LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 634-7431
E-MAIL: WREBSE@AOL.COM

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN

CHARLES E. SMARR
DEAN L. COOPER
MARK G. ANDERSON
TIMOTHY T. STEWART
GREGORY C. MITCHELL
RACHEL M. CRAIG
BRIAN T. McCARTNEY
DALE T. SMITH

OF COUNSEL
RICHARD T. CIOTTONE

January 4, 2000

FILED[2]
JAN 0 4 2000
Missouri Public
Service Commission

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

Re: Case No. TT-99-428 et al.

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter, please find an original and fourteen (14) copies of the Reply Brief of the Small Telephone Company Group.

Please see that this filing is brought to the attention of the appropriate Commission personnel. If you have any questions regarding this filing, please feel free to give me a call at your earliest convenience. Otherwise, I thank you in advance for your attention to and cooperation in this matter.

Sincerely,

Brian T. McCartney

Brian T. McCartney

BTM/da
Enclosure
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Mid-Missouri Group's Filing to Revise its Access Services Tariff, P.S.C. Mo. No. 2.	)))	CASE NO. TT-99-428 et al.

REPLY BRIEF OF THE SMALL TELEPHONE COMPANY GROUP

The tariffs at issue in this case, with a slight modification to address the Metropolitan Calling Area plan, are lawful and supported by compelling public policy interests. For these reasons, the STCG urges the Commission to approve the tariffs. The Commission should not be mislead by the arguments that the tariffs are unlawful, and this Reply Brief will focus on refuting those arguments.

I. The Tariffs Are Lawful

The STCG agrees with Public Counsel's clear analysis of the tariffs' legality under the Telecommunications Act of 1996 ("the Act"):

> Until a request for negotiation of an interconnection agreement is made to an ILEC, the ILEC is not subject to the requirements of Section 251(b)(5) or Section 251(c)(1). ***The FCC does not prohibit an ILEC which has not been requested to negotiate interconnection to adopt access rates for any traffic terminated to it. It is contrary to public policy to mandate that the ILECs must stand idle and allow carriers to terminate traffic for free.***

(Public Counsel's Initial Brief, p. 2) (emphasis added) This quote highlights the answers to the two key issues to be resolved in this case. First, Public Counsel explains that the tariffs are lawful under the Act and the FCC's rules. Second, Public Counsel recognizes that public policy

disfavors the "free ride" some carriers are receiving under the present arrangement.

A number of parties in this case, however, have argued that the tariffs are unlawful. For example, Sprint PCS ("Sprint") claims that there is "no doubt about the inapplicability of access charges to the termination of wireless originated traffic that originates and terminates within the same MTA." (Sprint's Initial Brief, p. 3) The Commission's Staff ("Staff") believes that the FCC's Interconnection Order prohibits the use of access charges, and Staff concludes that "[t]here is no ambiguity in this language." (Staff's Initial Brief at p. 3) But a closer examination of the Rules and the FCC's Interconnection Order reveals quite the contrary – there is a great deal of ambiguity and doubt about whether the FCC has prohibited the use of access charges in situations involving three carriers. In fact, the FCC has plainly stated that access charges ***are appropriate*** in situations involving three carriers.

a. The FCC's Rules

The FCC's rules defining "local telecommunications traffic" and "transport and termination" only contemplate traffic between two carriers, not three. The FCC defines "transport" as "the transmission and any necessary tandem switching of local telecommunications traffic subject to section 252(b)(5) of the Act from the interconnection point ***between the two carriers*** . . ." 47 CFR §51.701(c) (emphasis added) Likewise, "local telecommunications traffic" is defined as traffic between a single LEC and a CMRS provider, not as traffic between multiple LECs and a CMRS provider or as CMRS traffic that is transited through a LEC or some other carrier to another LEC. *See* 47 CFR §51.701(b) Even Southwestern Bell Wireless ("SWBW") concedes that "[t]he FCC does not address the situation in which three carriers collaborate to

complete a local call." (SWBW Initial Brief, p. 5)

b. The FCC's Interconnection Order

The FCC's Interconnection Order expressly recognizes that access charges were developed to address the situation in which three carriers collaborate to complete a call. *See* CC Docket No. 96-325, *First Report and Order* at ¶ 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.") This situation is directly analogous to the present situation where an originating CMRS carrier, a transiting carrier such as SWBT, and a terminating small LEC collaborate to complete a call. Thus, the FCC's Interconnection Order supports the STCG's position that access charges are appropriate in this three carrier situation.

