BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company And Modern Telecommunications Company, Petitioners, v. Southwestern Bell Telephone Company, Southwestern Bell Wireless (Cingular), Voicestream Wireless (Western Wireless), Aerial Communications, Inc., CMT Partners (Verizon Wireless), Sprint Spectrum LP, United States Cellular Corp., and Ameritech Mobile Communications, Inc., Respondents.	))))))))))))))))	Case No. TC-2002-57 *et al.* consolidated

REPLY BRIEF OF SOUTHWESTERN
BELL WIRELESS LLC D/B/A CINGULAR WIRELESS

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INTRODUCTION

Through their Initial Brief, Complainants Northeast Missouri Rural Telephone Company ("Northeast"), Modern Telecommunications Company ("Modern"), Chariton Valley Telephone Corporation ("Chariton Valley"), Choctaw Telephone Company ("Choctaw"), MoKan Dial, Inc. ("MoKan"), Mid-Missouri Telephone Company ("Mid-Missouri"), Alma Telephone Company ("Alma"), (jointly, "Complainants") make clear that the individual complaints that have been consolidated in this docket are a thinly veiled generic, collateral attack on the Commission's two decisions in the "*Alma*" case (*In the Matter of Alma Telephone Company*, Case No. TT-99-428, Report & Order iss'd Jan. 27, 2000, Amended Report & Order iss'd Apr. 9, 2002). Staff agrees that the *Alma* decisions are controlling on the crucial issue presented to the Commission -- Complainants' attempt to apply access charges to intraMTA wireless traffic on both a forward-looking and backward-looking basis -- which Staff's witness characterizes as "the heart of the complaints by MITG companies." Ex. 12 (Scheperle Surrebuttal) at 4.

> The Missouri Public Service Commission correctly rejected that argument [if three or more carriers were involved it was access] and looked to the jurisdictional nature of the carriers. The FCC has found that intraMTA traffic is a local call for a CMRS provider and as such access does not apply unless that traffic is carried by an IXC. (Initial Brief of Staff at 13.)

In addition, Staff and the wireless carriers agree that the underlying premise for Complainants' attempt to apply access charges to intraMTA traffic -- that Southwestern Bell ("SWBT") and Sprint operate as interexchange carriers ("IXCs") and not as transport service providers[1] -- should be summarily rejected by the Commission. Once again, Complainants are simply launching a collateral attack on a previous Commission decisions, this time in Case

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[1] *See* Complainants' Initial Brief at 10 ("Under that [MITG access] tariff, SWBT is the IXC purchasing terminating access services. (Footnote 18: It is noted that for MoKan Dial, Sprint Mo Inc. is the IXC purchasing access from MoKan.) . . . No wireless carrier purchased service under the access tariffs.")

No. TO-99-593, *Re: In the Matter of the Investigation into Signaling Protocols, Call Records, Trunking Arrangements, and Traffic Measurement.*

Staff is well aware of Complainants' continued attempts to change the business relationship of carriers involved in transiting. As Staff witness Scheperle points out in his Rebuttal Testimony:

> Staff believes that there is a current case open dealing with this matter and the recommendation of Mr. Jones. Case No. TO-99-593 was established to investigate the technical issues of signaling protocols, call records, trunking arrangements and traffic measurement. (Ex. 11 at 18-19.)

Indeed, in its August 7, 2002 Report submitted in that docket, Staff stated that it was continuing to meet with the parties and, in fact, was working to draft a rule designed to achieve the results set forth in the Commission's December 13, 2001 *Order Directing Implementation, Denying Motion to Consolidate, and Granting Intervention*. As the Commission stated in its *Order Denying Rehearing* issued in that docket on January 3, 2002:

> Most of the issues for which this case was established were not addressed by the parties. Instead, the attention of the parties was diverted from the purposes for which this case was established in order to deal with the "business relationship" issue raised by the Small Telephone Company Group ["STCG"] and the Missouri Independent Telephone Company Group [Complainants in this docket]. . . .
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> * * *
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> . . . The STCG mistakenly states that this case was "opened to address the small companies' concerns about missing records and unidentified traffic." In fact, it was created to investigate the issues of signaling protocols, call records, trunking arrangements, and traffic measurement, as discussed above. Adoption of Issue 2056 and its enhanced records exchange features is entirely consistent with the purposes for which this case was established. Its adoption is arguably the only proposal of the parties that is consistent with these purposes. (Order at 1-2).

The STCG is at it again. Through the filing of an *amicus curiae* brief, the STCG has once again tried to convert this docket from a complaint case into another generic attack on the business relationship. Once again, the STCG mistakenly attempts to interject their parochial objectives into a docket, this time appearing to equate their status to that of Petitioners/Complainants. It is curious to note, however, that the STCG appears to recognize a "transiting" function, while the MITG Complainants denounce the "transiting scheme." According to STCG, "[i]n the instant case, the small companies' access tariffs were the only tariffs in place that would apply to wireless-originated traffic *transiting SWBT's facilities* and delivered to the small companies prior to the wireless termination tariffs or an approved agreement under the Act." STCG Brief at 4 (emphasis added). And while the STCG devotes two pages of its brief to addressing the purported relevance of SWBT's Wireless Interconnection Tariff (PSC Mo. No. 40), the parties to this proceeding, including most notably Complainants, appear to agree that SWBT's tariff has no application to this proceeding. As explained in Complainants' Initial Brief (at 17), "[a]s none of Respondents [the wireless carriers] purchase from tariff, all of the traffic at issue appears to be interconnection agreement traffic. The terms and conditions of SWBT's PSC Mo No 40 -- the wireless interconnection service tariff -- therefore do not apply here."

Clearly, there is no record evidence about the STCG companies upon which the Commission could reach the conclusions suggested in the STCG brief. But let there be no mistake, if the Commission gives the Complainants the additional compensation they seek in this matter, it will ensure that no wireless carrier will be able to obtain an interconnection agreement without arbitrating the terms of such an agreement with each and every one of the Complainants *and* with each and every one of the STCG members.

Staff's suggestion that the Commission create a backward-looking rate from distinct elements of the access tariffs is unlawful, since it would constitute retroactive ratemaking. While Staff tries to maintain that piece parts of existing tariffs were in effect, Complainants truly capture the essence of this unlawful proposal in describing Staff's suggestion as one of four possible decisions presented to the Commission. "The Commission can *apply a rate which has yet to be approved*, and *apply this rate to previous periods* when no Wireless Service Termination Tariff was in effect (Staff's suggestion)." Complainants' Initial Brief at 1, n.1 (emphasis added). Staff's suggestion that the Commission create a backward-looking rate *or* a forward-looking rate is also not necessary, since the Complainants have been reasonably compensated through the current originating access and bill and keep arrangement, and since Complainants have a sufficient remedy to obtain explicit interconnection agreements through their rights under TA96 to negotiate and, if necessary, arbitrate such agreements.

I. CINGULAR HAS PAID APPROPRIATE INVOICES ISSUED UNDER THE WIRELESS TERMINATION TARIFFS

Southwestern Bell Wireless LLC d/b/a Cingular Wireless ("Cingular"), as well as other wireless carriers have made payments for invoices submitted under the wireless termination tariffs of Choctaw and MoKan Dial. *See* Cingular's Initial Brief at 10-11. Since Alma has never issued an invoice under its tariff, it has no real claim under the wireless termination tariff. Most telling of all, Complainants do not even argue this point in their Initial Brief. After forcing substantial litigation over this point, they have apparently abandoned the claim without comment. Cingular is entitled to judgment on this issue.

