SBC could not be liable because its monthly CTUSRs delivered to Complainants clearly identified T-Mobile as the traffic originator. Only if the principal is concealed can the agent be liable for the principal's actions. *Unisource Worldwide, Inc., v. Barth,* 109 S.W.3d 252, 255 (Mo.App. 2003).

Imposing liability on transit carriers would also constitute very poor policy and would harm customers. All telecommunications carriers, including rural LECs like the Complainants, benefit from the transit services that SBC provides. As a national trade association of rural LECs recently told the FCC, "[a]s a practical matter the most feasible and cost-effective option for most rural ILECs is to use the RBOC's tandem for transiting functions":

> Since all carriers in a service area or market must at some point connect to the area tandem, there is efficiency in utilizing the tandems to route calls to other carriers instead of building a direct connection to each carrier.[24]

The FCC has held that carriers like SBC are not required to offer transit service.[25] SBC's current transit rates do not include the costs of becoming a billing and collection intermediary.[26] If this Commission suddenly required transit carriers to assume a new collection function (*e.g.*, pay compensation to terminating carriers and recoup payments from originating carriers), one of two developments could easily occur: (a) the transit carrier may decide to increase its transit prices to recover its new costs, or (b) it may decide to exit the transit market altogether. Neither result – increased costs to carriers resulting in increased prices to customers, or disabling of interconnection between certain carriers – would benefit customers.

V. ALMA AND MOKAN ARE NOT ENTITLED TO RELIEF FROM T-MOBILE

Alma and Mokan Dial seek recovery from T-Mobile under their wireless termination tariffs ("WTTs") and under their access tariffs for the period before they filed their WTTs. The claims under the access tariffs fail for the same reason that Northeast's and Chariton's claims

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

[25] *See, e.g., Cavalier Arbitration Order*, 18 FCC Rcd at 25909 ¶ 38.

[26] *See* SBC Brief at 27.

fail: by the Complainants' own admission, T-Mobile is "not [an] access customer of Petitioners subject to their access tariffs."[27]

Alma and Mokan Dial are also not entitled to recovery under their WTTs. Both the FCC and federal courts have held that the tariff procedure is inconsistent with the intercarrier negotiation requirement of the 1996 Act.[28] But Alma's and Mokan Dial's WTTs would be unlawful even if the tariff procedure was deemed lawful, because (1) the WTTs do not provide reciprocal compensation as required by Section 251(b)(5) of the Act and (2) the rates in the WTTs do not comply with the FCC's TELRIC rules.[29]

VI. THERE IS NO BASIS IN THE RECORD TO SUPPORT THE ASSERTION THAT T-MOBILE IS AT FAULT BECAUSE THE COMPLAINANTS HAVE FAILED TO DEVELOP AN ACCURATE INTERMTA FACTOR

T-Mobile, Staff and SBC all agree that Complainants have not meet their burden of establishing an appropriate interMTA factor.[30] The Complainants, realizing these defects in their proof, attempt to blame T-Mobile for the deficiency:

> This [cell tower] information was not retained [by T-Mobile] even though it constituted the only evidence from which the originating cell tower could be determined. . . . T-Mobile . . . knew or should have known there was a likely compen-

[27] Complainants' Proposed "Report and Order" at 6 ¶ 3.

[28] *See, e.g., Verizon North* v. *Strand,* 367 F.3d 577 (6th Cir. 2004)(LEC call termination tariff unlawful); *Indiana Bell* v. *Indiana Utility Regulatory Comm'n,* 359 F.3d 493 (7th Cir. 2004); *Wisconsin Bell v. Bie,* 340 F.3d 441 (7th Cir. 2003), *cert. denied,* 124 S. Ct. 1075 (2004); *Illinois Bell v. Wright,* 2004 U.S. Dist. LEXIS 16575 (N.D. Ill., Aug. 23, 2004); *Bell Atlantic* v. *Global NAPs Reconsideration Order,* 15 FCC Rcd 5997, 6002 ¶ 14 (2000), *affirming Bell Atlantic* v. *Global NAPs Order,* 15 FCC Rcd 12946, 12959 ¶ 23 (1999), *aff'd Global NAPs* v. *FCC,* 247 F.3d 252 (D.C. Cir. 2001), *cert. denied,* 534 U.S. 1079 (2002); *Virginia Arbitration Order,* 17 FCC Rcd 27039, 27331-32 ¶ 601-02 (2002).

[29] *See, e.g., 3 Rivers Telephone* v. *U S WEST,* CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 (D. Mt., Aug. 22, 2003).

[30] *See* T-Mobile Initial Brief at 12-16 and Proposed Findings at 11-15 ¶¶ 67-91 and 26-27 ¶¶ 41-50; SBC Brief at 35-36; Staff Brief at 29-33.

sation dispute, and that in resolving this dispute the originating cell tower location would have been critical to resolving that dispute.[31]

The Complainants' argument is simply incredible. The Complainants readily concede that wireless carriers like T-Mobile and their own wireless affiliates do not, in the ordinary course of business, assemble and retain data concerning the cell tower serving the calling mobile customer.[32] Yet, according to the Complainants, the wireless companies operating in Missouri that T-Mobile acquired in 2000 should have (a) "divined" in February 1998 that Complainants intended to file a complaint against T-Mobile in September 2001; (b) divined that the Complainants would have wanted T-Mobile to retain data that it does not assemble in the ordinary course of business; and (c) undertaken this assembly and storage function for billions of call records at its own cost.

The Complainants have recognized that interMTA factors ordinarily are developed during negotiations.[33] However, as discussed above, the Complainants refused to negotiate with T-Mobile in good faith. The predicament in which the Complainants find themselves is a self-inflicted injury.[34]

VII. CONCLUSION

The Commission's decision in this complaint proceeding will have significance far beyond the parties. If the Commission follows federal law and rules in favor of T-Mobile, all incumbent carriers in the state will be reminded of their obligation to negotiate in good faith with competitive

[31] Complainants' Proposed "Report and Order" at 18 ¶ 28.

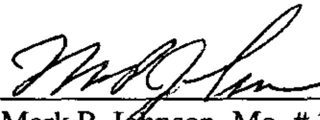
[32] *See, e.g.*, Complainants' Proposed "Report and Order" at 18 ¶ 28; Tr. 464 (Aug. 6, 2002); TR. 1578 (Sept. 8, 2004).

[33] Tr. 1383 (Sept. 8, 2004).

[34] *See* As Staff observes, "one who has engaged in inequitable activity regarding the very matter for which he seeks relief will find his action barred by his own misconduct." Staff Brief at 23 (citations omitted).

carriers. If, on the other hand, the Commission follows "home town" politics and rules in favor of the incumbent Complainants, no incumbent carrier will have any incentive to negotiate in good faith with any competitive carrier. If the Commission sends the latter message, incumbent carriers will be emboldened to resist meaningful give-and-take negotiations because they will instead rely on their "right" to file one-sided tariffs that contravene federal law. The Commission would soon find itself enmeshed in years of protracted litigation involving hundreds of carriers and disputes.

Respectfully submitted,



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ATTORNEYS FOR T-MOBILE USA, INC.

November 23, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 23, 2004, a copy of the foregoing Reply Brief of T-Mobile USA, Inc. was served via First-Class United States mail, postage prepaid, to the following parties:

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