Missouri Public Service Commission

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December 10, 1999

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: TT-99-428

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of the **INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Marc Poston

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MP/jb
Enclosure
cc: Counsel of Record

FILED
DEC 10 1999
Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Alma Telephone Company's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2., et al.	)))	Case No. TT-99-428 et al. (consolidated)

INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

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INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

I. INTRODUCTION

The Staff of the Missouri Public Service Commission (Staff) hereby submit this brief in opposition to the proposed tariff of the Mid Missouri Group (MGE) for the following reasons.

The opening statements made at the outset of the evidentiary hearing emphasized that the parties are in agreement on one thing – the issues of this case are primarily legal. The phrasing of the first issue attests to this assertion when it questions the lawfulness of MMG's tariff filing. If the answer to the first issue is "no, the tariff filing is unlawful," then the answer to the second issue should unquestionably be answered in the negative as well, since no party to this proceeding would admittedly endorse a position it believed to be unlawful. The weight of the evidence before this Commission, and the positions advocated by most parties to this proceeding, all point to the conclusion that this tariff filing is unlawful as filed and should be rejected.

II. IS THE TARIFF PROPOSED BY MMG LAWFUL AS APPLIED TO WIRELESS OR CLEC TRAFFIC?

The tariff is unlawful as proposed by MMG and should be rejected in its current form. In the "Applicability" section of the proposed tariff, MMG attempts to implement a tariff that

places no restrictions whatsoever on the type of traffic that is to be charged access. The proposed access service tariff states:

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

There are inherent dangers in approving tariff language with overly broad applicability. Such proposed tariffs should be carefully analyzed by this Commission to identify exceptions that may cause the tariff to be unlawful or unjust. In MMG's proposed tariff, the use of the term "all traffic regardless of type or origin" is a red flag that this tariff should be closely scrutinized. Further analysis reveals that the tariff's sweeping applicability is unlawful.

The purpose behind MMG's tariff, as explained by MMG witness Donald D. Stowell, is to require "traffic originated by commercial radio service providers (wireless carriers) and by competitive local exchange companies (CLECs)" to pay switched access rates unless the tariff is "superseded by an approved interconnection agreement between the originating carrier and the terminating" secondary carrier. (Stowell Direct, P. 3, L. 16). The Staff does not dispute that MMG has a legitimate complaint with the compensation, or lack of compensation, that it is currently receiving. The Staff's objection to MMG's tariff lies in the fact that the tariff creates a compensation mechanism that is unlawful due to its violation of the FCC's Interconnection Order.[1] By creating a tariff that charges access rates to all types of traffic, MMG would be imposing this obligation on CLEC and CMRS providers as well as intra-MTA and inter-MTA

[1] FCC 96-325, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; and Interconnection Between Local Exchange Carriers and Commercial Radion Service Providers, CC Docket No. 95-185.

service.[2] This overreaching applicability is the reason this tariff is being contested by so many parties. The FCC's Interconnection Order at paragraph 1036 states:

> **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.**

There is no ambiguity in this language. The FCC determined that traffic originating from a wireless carrier and terminating within the same MTA is not subject to access charges as would occur if the Commission approved MMG's tariff. (Clark Rebuttal, P. 5, L. 10). This is reason alone to reject the tariff. Further argument made by the parties regarding the manner in which this compensation *should* be made is irrelevant when the issue before the Commission is whether the tariff *proposed* by MMG is lawful as applied to wireless and CLEC traffic. The answer to that question is "no" since the tariff is to apply to wireless traffic in direct contradiction with the FCC's Interconnection Order.

The inherent problems of the tariff are conceded to by MMG's own witness. Regardless of the fact that the wording of the tariff will include *all types of traffic,* Mr. Stowell states in his surrebuttal testimony that it was not MMG's "intent to have access tariffs apply to qualifying MCA traffic." (Stowell Surrebuttal, P. 18, L. 11). This indicates that the tariff goes beyond MMG's intent. If the tariff applies to a type of traffic that goes beyond the intent, this is a clear indication that the tariff is defective. Under cross-examination, Mr. Stowell again concedes the tariff is flawed regarding Metropolitan Calling Area (MCA) traffic when he states "I can understand where there might be some confusion or questions about what it actually applies to..." (Tr. 90, L. 6). No attempt was made by MMG to change the proposed tariff and clear up the admittedly confusing tariff.

[2] "Major Trading Areas", or MTA's, are the FCC-authorized license areas of wireless carriers.