II. ALLOWING THE COMPLAINANTS TO IMPOSE ACCESS CHARGES ON INTRAMTA TRAFFIC IS CONTRARY TO TA96 AND WILL ONLY DELAY THE NEGOTIATION OF INTERCONNECTION AGREEMENTS

a. As this Commission Determined In The *Alma* Case, Access Charges Are Not Appropriate

Complainants' demand for full carrier access for terminating intraMTA wireless traffic in the absence of an explicit interconnection agreement is no more than another attempt to get this Commission to reverse the decision it already made in the *Alma* case. As Staff recognizes in its Initial Brief (at 3), "The Commission has precluded [access for terminating intraMTA wireless traffic] in its previous decisions based on the FCC *First Report and Order*[2]." The Federal Communications Commission's ("FCC") *First Report and Order*, as quoted in Cingular's Initial Brief (at 16), unequivocally supports the Commission's conclusion that carrier access rates are unlawful. For example, as the FCC made clear:

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

First Report and Order at ¶ 1043 (emphasis added).

Moreover, as Staff correctly explains, the FCC's pronouncements in its recent notice of proposed rulemaking regarding intercarrier compensation reconfirm that the FCC fully intended that intraMTA wireless traffic be treated as *local* (and thus subject to reciprocal compensation) and that it be treated differently from carrier access traffic. *See* Staff's Initial Brief at 13-14 (citing Notice of Proposed Rulemaking, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (rel. April 27, 2001)). The Commission has twice ruled in the

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[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (August 8, 1996)

Alma docket that carrier access is inappropriate and Complainants have raised no new arguments that merit additional consideration from this Commission.

As Cingular discussed in its Initial Brief (at 16-17), that same conclusion has been confirmed by the state commissions in Iowa (Iowa Utility Board Docket No. SPU-00-7 *et al.*, *In Re: Exchange of Transit Traffic*. (Iowa Utils. Bd. March 18, 2002)) and Oklahoma (Interlocutory Order *In the Matter of: Application of AT&T Wireless Services, Inc. For Arbitration Under the Telecommunications Act of 1996*, Case No. PUD 200200149 *consol.* (Aug. 1, 2002)). Moreover, since this case went to hearing, at least two additional federal court decisions have bolstered the Commission's conclusion that access charges cannot be applied to intraMTA wireless traffic. *See Verizon North v. Coast to Coast Telecom.*, Case No. 00-CV-71442-DT (E.D. Mich., Oct. 3, 2002) (slip opinion attached); *Verizon North v. Strand*, __ F.3d __, Case No. 01-1013 (6th Cir., Nov. 7, 2002) (slip opinion attached) (affirming *Verizon North v. Strand*, 140 F. Supp. 2d 803 (W.D. Mich. 2000)). In each case, the courts reversed a state utility commission's imposition of tariffs in lieu of reciprocal compensation arrangements. In each case, the courts concluded that state tariffs were inconsistent, not only with the substantive requirements of federal law, but with the procedural requirements of federal law as well. In each case, the court struck down the state-approved tariff as inconsistent with both the substantive and procedural requirements of TA96 and the FCC. *See Coast to Coast*, Slip Op. at 10-11; *Strand*, __ F.3d at __, Slip Op. at 5.

Complainants attempt to rehabilitate their position through reference to the Ninth Circuit's recent ruling in *3-Rivers Telephone Coop. v. U.S. West Communications,* __ F.3d __, Case No. 01-35065, Mem. Op. (9th Cir. Aug. 27, 2002). However, there is a substantial difference between the directions given by the Ninth Circuit on remand and the action already taken by this Commission in the *Alma* case. The Ninth Circuit remanded the *3-Rivers* case with directions that

the district court first "*interpret[] the tariffs themselves.*" *See id.* Complainants convert that holding into a direction that this "Commission *must* interpret *and apply* [Complainants'] access tariffs." Complainants' Initial Brief at 14. What Complainants overlook is that this Commission has already interpreted their access tariffs and found that *they don't apply.*

Complainants also attempt to attack this Commission's *Alma* decisions by arguing that their access tariffs should be applied because, under the filed tariff doctrine, they are the only tariffs applicable to the wireless traffic being terminated. *See* Complainants' Initial Brief at 12-14, 16. This Commission has already decided, however, that Complainants' access tariffs are *not* applicable to intraMTA wireless traffic. Therefore, Complainants' application of the filed tariff doctrine is backwards. For the filed tariff doctrine to apply, Complainants would have to have a tariff filed that *validly applied to this traffic.* This Commission has already ruled that the access tariffs cannot be applied to this traffic and that conclusion is bolstered by FCC Orders and the several court decisions cited above. Complainants' filed tariff argument places the cart before the horse by reasoning the tariff must be valid because Complainants wish to apply it rather than asking whether there is a tariff that can validly be applied to this traffic.

Complainants also argue that the *Alma* decision was wrong because their access tariffs are entitled to a "safe harbor" exception. They point to the Oregon Farmers Mutual tariff filed in 1993 and argue that, by concurring in that tariff, Complainants had a carrier access tariff on file that was the appropriate rate for the termination of wireless calls at the time that TA96 was passed. Complainants argue that the Oregon Farmers Mutual tariff enjoys a "safe harbor" exemption from the requirements of reciprocal compensation. Complainants' Initial Brief at 21-27. In fact, Complainants identify this safe harbor argument as their "Key Legal Issue" (*id.* at 21), claiming that the requirements of reciprocal compensation originated with TA96. *Id.* at

22 ("wireless carriers argue that reciprocal compensation became the "default" mechanism after the Act"). However, that is not Cingular's argument, since the requirement that LECs negotiate reciprocal compensation agreements with wireless carriers long predates TA96 and predates the 1993 tariff. *See, e.g., In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 1986 FCC LEXIS 3878, Appendix B, "Policy Statement on Interconnection of Cellular Systems, ¶ 5, rel. March 5, 1986).[3] Therefore, there is no basis for Complainants to point to any access tariff as a safe harbor.

The crux of Complainants' argument is no more than an additional collateral attack on the Commission's two rulings in the *Alma* case. *See, e.g.,* Complainants' Initial Brief at 24-27. As Cingular explained in its Initial Brief (13-15), this attack is barred by the doctrines of *res judicata* and collateral estoppel. Complainants' lengthy arguments about other Commission dockets is no more than a rehash of arguments they made (or could have made) in the *Alma* case. The Commission's Order on remand is now on appeal. The Complainants can pursue that appeal as vigorously as they deem appropriate, but it is no grounds for them to attempt to re-litigate the same issue over and over in this Commission while the *Alma* appeal is pending. The Commission should dismiss these Complaints outright as an improper collateral attack on the Commission's existing order.

b. Awarding Access Charges To Complainants Will Thwart Any Hope Of Negotiated Interconnection Agreements

By its decision in the SWBT transiting tariff action (TT-97-524), by its decision in *Mark Twain* and through many of the questions that came from the Commissioners during the hearings

[3] The fact that the Missouri Commission may have imposed terminating liability on SWBT for the termination of traffic that included CMRS-originated traffic prior to 1996 is no basis for asserting that the Commission had assessed access on wireless carriers.

in this case, the Commission has made clear its directive that the parties negotiate explicit interconnection agreements. Cingular has attempted to cooperate with that directive by soliciting negotiations for interconnection. *See* Cingular's Initial Brief at 19-20. The Commission has sought to back up its goals by attempting to create incentives for the parties to negotiate explicit interconnection agreements by imposing wireless termination tariffs on the wireless carriers, ostensibly outside of the requirements of TA96. *See Mark Twain* Order at 46.

None of this has yet resulted in explicit interconnection agreements, however, because there are not enough minutes at stake between any single wireless carrier and any single Complainant to justify the cost of full arbitration. In addition, Complainants already have a greater incentive to block negotiation, to collect originating access and to badger this Commission for terminating access than to negotiate appropriate interconnection agreements. The record in this case made clear that Complainants view it as being to their advantage to avoid interconnection agreements and, instead, to seek an order from this Commission awarding them carrier access charges.