c. Access Is Being Used Today

The witness for AT&T Wireless ("AWS") admitted during the hearing that access charges are presently being paid when AWS delivers traffic to small LECs via an interexchange carrier ("IXC"). (Tr. 245) If the use of access is unlawful, then why are IXCs paying access on intraMTA traffic? Also, intraMTA wireless traffic being terminated to Southwestern Bell Telephone Company ("SWBT") exchanges under its wireless interconnection services tariff is being charged the same rate as SWBT's access rates. (*See* Ex. 16 – excerpts from SWBT's Access Services Tariff and SWBT's Wireless Carrier Interconnection Services Tariff) If access is prohibited, then why is SWBT authorized to charge its access rates on intraMTA wireless

terminated traffic? Missouri's small companies should be afforded the same rights as SWBT to charge access rates unless and until other arrangements are negotiated with the wireless carriers. In fact, it is SWBT who is being disingenuous when it argues that the MMG's proposed tariff revisions are unlawful since SWBT's own wireless tariff proposes the same arrangement.

d. The Cole County Circuit Court's Order

SWBW misreads the Cole County Circuit Court's decision in the appeal of Case No. TO-97-524 and claims the Court "found that reciprocal compensation clearly applies to intraMTA, or local, traffic exchanged between LECs and wireless carriers.'" (SWBW Initial Brief, p. 6) SWBW's reading is flawed, and this is what the Court actually did say:

> 9. The Court finds that the PSC's use of the words "reciprocal compensation" in the paragraph of the Commission's Report and Order quoted above 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.

Cases No. CV198-178CC and CV198-261CC, *Findings of Fact, Conclusions of Law, and Judgment,* issued Feb. 23, 1999, p. 7. Staff also points out the fallacy of SWBW's position:

> ***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 this 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.

(Staff's Initial Brief, p. 4) (emphasis added)

e. The Tariffs Are a Lawful Solution to the Present Problem

The FCC's Rules and Interconnection Order do not expressly prohibit an ILEC which has not been requested to negotiate an interconnection agreement from adopting access rates for any traffic that is terminated to it. Thus, the FCC does not "unambiguously" or "undoubtedly" prohibit the use of access rates in the situation where three carriers collaborate to complete a call, and the MMG's proposed tariffs are a reasonable and workable solution to ensure that all carriers are compensated for this traffic. Again, it is no different than what SWBT's wireless interconnection service tariff does today.

II. The Tariffs Should Be Approved

Public policy clearly supports the approval of the MMG's tariffs. Unless these tariffs are approved, wireless carriers will have no incentive to enter into negotiations with the STCG and MMG companies. Instead, they will continue to terminate traffic to the STCG and MMG companies without paying for it.

a. Proposals for a "Bill and Keep" Compensation Arrangement Are Inappropriate

Some of the wireless carriers point to the fact that they have offered to enter into "bill and keep" arrangements with the small companies, but these proposals can hardly be considered good faith efforts to negotiate. Because the STCG companies will not be delivering any traffic to the wireless carriers, there is no "balance" of traffic. Thus, a bill and keep proposal would provide no

opportunity for the STCG companies to be compensated for the traffic that the wireless carriers are terminating.

AT&T proposes that the Commission continue to allow the wireless carriers to terminate traffic to the small incumbent LECs under a "defacto bill and keep arrangement." (AT&T Initial Brief, p. 5) In other words, AWS wants to keep terminating its traffic to the small companies without paying for it. This proposal is inappropriate and unfair. First, AT&T assumes that the amount of traffic delivered by the STCG companies to the wireless companies is roughly equal to the amount of traffic delivered by the wireless companies to the STCG companies. However, the STCG delivers virtually no traffic at all to the wireless carriers. Second, AT&T argues that the traffic volumes are "de minimus" and not worth the trouble, yet this traffic is very significant to the small companies. Moreover, it is also an important matter of regulatory policy that no "free rides" be allowed in Missouri because, as Public Counsel explains, "It is always the consumer that pays the price for any 'free lunches' served to others." (Public Counsel Initial Brief, p. 1)

b. Proposals for a Reciprocal Compensation Arrangement Are Inappropriate

Reciprocal compensation is inappropriate in a three carrier situation because the STCG will be terminating virtually no traffic to wireless carriers, CLECs, or other ILECs. Reciprocal compensation is based upon the presumption of a two-way exchange of traffic. If wireless carriers terminate traffic to the STCG companies, but the STCG companies do not terminate traffic to the wireless companies, then there can be no "reciprocal" arrangement since the traffic exchange is not reciprocal. Even SWBT recognizes that reciprocal compensation cannot apply in

this situation.[1]

c. Incentives

The wireless carriers complain that their negotiations with the STCG and MMG companies were fruitless, yet none of the wireless carriers have sought to arbitrate these issues before this Commission. In fact, although the wireless carriers believe that an indirect interconnection is appropriate under these circumstances, none of them have pursued arbitration under the Act. Approval of the MMG's proposed tariffs will immediately put an end to the wireless carriers' free ride, and it will instantly provide the wireless carriers with the incentive to negotiate, or arbitrate if necessary, with the STCG and MMG member companies. This is exactly the same incentive that exists in SWBT's tariffs today: pay access rates or initiate negotiations for interconnection.