A second argument made by MMG to defend the tariff contends that the Commission's Order in Case No. TT-97-524 and the decision of the Circuit Court of Cole County in Case No. CV198-178cc in the appeal of the Commission's Order both offer support for the tariff. Regarding the Circuit Court case, Mr. Stowell argues that the Court found secondary carriers "were not foreclosed from applying their access tariffs to the termination of wireless traffic." (Stowell Direct, P. 6, L. 10). This is an incorrect reading of the Court's ruling. Nowhere in its decision did the Circuit Court hold that secondary carriers were not foreclosed from applying their access tariffs to the termination of wireless traffic. The Circuit Court did not consider the lawfulness of applying access charges to wireless traffic. The Court's decision was referring to whether the *decision of this Commission* foreclosed secondary carriers from applying their access tariffs to the termination of wireless traffic. On appeal, the Relators in that case were concerned that the Commission's decision prevented them from charging access to wireless carriers. The Circuit Court reviewed the language of the Commission's Order in TT-97-524 and determined that the decision of the Commission did not foreclose such charges. Nowhere in the Commission's case or in the appeal does the Circuit Court or the Commission affirmatively hold that charging access to wireless carriers is lawful. The Circuit Court simply states that the Commission did not place limits on the Relator CLEC's compensation, restricting it to reciprocal compensation only. Judge Brown states in his opinion:

> The Court finds that the PSC's use of the words "reciprocal compensation" in the paragraph of the Commission's Report and Order ... was not intended by the Commission to limit Relators' right to be compensated for terminating wireless carriers' traffic only to "reciprocal compensation" under the Act. In various places in the Report and Order, the PSC speaks in terms of "compensation arrangements" or "compensation agreements" without specifying that they be reciprocal in nature. This language is evidence that the PSC was not intending to require that only reciprocal compensation agreements be used.[3]

[3] State of Missouri, ex rel. Alma Telephone Company et al, v. The Public Service Commission of Missouri, Case No. CV198-178CC, *Findings of Fact, Conclusions of Law, and Judgment,* February 23, 1999, p. 7.

The Circuit Court's actual decision that the Commission *did not foreclose* is a far cry from Mr. Stowell's mistaken belief that the Circuit Court *affirmed* that secondary carriers (SC) could charge access to wireless providers. Mr. Clark states that "nowhere in its findings does the Court affirm the use of switched access rates for the termination of intra-MTA wireless traffic." (Clark Rebuttal, P. 5, L. 7).

In Case No. TT-97-524, as testified to by Mr. Clark, the Commission recognized "the inherent problem in allowing the SCs to charge switched access for terminating wireless traffic." (Clark Rebuttal, P. 4, L. 6). Mr. Clark's testimony quotes from page 20 of the Commission's Order where it stated:

> The problem of incentives is a two-sided question, and the Commission must also consider how its decision in this case will affect the third-party LECs' incentive to engage in the negotiation of agreements with the wireless carriers. If third-party LECs are allowed to bill SWBT access charges for the termination of wireless traffic in their exchanges, the third-party LECs will have little or no incentive to negotiate reciprocal compensation agreements with the wireless carriers.

This indicates this Commission's concern that the disincentives in place for the wireless carriers to negotiate would be reversed and the disincentive would now be in the hands of the CLECs if tariffs such as MMG's proposed tariff were approved. The Commission noted that simply changing these roles would serve no beneficial purpose.

The fact that seems to be overlooked in this tariff filing is that an incentive exists for the CLECs and wireless carriers to work out compensation arrangements with the SCs. That incentive is Federal Law. Staff witness Anthony Clark testified that "Section 251(b)(5) of the 1996 Act imposes upon each local exchange carrier the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications services."[4] (Clark

[4] Section 251(b)(5) of the 1996 Act states:
"(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS- Each local exchange carrier has the following duties: ..."

Rebuttal, P. 5, L. 23-26). Accordingly, relief for MMG of its compensation problem would be improper if switched access were the remedy. This tariff filing is an inappropriate backdoor approach at enforcing a local carrier's obligation under the Act.

As stated in Mr. Clark's testimony, "charges for transport and termination of traffic are covered under Section 252(d)(2)" which states:

> (d) PRICING STANDARDS-
> (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC-
> (A) IN GENERAL- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
> (i) such terms and conditions 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; and
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

These sections of the 1996 Act do not contemplate switched access rates for the termination of intra-MTA wireless traffic.

Even though the issue before the Commission is whether the proposed tariff is lawful and no alternative remedies are at issue, Mr. Clark presented the Commission with several possible solutions. These remedies begin on page 6 of Mr. Clark's Rebuttal Testimony. While these remedies may go beyond the issue of a tariff's lawfulness, they are helpful in assuring the Commission that alternatives exist and that MMG's concerns can be addressed in a different manner than the proposed tariff. Perhaps these alternatives will give MMG the incentive to seek

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> "(5) RECIPROCAL COMPENSATION- The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

a remedy that is not only workable, but comports with both federal and state law. Furthermore, the Staff would support a tariff filing by the MMG companies with proposed rates for transport and termination of intra-MTA wireless traffic that are cost-justified or established by Commission determined default rates. (Clark Rebuttal, P. 6-14).

III. IF LAWFUL, SHOULD THE TARIFF PROPOSED BY MMG BE APPROVED?

The proposed tariff is unlawful for the reasons stated herein by the Staff and the reasons stated on the record by most of the other parties to this proceeding. Accordingly, the tariff should not be approved.

IV. CONCLUSION

Despite the objections to the tariff raised by the parties to this case, and the recurring position of those parties that the language of the tariff is unlawful, MMG has made no attempt to amend the tariff to make its unlawful tariff lawful. The tariff is still before this Commission as originally written and should be rejected.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 10th day of December, 1999.

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Revised: December 10, 1999

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