Moreover, it became clear that the assessment of carrier access charges will not be a means to negotiate interconnection agreements, but a means to ensure that they are never "negotiated." Rather, if the Commission secures to Complainants the additional compensation stream they are seeking in this docket, their incentive to stonewall negotiations and to force all issues to arbitration will only be increased. Thus, a wireless carrier that delivers traffic to all of the Complainants would have to arbitrate *seven* different agreements. A wireless carrier that delivers traffic to Complainants and the members of the STCG would have to arbitrate almost thirty different agreements.

1. Complainants Have As Much Opportunity As The Wireless Carriers To Pursue Negotiation And Arbitration

While the Staff suggests that "[t]he Commission can readily find that neither party has done all it could do to further a decision in this matter" (Staff's Initial Brief at 20), Complainants and Staff persist in claiming that *only the wireless carriers* have an opportunity to pursue negotiations and, if necessary, arbitrations. That argument is refuted by the facts of this case and the applicable law. Neither Complainants nor Staff can seriously dispute that Cingular and the other wireless carriers have solicited negotiations with every one of the Complainants. Moreover, Cingular has made a continuing commitment to negotiate as part of its testimony in this docket. *See* Transcript at 1212. Neither Complainants nor Staff can seriously dispute that those offers provided *and continue to provide* Complainants with as much opportunity as the wireless carries to pursue negotiations and, if necessary, arbitrations. *See, e.g.*, 47 C.F.R. § 51.301; Cingular's Initial Brief at 24-25. Therefore, the continuing efforts of the Complainants to blame the wireless carriers for the absence of interconnection agreements is baseless. Similarly, the continuing suggestions of Staff that the consequences of no interconnection agreements should be borne solely by the wireless carriers are misdirected. Moreover, Complainants admitted they had engaged in negotiations with wireless carriers and therefore could have themselves pursued negotiations and arbitrations. *Id.* at 24; Transcript at 271-72, 758-59.

The real question that the Commission should ponder is this: If Complainants truly believe they are losing so much through the absence of interconnection agreements, why have Complainants not pursued any of their numerous opportunities to negotiate or arbitrate agreements? As Cingular demonstrated in its Initial Brief (at 28-30), the answer is quite simple: Complainants are better off financially under the current bill and keep arrangement than they

would be with explicit reciprocal compensation under negotiated interconnection agreements. If the Commission were to rule in favor of Complainants here and thus add to what Complainants could obtain in the absence of interconnection agreements, the Commission will only calcify Complainants' intransigence.

Complainants attempt to divert this argument to the question of whether their negotiating behavior truly constitutes bad faith. To set up their argument, Complainants inaccurately portray their own bargaining positions, claiming that by seeking to negotiate direct interconnection and full access they were only asking to negotiate for the same sorts of things that SWBT had in its agreements. Complainants' Initial Brief at 46-47. While it is not nearly so clear that Complainants are seeking the same terms as SWBT has sought, Complainants miss the point. The point is that Complainants did not simply seek to negotiate about direct interconnection or recovery of full access charges. Rather, Complainants demanded agreement to those points as a *pre-condition* to negotiating any other terms of interconnection. *See* Cingular's Initial Brief at 20-21 and Transcript at 508, 515, 574-75. In the words of Mr. Stowell, "that usually ended the negotiations." *Id.* 575. It is the imposition of pre-conditions to negotiations that made it impossible for wireless carriers to engage in negotiations. Whether or not Complainants' bargaining behavior constitutes bad faith, it demonstrates that they have been unwilling to exercise their statutory rights under TA96 to negotiate and arbitrate to obtain the compensation they claim to be entitled to. If Complainants are unwilling to help themselves by pursuing the remedies available to them, the Commission should not create remedies to help them.

Moreover, a deeper look into one of Complainants' demands -- direct interconnection -- demonstrates the baseless obstructionism of Complainants' actions. While Complainants have repeatedly demanded "direct interconnection" as a pre-condition for negotiating reciprocal

compensation, Complainants state in their testimony and in their Initial Brief that establishing direct interconnections would not require new or different facilities. According to Complainants, direct interconnections could be accomplished through leased facilities or facilities acquired from any number of transport providers. Transcript at 387-88, 423, 431-32; Complainants' Initial Brief at 19.[4] Curiously, Complainants ignore the fact that Cingular and other wireless carriers already acquire transport facilities today, most commonly from SWBT through their interconnection agreements. Complainants also ignore that all of the wireless traffic is delivered to the Complainants at Complainants' meet point with SWBT and that the Complainants bear no cost or responsibility to bring the traffic from the wireless carriers to that meet point.[5]

Complainants disregard these connections because the current transport facilities are common trunks. Common trunking does not consistently identify the originating carrier in the way that direct trunking does. Complainants finally reveal in their Initial Brief (at 19) that, when they *say* "direct connection," they really *mean* "dedicated trunking" and when they *say* "indirect connection," they really *mean* "common trunking." These definitions, however, have no basis in statutory or regulatory law and Complainants cite none. These distinctions are presented only as what Complainants' witness Mr. Jones "meant" by discussing the involvement or

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[4] Apparently, Complainants make this argument to deflect the criticism that direct interconnection would be an expensive waste of resources. Direct trunking, however, is also an expensive waste of resources. For example, the costs referenced in Cingular's Initial Brief at 26-27 assume the lease of existing facilities on a dedicated basis. The cost to build such facilities would be *astronomically higher* than the costs cited by Cingular. Moreover, FCC rules make it clear that wireless carriers are entitled to chose the most efficient means of interconnection. Not only is it true that they are not obligated to create direct interconnection through the build out of new facilities, they are equally not required to purchase expensive dedicated trunking when less expensive, common trunking is available and technically adequate.

[5] Interestingly, while admitting that Complainants like Mid-Mo would face reduced revenues as the result of reciprocal compensation, Mr. Jones suggested that "[h]opefully, you would make some of that up off the lease of facilities, direct facilities, to the wireless carriers." Transcript at 740-41. To the best of Cingular's knowledge, none of the Complainants have transport facilities outside of their exchanges. Therefore, for the small carrier to believe they will make up revenue on the lease of direct facilities to the wireless carriers, the small carriers must be intending to charge wireless carrier the cost of dedicated facilities on small carriers' side of the point of interconnection. That, too, would be inconsistent with FCC rules regarding local interconnection and regarding pricing the forward-looking economic cost of terminating wireless calls.

non-involvement of SWBT's tandem in the switching of wireless traffic. What Mr. Jones lacks is an authority other than his own personal preferences as to how he would like to see the public switched network operated. He also lacks authority to tell wireless carriers how to design their network. To the contrary, as this Commission has concluded, a carrier is "free to design its network and to capitalize on any competitive advantages conferred by its network architecture in conjunction with [the LEC's] interconnection duty. . . ." *See In the Matter of the Applications of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc. for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, Arbitration Order, (iss'd June 7, 2001) at 42.

What Complainants make clear through this "clarification" is that, despite their constant demands for "direct" interconnection, they really don't care how many carriers are involved in carrying the call. What they care about is being able to identify the originating carrier and the call detail. However, while Complainants believe they have found some authority to distinguish between direct and indirect interconnection in the FCC's language about two- and three-carrier calls, they can identify none that distinguishes between common and dedicated trunking.

Complainants' leap of logic has several important implications.[6] For instance, Complainants admission that "direct" interconnection can be accomplished through the use of "third party" transport providers completely undermines their tired claim (repeated in their Initial

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[6] Complainants' concession that transiting carriers need not be counted in the call path also reveals a flaw in their claim that SWBT as a transiting carrier should be treated as an IXC. See Complainants' Initial Brief at 37-42. The difference between SWBT and a traditional IXC is that, in the case of a traditional IXC, the end user is a customer of the IXC, not a customer of the originating carrier. Where SWBT acts as a transiting carrier, the end user is a customer of the wireless carrier, and SWBT is acting as an agent for the wireless carrier. Staff accurately captures this same point in its discussion of the Calling Party Network Pays (CPNP) principle in the FCC's *Intercarrier Compensation* rulemaking. *See* Staff's Initial Brief at 14-15. Repeatedly, Complainants' tortured and self-serving reading of the FCC precedents is an outlier to what all other parties, including Staff, see in those rules and orders.