d. The Tariffs May Be Approved with a Minor Modification

The STCG proposed that the tariffs could be modified by adding the following clause to the last sentence of the tariffs:

> " . . . , other agreements between the parties for different interconnection and/or compensation terms, or specific orders of the Missouri Public Service Commission that establish different interconnection and compensation terms."[2]

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[1] *See* SWBT's Initial Brief at p. 11 ("In situations like those here where a LEC does not originate traffic to a wireless carrier (but instead has an IXC handle it), the established reciprocal compensation rate would simply not be used in the land to mobile direction.")

[2] Schoonmaker Surrebuttal, Ex. 3, p. 4.

This language will clarify that the tariffs do not apply to existing or future calling plans ordered by the Commission such as the Metropolitan Calling Area ("MCA") plan. The MMG has consented to the addition of this language, and the MMG agrees that "MCA is not intended to be included." (MMG's Initial Brief, p. 29)

Staff and SWBT argue that the tariff should be rejected because the tariff language is unclear. This approach is too severe, and it would throw the baby out with the bath water. Any uncertainty about the tariffs can be easily cured by adding the language quoted above. Because the MMG has agreed to add this language to its tariffs, the Commission may approve the tariffs with this minor modification.

e. Carrier Responsibility

In Case No. TO-97-524, the Commission allowed SWBT to revise its wireless interconnection tariff so that SWBT only provided a "transiting" function between wireless carriers and LECs. SWBT has also entered into interconnection agreements with wireless carriers. However, SWBT's wireless interconnection contracts and tariffs only involve the business relationships between SWBT and the carriers with whom SWBT directly connects and to whom SWBT offers services. The contracts specifically state that they are only between these two parties. Nothing in SWBT's wireless interconnection contracts and tariffs establishes the terms, conditions, or prices upon which the terminating LEC will interconnect with either SWBT or indirectly with other carriers. SWBT's "transiting" contracts and tariffs do not mean that the STCG has offered or entered into a contract to interconnect with SWBT in this manner or to terminate that traffic either for SWBT or the carriers who contract with SWBT.

Therefore, the "originating carrier responsibility" trumpeted by SWBT is limited to terminating cellular traffic that transits SWBT's network. SWBT overstates the significance of the Commission's decision in Case No. TO-97-524 when SWBT states that the Commission specifically approved "placing responsibility to compensate terminating carriers on the wireless carrier whose customer placed the call." (SWBT Initial Brief, p. 7) At best, the findings in Case No. TO-97-524 apply only to SWBT and ***not to all*** "transiting carriers".

SWBT also points to the individual interconnection agreements that it has reached with the wireless carriers, yet the STCG was not a party to these agreements. Obviously, interconnection agreements between other carriers cannot bind non-signatories, and again, even if they could, their effect would be limited to traffic transiting SWBT's network.

III. CONCLUSION

The tariffs at issue in this case are lawful, and they are supported by compelling public policy. Because the tariffs present a reasonable and workable solution to the present compensation problems, the Commission should approve the tariffs with the minor modification proposed by the STCG.

Respectfully submitted,

W.R. England, III Mo. Bar #23975
Brian T. McCartney Mo. Bar #47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
Jefferson City, Missouri 65102-0456
(573) 635-7166
Attorneys for the Small Telephone Company Group

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed or hand-delivered, this 4th day of January, 2000, to:

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

Marc Poston
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Craig S. Johnson
Andereck, Evans, Milne, Peace & Baumhoer
P.O. Box 1438
Jefferson City, MO 65102

David Evans
GTE
601 Monroe Street, Suite 304
Jefferson City, MO 65101

Paul Lane/Leo Bub
Southwestern Bell Telephone Company
One Bell Center, Room 3518
St. Louis, MO 63101

Paul S. DeFord
Lathrop and Gage
2345 Grand Blvd
Kansas City, MO 64108

Jeanne A. Fischer
Southwestern Bell Wireless
13075 Manchester Road, 100N
St. Louis, MO 63131

Charles W. McKee
Sprint PCS
4900 Main, 12th Floor
Kansas City, MO 64112

Brian T. McCartney
W.R. England, III/Brian T. McCartney