Brief at 29-37) that access is appropriate wherever there are three or more carriers involved in a call. By their own admission, even "direct" interconnections employing third party transport providers will have more than two carriers in the call path. Alternatively, if Complainants' point is that transport providers are not counted toward the number of carriers in a call path, it is clear that, by their own definition, calls from Cingular and the other wireless carriers to Complainants today, where the wireless carrier arranges for and pays for third party transport are *two*-carrier calls after all, and therefore those calls are entitled to reciprocal compensation.[7] Equally, important, if transport providers are not counted toward the number of carriers in a call, as Complainants reasoning would imply, Complainants already have today what they have always wanted -- direct interconnection.

But Complainants will say it's not direct interconnection because the trunking is not dedicated and they cannot always identify the originating party. With a dedicated trunk, they could get the same information that they get today from SWBT's CTUSR, *i.e.*, the identity of the originating carrier. Significantly, even if Complainants received direct trunking, the information they would get would still not allow them to do anything they cannot currently do with the CTUSRs. For example, that information would not distinguish between in*tra*MTA and in*ter*MTA calling since even the caller's home NPA-NXX would not show where the call was originated, which is the primary basis on which inter- and intraMTA calling is measured. Moreover, as Mr. Biere referenced in his testimony, with number pooling and number portability, any reliance on NPA-NXX information will no longer be identifiable even to a

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7 Similarly, the FCC has recognized that when transport is provided among carriers through unbundled network elements, ("UNEs") the transport is considered a part of the purchasing carrier's network. *See, e.g.*, FCC *First Report and Order* ¶ 1039 ("Many alternative arrangements exist for the provision of transport between the two networks, [including]. . . unbundled network elements provided by incumbent LECs. . . ."); *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, FCC 97 157, CC Docket No. 96-45, 128 (Mar. 8, 1997) [the "own facilities" requirement for universal service is satisfied by facilities obtained as UNEs under Section 251(c)(3)]. Because a CMRS provider routing calls through the use of UNEs is effectively "connected" to the ILEC terminating the call, Complainants' attempt to distinguish "direct" and "indirect" connections is meritless.

particular carrier. Transcript at 697. Therefore, the benefit that could be gained by Complainants getting this information would be short-lived, at best.

Complainants' empty rhetoric about direct and indirect interconnection and about two-carrier and three-carrier calls demonstrate two important points. First, Complainants' demand for direct interconnection is just another face of their demand that FGD-type connections be required as the ubiquitous standard in the public switched network in Missouri. As the Commission stated in Case No. TO-99-254:

> Finally, there is little concrete evidence about the cost of converting the LEC to LEC network to FGD, but what evidence there is certainly suggests that the cost will be great. The Commission will not order the industry to embark on a massive project to convert to another standard, at an unknown cost, to achieve uncertain benefits and possibly cause tangible harm to customers trying to place calls. (Report and Order, Case No. TO-99-254, *et al.*).

Second, even Complainants recognize that there is no statutory or regulatory authority that would force wireless carriers to use dedicated trunking for interconnection with Complainants. That's why Complainants have pursued this verbal sleight of hand. The Commission should reject it unambiguously and direct Complainants to negotiate appropriate and legal interconnection terms.

2. Arbitrating An Interconnection Agreement Costs More Than Either Party Will Gain in Reciprocal Compensation

Complainants and Staff are quick to point out that, if the wireless carriers do not like the compensation arrangements imposed by this Commission, the wireless carriers can negotiate or arbitrate interconnection agreements. What Complainants count on and Staff fails to realize is that the cost to pursue an arbitration far exceeds what a wireless carrier could hope to gain through a reduction in termination charges or obtaining reciprocal compensation. As Verizon

Wireless's witness testified in hearing, pursuing an arbitration can cost from $40,000 to $60,000 and can cost well over $130,000. Transcript at 1090.

Even where arbitration is pursued, it will result in an interconnection agreement only with a single LEC, since the ability to "opt into" an agreement does not allow wireless carriers to force one LEC to honor an agreement reached with another LEC. Thus, with eight Complainant companies and approximately twenty more represented by the amicus brief of the STCG, those arbitration costs alone could easily exceed $1.5 million. Where a given LEC is terminating minutes that amount to only a fraction (and, frequently, a tiny fraction) of the cost of arbitration -- which is the case in every wireless carrier-to-LEC relationship at issue in this docket and probably the case with virtually every wireless carrier-to-small LEC relationship in the State of Missouri -- arbitration cannot be cost justified.

Complainants are counting on the fact that arbitration is not cost justified when they try to drive the wireless carriers to enter transport and termination arrangements with the IXCs, simply because those arrangements cost less to wireless carriers than Complainants' terminating access rates. *See* Cingular's Initial Brief at 34. If the Commission truly wants to see explicit interconnection agreements, it should level the playing field so that both parties see an advantage in negotiating rather than arbitrating. The current bill and keep regime represents such a level playing field (although it has not induced Complainants to negotiate). If, however, the Commission accedes to Complainants' demand in this case, a likely result will be no interconnection agreements. More importantly to customers, it will mean no reduction in the amount of intraMTA, local wireless calling being treated as toll by Complainants and other small carriers in the State of Missouri.

3. Bill and Keep Is A Fair And Reasonable Mode Of Compensation Under the Circumstances

Unfortunately, the more this Commission gives to the Complainants and other small LECs outside of the Section 252 negotiation process, the less likely it is that any companies will negotiate reciprocal compensation arrangements. While arbitration is available to both the wireless carriers and to the LECs, neither side is likely to force an arbitration "out of principle" where the benefits of the resulting agreement amount to far less than the cost of the procedure for obtaining one.

Particularly, where the number of minutes at issue is small, negotiated agreements are most likely to be reached where the introduction of an explicit reciprocal compensation arrangement improves the position of both parties. The evidence in this docket shows that the wireless carriers have repeatedly solicited agreements, which shows they have been responsive to the Commission's directive that there ought to be explicit agreements, and shows that the wireless carriers see some value in having agreements. But the evidence in this docket shows that Complainants do not see any value in negotiating agreements because they receive more under the current regime where they can collect full carrier access on all calls they originate to the wireless carriers (Cingular's Initial Brief at 29) and because they hope to goad this Commission into awarding carrier access on all minutes they terminate. *Id.* at 33. If this Commission awards them full carrier access on the wireless traffic they terminate, Complainants will have even less reasons to negotiate reciprocal compensation and even more reason to stonewall the process.

Complainants clearly intend to use what they view as a one-sided obligation to lock the wireless carriers into a fully access-based compensation regime. As they state, "[t]he MITG companies contend it is the obligation of the wireless carriers to obtain an approved agreement

before access is subject to displacement by reciprocal compensation." Complainants' Initial Brief at 21. If they can obtain full access, they clearly intend to make this even more of an uphill battle for wireless carriers to obtain the benefits of TA96.

Bill and keep[8] is the best policy for this Commission to leave in place in the absence of negotiated interconnection agreements. Contrary to the assertions of Complainants (at 23), bill and keep it is not a "penalty" for their bad faith negotiating tactics. It is a simple recognition of the fact that, given the small and relatively balanced flow of traffic between particular wireless carriers and particular Complainants, *neither* party is sufficiently better off under an explicit reciprocal compensation agreement to make the negotiation of that agreement worth while. It would simply cost more to negotiate (let alone, arbitrate) an agreement than the party could hope to gain from having it. Through bill and keep, the parties retain adequate revenues to offset the cost of terminating calls and avoid the transactional costs associated with negotiating and administering agreements.

III. STAFF'S SUGGESTION THAT THE COMMISSION RETROACTIVELY IMPOSE "PARTS" OF THE ACCESS TARIFFS IS UNLAWFUL

Staff correctly states that it is not appropriate for the Complainants to assess carrier access charges on the termination of intraMTA wireless calls. Staff's Initial Brief at 3, 13-15. Staff acknowledges the position of various wireless carriers that the Complainants are entitled to compensation for terminating wireless calls. However, Staff ignores the fact that the Complainants are currently recognizing compensation for that termination by collecting and retaining revenue associated with the origination of intraMTA calls to wireless customers.

[8] It is a fascinating irony that, while relying on the Commission's holding in the *Mark Twain* case that TA96 does not even apply in the absence of a negotiated interconnection agreement, Complainants can argue that a *de facto* bill and keep is absolutely barred unless it meets the strict requirements of TA96. While Cingular respectfully disagrees with the Commission's holding the *Mark Twain* case, it seems beyond question that, if TA96 does not apply to state tariffs, it has no impact on the Commission's ability to recognize bill and keep relationships.

Because Staff is unwilling to recognize the revenue that the Complainants are already obtaining, it attempts to invent a revenue stream for Complainants, a revenue stream that Complainants themselves reject. *See* Complainants' Initial Brief at 3 (". . . Staff's suggestion to retroactively apply a rate not in existence is unworkable"); Transcript 144, 150-51 (Complainants' counsel rejecting Staff's approach in his opening argument).

While re-affirming that Complainants' attempt to rely on their carrier access tariffs is unlawful, Staff proposes to piece together a "wireless termination rate" by drawing on those same access tariffs and then to apply that rate retroactively back to 1998 (when SWBT amended its tariff to omit its termination service). Aside from violating the well-established prohibition on retroactive ratemaking (as demonstrated by Cingular's Initial Brief at 34-37), Staff acknowledges that "[t]he MITG companies [Complainants] have set a hurdle for Staff as they argue that their current tariffs do not allow for indirect interconnection through a transiting carrier." Staff's Initial Brief at 15. Staff fails to mention the even higher hurdle Complainants set for Staff's proposal: "No wireless carrier purchased service under the access tariffs." Complainants' Initial Brief at 10. Staff is trying to find a creative way to solve what it views as a problem of non-compensation, but its solution does not reflect sound policy and, equally important, given that Complainants have been compensated through bill and keep, the problem it seeks to solve does not exist. The Commission should not follow Staff down this slippery slope of amalgamating new tariff rates and applying them retroactively.

Staff also suggests that the excerpted elements of the access rate meet the forward-looking, economic-cost requirements of Section 252(d)(2) of TA96. Staff's Initial Brief at 11. There is no basis in this record to conclude that any element of the Complainants' access tariff has any relationship to their forward-looking costs.

The Staff builds its assertion on its statement that, "in *Mark Twain*, the Commission was presented forward-looking cost data that was in excess of the termination rates proposed by the LECs." *Id.* Staff appears to be referring to the HAI model that was presented in the *Mark Twain* case. It would be wholly inappropriate for the Commission to rely on that HAI model because, as Mr. Scheperle agreed at the hearing in this matter, the Commission reached no determination in the *Mark Twain* case as to whether that rendering of the HAI model was in any way valid. Transcript at 1142-43. Not only did Mr. Scheperle agree that there was great controversy about the validity of that model, Mr. Scheperle also agreed that even the witness who presented the HAI model in the *Mark Twain* case questioned the validity of using the HAI model to determine the forward-looking costs of small companies. *Id.* In sum, there is no basis for Staff's speculation that elements of the Complainants' access tariffs have any relationship to their forward-looking, economic costs for terminating wireless calls.

IV. STAFF'S REQUEST FOR A STUDY SHOULD BE <u>CONSIDERED AS A SEPARATE INVESTIGATION</u>

Staff repeats its concern that no studies have been conducted to analyze the percentage of interMTA versus intraMTA traffic between any of the wireless carriers and the Complainants. Although Staff acknowledges that there is no evidence suggesting that the capacity currently exists to conduct such a study, Staff strongly recommends that such studies be done, and suggests that the study described by Mr. Clampitt in response to the Commissioner's questions might be an appropriate model.

While Cingular does not object to investigating what studies could be done, it does not believe that the current record in this docket provides a sufficient basis for the Commission to identify how such a study should be conducted. Cingular suggests that, if the Commission concurs in Staff's goal of pursuing studies, it should order its Staff to initiate an investigation of

what studies are technically and economically feasible and what such studies would require from the wireless carriers and from Complainants.[9]

CONCLUSION

The Complainants are seeking relief from the Commission when the only appropriate relief is already in their own control. If Complainants truly want reciprocal compensation, all they have to do is set aside their unreasonable preconditions and engage in good faith negotiations.

Choctaw and MoKan Dial are being compensated under their WST tariffs. Alma will be similarly compensated if and when it decides to issue invoices under its WST tariff. Complainants have entirely failed to prove their allegations that Cingular is inappropriately failing to compensate them.

Complainants have also failed to make any case that this Commission should reverse its course and allow carrier access for the termination of intraMTA wireless calls. This Commission has already ruled that carrier access is an inappropriate mechanism for compensation to terminate intraMTA traffic. Complainants raise no new arguments that suggest the Commission should revisit its ruling, particularly where its ruling is supported by the orders of the FCC and the consistent rulings of several other state commissions.

This Commission has already made an effort by allowing ILECs in Missouri to file WST tariffs (although Cingular respectfully disagrees that those tariffs are necessary or lawful), and four of the Complainants have not been willing even to meet the Commission "half way." It is

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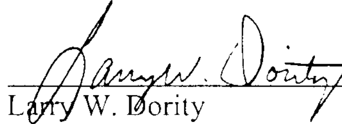
[9] Another way to view the interMTA, intraMTA analysis would be under the FCC's alternative that the location of the calling and called party could be identified as the point of interconnection. *See First Report and Order* at ¶ 1044 ("LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party"). Since the wireless carriers are already solely responsible for obtaining third-party transport to carry their traffic to the Complainants, the Commission could view SWBT as standing in for the wireless carriers when it provides transport to Complainants. Therefore, the point of interconnection between SWBT and Complainants could be viewed as the point of interconnection between the wireless carriers and the Complainants, making the traffic 100% intraMTA.

apparent that Complainants have no intention of pursuing any compensation other than full carrier access for the indefinite future. Moreover, if Complainants have been unwilling to negotiate reciprocal compensation when their current alternative is originating access under a bill and keep regime, what reason does the Commission have to believe they will negotiate reciprocal compensation if they have full carrier access on both origination and termination to protect? If the Commission wishes to encourage the negotiation of appropriate interconnection

agreements, it should dismiss or deny these Complaints and direct the Complainants to stop their gaming, drop their tactics and negotiate in good faith.

Dated this 22nd day of November 2002

Southwestern Bell Wireless, LLC
d/b/a Cingular Wireless



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered; mailed, First Class mail, postage prepaid; or e-mailed this 22nd day of November 2002, to:

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APPENDIX 1

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10-8-02

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VERIZON NORTH, INC. f/k/a GTE
NORTH INCORPORATED, *et. al.*,

Plaintiffs, Case Number: 00-CV-71442-DT

v. HON. GEORGE E. WOODS

COAST TO COAST
TELECOMMUNICATIONS, INC.,
et. al.,

Defendants.
______________________________/

ORDER VACATING THE MPSC DECISION AND REMANDING

This matter having come before the Court on the parties' joint stipulation to submit this matter on the briefs on summary judgment [Document Nos. 29-30 and 34-35];

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that because the MPSC decision is inconsistent with the Telecommunications Act of 1996, 47 U.S.C. §§ 151-714, the MPSC decision shall be, and hereby is, VACATED; and upon REMAND, the parties are directed to act in conformance with § 252 of the Telecommunications Act.

I. BACKGROUND

Plaintiffs, Verizon North Inc. ("Verizon") and Verizon North Systems ("VS") (collectively referred to as "Plaintiffs"), instituted this action against Coast to Coast Telecommunications, Inc. ("Coast to Coast") and John G. Strand, David A. Svanda, and Robert B. Nelson, Commissioners of the Michigan Public Service Commission ("MPSC"), in their official capacities, seeking injunctive and declaratory relief against enforcement of a February 22, 2000, MPSC Order obligating Plaintiffs to pay Coast to Coast's bills for ISP-bound traffic pursuant to a local tariff.[1] Plaintiffs allege that the MPSC's Order violates and is preempted by the Federal Telecommunications Act of 1996, 47 U.S.C. §§ 151-714 ("FTA"). Plaintiffs have also sued Coast to Coast, seeking this Court to order Coast to Coast to refund all monies that Plaintiffs have paid to Coast to Coast pursuant to the disputed tariff.

This dispute involves the costs, if any, which Coast to Coast can charge Plaintiffs when Plaintiffs' customers access the internet via Internet Service Providers ("ISPs") served by Coast to Coast. According to Plaintiffs, their typical customer

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[1] By Order dated August 22, 2000, this Court granted Plaintiffs' unopposed motion to change the case caption to reflect that as a result of a corporate merger, Plaintiff GTE North Incorporated changed its name to Verizon North Inc., and Plaintiff Contel of the South, Inc. assumed the name Verizon North Systems.

accesses the internet "by dialing a 7-digit number to call an ISP." See Plfs.' Am. Complt. at ¶ 2. Plaintiffs represent that the "ISP then acts as a conduit and connects the end user's call to the Internet." Id. On occasion, the end user's call must be "carried by more than one local telephone company before it reaches the ISP." Id. This latter situation is implicated in the underlying dispute between Plaintiffs and Coast to Coast. Id.

It is undisputed that Plaintiffs and Coast to Coast do not have an interconnection agreement.[2] Coast to Coast filed a local tariff under Michigan law establishing the rate it would charge Plaintiffs (and presumably all other local exchange carriers) for Coast to Coast to terminate calls to ISPs made by Plaintiffs' customers and carried, in part, by Coast to Coast. Plaintiffs disputed Coast to Coast's ability to issue this local tariff (and the rate charged). Therefore, Plaintiffs refused to pay any charges billed by Coast to Coast. Plaintiffs contend that the payment of such termination costs is controlled by federal law, which preempts Coast to Coast's state law tariff.

On August 18, 1999, Coast to Coast filed a complaint against Plaintiffs before the MPSC to resolve a billing dispute concerning reciprocal compensation. Coast to Coast alleged:

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[2] Interconnection agreements exist between Ameritech and Coast to Coast and between Ameritech and Verizon (formerly GTE). See MPSC Brief at 3 & n. 1-2.

> This matter relates to the refusal of GTE to compensate Coast to Coast for local traffic termination from the period of March 9, 1999 through the present. GTE alleges that they are not required to do so without an interconnection agreement in place between the carriers, negotiated pursuant to the provisions of Sections 251 and 252 of the Federal Telecommunications Act, 47 U.S.C. §§ 25[1], 252 ("The Federal Act"). The amount of termination traffic compensation withheld by GTE is significant to Coast to Coast and places Coast to Coast at a competitive disadvantage.

Plfs.' Ex. 1 of Am. Complt. at ¶ 5. On September 30, 1999, the administrative law judge ("ALJ"), Daniel E. Nickerson, Jr., denied Verizon's and VS's motion to dismiss and took Coast to Coast's motion for summary determination under advisement.

Subsequently, on November 4, 1999, upon a full briefing by the parties, the ALJ conducted an extensive evidentiary hearing pertaining to Coast to Coast's motion for summary determination. The MPSC issued its Opinion and Order on February 22, 2000. The MPSC held that, contrary to Verizon's and VS's argument, the MPSC had jurisdiction to decide the tariff dispute under Michigan law. The MPSC concluded that the Federal Telecommunications Act of 1996 did not preempt state law on this issue. See Order at 3-7. The MPSC further concluded that Coast to Coast's tariff was proper, but found that Verizon and VS had a right to contest the rate established by the tariff as being excessive. Id. at 7-8.

The parties, by joint stipulation, agree that the case is ready for decision based on the current record without the need

for additional discovery. Upon review of the parties' well-presented briefs, the Court finds that oral argument is not necessary to resolve the instant matter. See E.D. MICH. Local Rule 7.1(e)(2). Accordingly, the Court decides the issues based on the briefs submitted by the parties.

II. STANDARD OF REVIEW

It is undisputed that this Court conducts a de novo review of a MPSC decision to determine whether it is consistent with the Federal Telecommunications Act of 1996 ("FTA"), 47 U.S.C. §§ 151-714. See, e.g., Michigan Bell Tel. Co. v. MCI Metro Access Transmission Serv., Inc., 128 F.Supp.2d 1043, 1051 (E.D. Mich. 2001)(citations omitted); Michigan Bell Tel. Co. v. Climax Tel. Co., 121 F.Supp.2d 1104, 1108-09 (W.D. Mich. 2000). The Court reviews all other factual decisions rendered by the MPSC under an arbitrary and capricious standard. See MCI Metro, 128 F.Supp.2d at 1051; MCI Telecomms. Corp. v. Michigan Bell Tel. Co., 79 F.Supp.2d 768, 773 (E.D. Mich. 1999).

In the instant case, all parties contend that they are entitled to summary judgment. Motions for summary judgment require the Court to look beyond the pleadings and evaluate the facts to determine whether there is a genuine issue of material fact that warrants a trial. Federal Rule of Civil Procedure 56 mandates the entry of summary judgment if all the evidence shows

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The moving party has the burden of showing that there is an absence of evidence to support the nonmoving party's case. Id. at 325. Thus, this Court determines "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Cicero v. Borg-Warner Auto., Inc., 280 F.3d 579, 583 (6th Cir. 2002)(citation omitted). This Court does not weigh the evidence, but determines whether there is a genuine issue for trial, viewing the record as a whole and viewing all the facts in a light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 578 (1986).

In order to avoid summary judgment, the opposing party must have set out sufficient evidence in the record to allow a reasonable jury to find for him at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. at 256. Accord, Hunter v. Caliber Sys., Inc., 220 F.3d 702, 709 (6th Cir. 2000)(finding that the mere existence of a scintilla of evidence is insufficient to avoid summary judgment).

Summary judgment is appropriate if the evidence favoring the nonmoving party is merely colorable or is not significantly probative. See Hill v. White, 190 F.3d 427, 431 (6th Cir. 1999).

III. ANALYSIS

A. Reciprocal Compensation

Plaintiffs contend that the MPSC's February 22, 2000, Order is erroneous because it: (1) Ordered Plaintiffs to pay reciprocal compensation for Internet bound calls, as § 251(g) exempts ISP traffic from reciprocal compensation; and (2) by imposing reciprocal compensation via a tariff when § 252 mandates a negotiation process for interconnection agreements. The MPSC responds that its February 22, 2000, Order should be affirmed because it is consistent with the FTA's purpose of promoting competition and does not substantially prevent implementation of the FTA's requirements. See 47 U.S.C. § 251(d)(3).

1. Whether the FTA Expressly Exempts ISP Traffic from Reciprocal Compensation

Plaintiffs rely on a 2001 Federal Communications Commission ("FCC") Order to support their argument that Section 251(g) of the FTA expressly exempts ISP traffic from reciprocal compensation. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,

Intercarrier Compensation for ISP-Bound Traffic, 16 F.C.C.R. 9151, 9152-53 (2001).[3] They contend that ISP traffic is subject to a different regulatory treatment. Plaintiff's reliance on § 251(g) and the FCC's decision is misplaced. The D.C. Circuit Court of Appeals held that the FCC's reliance on § 251(g) does not support the FCC's conclusion that the reciprocal compensation obligations of § 251(g)(b)(5) do not apply to internet bound traffic. See WorldCom Inc. v. Federal Communications Comm'n, 288 F.3d 429, 430, 433 (D.C. Cir. 2002). Although the WorldCom court did not reject the conclusions reached by the FCC, the court declined to address whether another legal basis supported the FCC's findings and instead remanded the matter to the FCC. See id. at 434. Accordingly, the authority Plaintiffs cite does not provide a basis for concluding that the MPSC's Order in the instant case was contrary to the FTA. The Court thus turns to Plaintiff's alternative contention.

2. Tariff v. Interconnection

Plaintiffs alternatively argue that the MPSC improperly supplanted the interconnection agreement procedures and standards set forth by the FTA by imposing the Coast to Coast tariff.

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[3] Specifically, the FCC found that the compensation between two LECs involved in delivering internet-bound traffic to an ISP should not be governed by the reciprocal compensation provision of § 251(b)(5). Id. at 9152-53.

Plaintiffs maintain that the FTA requires parties to negotiate an interconnection agreement, see 47 U.S.C. § 252(c)(1), and in the event that negotiations are unsuccessful, the FTA provides for an arbitration process to resolve open issues. See 47 U.S.C. § 252(b)(1).

It is undisputed that Coast to Coast filed a local tariff with the MPSC on March 5, 1999. See Plfs.' Ex. 5, Tariff MPSC No. 1R, § 11.4. The tariff requires carriers handing off local traffic to Coast to Coast to compensate Coast to Coast at a rate of $0.015 per minute for the use of Coast to Coast's network. Coast to Coast subsequently demanded reciprocal payments from Verizon for internet-bound calls as the parties did not have an interconnection agreement.

A review of the record in this matter persuades the Court that the MPSC erred when it applied the Coast to Coast tariff in the absence of an interconnection agreement between the parties. The Court finds that the MPSC Order, imposing the tariff on Plaintiffs, operates as a bypass of § 252 of the FTA and thus is inconsistent with the FTA.

As Plaintiffs note, the FTA provides some guidelines for negotiating an interconnection agreement. The FTA provides that "an incumbent local exchange carrier may negotiate and enter into

a binding agreement." 47 U.S.C. § 252(a)(1).[4] If the parties' negotiations are unsuccessful, the FTA authorizes either party to petition for binding arbitration before the state commission and provides a time table for the process. See 47 U.S.C. § 252(b). Additionally, the FTA establishes standards that control the compulsory arbitration proceedings. See 47 U.S.C. § 252 (c) & (d).

Defendants argue that negotiation and arbitration are not required to satisfy the FTA. Defendants maintain that the MPSC is free to impose its own requirements and rules to foster competition as long as the requirements are not inconsistent with the FTA and do not prevent the implementation of FTA provisions. See 47 U.S.C. § 261(c). The MPSC maintains that its February 22, 2000, Order imposing the Coast to Coast tariff in place of an interconnection agreement does not substantially prevent implementation of the FTA's § 251 and is fully consistent with the FTA's purpose of promoting competition. The MPSC argues that it has repeatedly ruled that interconnection can be achieved by agreement or tariff. See MPSC's Br. at 8-10.

The Court finds that the MPSC's decision to impose a tariff in the absence of an interconnection agreement is inconsistent with the FTA as it contravenes the clear guidelines for

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[4] Both the incumbent carrier and the requesting carrier have the duty to negotiate in good faith. See 47 U.S.C. § 251(c)(1).

negotiating and reaching an interconnection agreement set forth under § 252. In Verizon North v. Strand, 140 F.Supp.2d 803 (W.D. Mich. 2000), the plaintiff was challenging a MPSC order that required it "to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants without the necessity of negotiating an interconnection agreement." Id. at 809. The tariff which the plaintiff was ordered to file would "completely displace [ ]. . . interconnection agreement[s]." Id. The court concluded that § 252's specific requirements for negotiations and arbitration "indicates that the registration and arbitration process plays an integral role in achieving Congress's [sic] goal of enhancing competition." Id. at 810.

Because the MPSC approved Coast to Coast's tariff without the parties satisfying the clear dictates of § 252's negotiation/arbitration process, the MPSC acted contrary to the FTA. Imposing the tariff results in a chilling, rather than enhancement, of competition in contravention of the TCA's aim. As such, the tariff is unenforceable. The Court finds that the MPSC decision must be vacated. Upon remand, the parties are directed to act in conformity with § 252.[5]

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[5] In light of this ruling, the Court finds it unnecessary to address Plaintiffs' alternative argument that even if the MPSC had authority to impose reciprocal compensation under a tariff, it erroneously applied the Coast to Coast tariff in the instant case.

B. Reasonableness of Rates for Reciprocal Compensation

Plaintiffs alternatively attack the reasonableness of the rates. The MPSC argues that Plaintiffs cannot challenge, via this lawsuit, the reasonableness of the rates which Coast to Coast charges for reciprocal compensation. The issue of the reasonableness of Coast to Coast's reciprocal compensation rates was addressed as follows in the MPSC decision:

> The Commission finds that relief from an allegedly excessive local termination rate is outside the scope of a complaint brought by a terminating provider to challenge the originating provider's nonpayment. As noted in Case No. U-11821, "[i]f [the originating provider] is dissatisfied with the arrangement available under the tariffs, there are lawful remedies available through negotiation, arbitration, or the filing of an application or complaint." Order at 11. Until [Verizon and VS] invoke[] one of those remedies, there is no need to address whether the rate is excessive.

MPSC Order at 8.

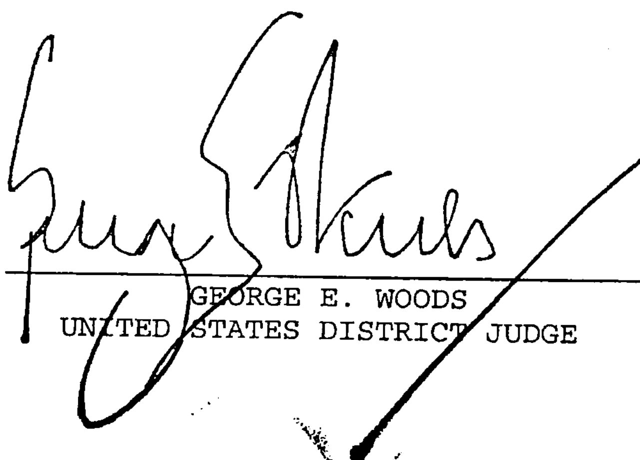
The MPSC argues that because, to date, Plaintiffs have not challenged the rate "through negotiation, arbitration, or the filing of an application or complaint" before the MPSC, Plaintiffs cannot challenge the rate before this Court in the first instance. This Court agrees. The Court does not find that Plaintiffs have waived this issue. Rather, Plaintiffs must initiate a separate action, consistent with the directive contained in the MPSC Order, to address the reasonableness of the

rates.[6]

IV. CONCLUSION

For the reasons set forth above, the Court finds that the MPSC decision is inconsistent with the Telecommunications Act of 1996, 47 U.S.C. §§ 151-714 and therefore, the MPSC decision is VACATED. Upon REMAND, the parties are directed to act in conformance with the Telecommunications Act.

IT IS SO ORDERED.



GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

Dated: October 3, 2002
Detroit, Michigan

Copies mailed this date to:

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[6] The Court declines to indicate what methodology to apply to determine a reasonable rate. The Court notes, however, that the compensation plan described in the FCC's April 27, 2001, Order appears instructive and a logical starting place for calculating a reasonable rate.

APPENDIX 2

Only the Westlaw citation is currently available.

United States Court of Appeals,
Sixth Circuit.

VERIZON NORTH, INC., Plaintiff-Appellee.
v.
John G. STRAND, Chairman; John C. Shea, Commissioner; and David A. Svanda, Commissioner, Defendants-Appellants.

No. 01-1013.

Argued: June 20, 2002.
Decided and Filed: Nov. 7, 2002.

Appeal from the United States District Court for the Western District of Michigan at Lansing. No. 98-00038--Robert Holmes Bell, Chief District Judge.

ARGUED: David A. Voges, Assistant Attorney General, Lansing, MI, for Appellant. Gerald Masoudi, Kirkland & Ellis, Washington, DC, for Appellee. Brian J. Leske, Worldcom, Inc., Washington, DC, for Amici Curiae. **ON BRIEF:** David A. Voges, Henry J. Boynton, Assistant Attorneys General, Lansing, MI, for Appellant. Patrick F. Philbin, Kirkland & Ellis, Washington, DC, for Appellee. Brian J. Leske, Worldcom, Inc., Washington, DC, Darryl M. Bradford, Sona Rewari, Jenner & Block, Chicago, IL, David L. Lawson, Jennifer M. Rubin, Sidley, Austin, Brown & Wood, Washington, DC, Leland R. Rosier, Clark Hill, Okemos, MI, for Amici Curiae.

Before BOGGS, NORRIS, and BATCHELDER, Circuit Judges.

OPINION

BOGGS, Circuit Judge.

*1 Commissioners John G. Strand, John C. Shea, and David A. Svanda of the Michigan Public Service Commission (the "MPSC") appeal from the district court's grant of a declaratory judgment in favor of Verizon North, Inc. ("Verizon") [FN1] in Verizon's suit challenging a February 25, 1998 order of the MPSC (the "February 25 order" or the "order"). Verizon, an incumbent local telecommunications carrier in Michigan, alleged that the order conflicted with, and was preempted by, the federal Telecommunications Act of 1996 (the "FTA" or the "Act"), Pub.L. No. 104-104, 56 Stat. 110 (1996) (codified in various sections of 47 U.S.C.) to the extent that it required incumbents to offer network elements and services to competitors through published tariffs and to combine unbundled network elements for competitors. The district court agreed and granted injunctive relief from both aspects of the order. For the reasons set forth below, we affirm the district court's judgment with respect to the tariff requirement, but vacate the judgment with respect to the bundling requirement.

FN1. The case was instituted by GTE North Inc., which in 2000 became Verizon North, Inc.

I

This is the second time that this case has reached this court. In our first decision, issued on April 20, 2000, we explained the history and substance of the action brought by Verizon (which at the time was still GTE):

> [In December 1996,] the MPSC initiated ... state law proceedings against GTE and other incumbent [Local Exchange Carriers, or "LECs"] in order to establish terms of interconnection to Michigan local exchange networks generally.... In connection with these general interconnection proceedings, the MPSC required GTE and Ameritech, as Michigan LECs, to file with the Commission "Total Service Long Run Incremental Cost" (TSLRIC) studies for both regulated and non- regulated telecommunications services. In addition, the MPSC directed GTE to publish tariffs in which GTE would offer to sell its network elements and wholesale services to any interested party at rates predetermined by the Commission. GTE responded to the Commission's order by filing a petition for rehearing in which GTE challenged the MPSC's rates for unbundled loops as confiscatory in violation of the FTA. The MPSC denied GTE's petition for rehearing, and GTE appealed the MPSC's order to the Michigan Court of Appeals. On December 30, 1997, the court affirmed the MSPC's order, and the MPSC proceeded to use GTE's and Ameritech's TSLRIC studies to determine prices for new entrants' access to bundled and unbundled network elements and basic local exchange services throughout Michigan.
> On February 25, 1998, in the course of the state proceedings against GTE and Ameritech, the

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MPSC issued the order contested in this appeal. In the February 25 order, the MPSC used GTE's TSLRIC studies to establish the rates at which GTE would be compelled to sell unbundled network elements to its competitors. In addition, the order stated that the FTA requirement that GTE allow competitors to access pieces, or unbundled elements, of GTE's local network did not preclude GTE's competitors from requesting access to pre-assembled, fully operational local service platforms. Upon receiving the order, GTE sued the MPSC in the district court, alleging that the Commission, acting pursuant to Michigan law, violated the FTA when it issued the February 25 order: (1) directing GTE to provide competitors with access to pre-assembled, fully operational service platforms; and (2) requiring GTE to publish tariffs offering to sell elements of its network at rates predetermined by the Commission. *2 *GTE North, Inc. v. Strand,* 209 F.3d 909, 913-14 (6th Cir.2000) (*"Verizon I"*).

In that first decision, this court reviewed the district court's dismissal of the case for lack of subject matter jurisdiction. The district court had held that it lacked jurisdiction in the case, because § 252(e)(6) of the Act (47 U.S.C. § 252(e)(6)) gives federal courts jurisdiction to review state commission orders approving or rejecting final interconnection agreements and the February 25 order was not such an order. This court determined that the limitation on federal review set forth in § 252(e)(6) did not apply and held that, since the action presents a potential instance of federal preemption, the district court had jurisdiction to review the order under its general federal question jurisdiction (28 U.S.C. § 1331). *See Verizon I,* 209 F.3d at 915- 20. Further, this court held that Verizon's suit against the individual commissioners in their official capacity, which seeks only prospective injunctive relief, is appropriate under *Ex parte Young,* 209 U.S. 123 (1908). [FN2] *See Verizon I,* 209 F.3d at 922. Accordingly, this court remanded the case to the district court for consideration of the merits.

FN2. In its present appeal, the MPSC again challenges this court's jurisdictional and *Ex parte Young* holdings. However, after the parties' briefs were filed, the Supreme Court decisively answered the questions raised by the MPSC. In *Verizon v. Public Service Commission of Maryland,* 122 S.Ct. 1753 (2002), the Court held that § 252(e)(6) does not divest federal courts of federal question jurisdiction under 28 U.S.C. § 1331, *id.* at 1758, and that a suit seeking injunctive relief from individual state commissioners is proper under *Ex parte Young. Id.* at 1760-61.

On remand, the district court granted Verizon's motion for summary judgment and struck down both challenged portions of the MPSC order, holding that they conflicted with and were preempted by the FTA. First, the court held that the tariff requirement was invalid, because it would allow competitors to circumvent the negotiation and arbitration process set out in § 252 of the Act. *Verizon North, Inc. v. Strand,* 140 F.Supp.2d 803, 809-10 (W.D.Mich.2000). Second, the court held that requiring incumbents to combine previously unbundled network elements at competitors' request violated the plain language of the Act, which requires incumbents to provide competitors access to network elements "in a manner that allows *requesting carriers* to combine such elements." *Verizon North, Inc.,* 140 F.Supp.2d at 810 (quoting 47 U.S.C. § 251(c)(3) (emphasis added)). The MPSC filed a timely appeal from both holdings.

II
The Tariff Requirement

Congress passed the FTA in order to end local telecommunications monopolies and engender competition in local telecommunications markets. To attain these goals, the Act imposes various requirements on incumbent telecommunications providers. The requirements include the duty to: (1) permit competitors who have built their own telecommunications networks to interconnect with the incumbent's network "for the transmission and routing" of traffic between the networks, 47 U.S.C. § 251(c)(2); (2) permit competitors to lease elements of the incumbent's network in order to allow the competitors to provide retail services through such a network, *id.* at § 251(c)(3); and (3) permit competitors to purchase telecommunications services at wholesale prices in order to allow the competitors to resell those services to retail customers, *id.* at § 251(c)(4).

*3 In order to facilitate this interconnection, leasing, and wholesaling, Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationship. *Id.* at §§ 251(c)(1), 252. First, the Act explains that, "[u]pon receiving a request for interconnection, services, or network elements ... an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier...." *Id.* at § 252(a)(1). In

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this regard, the FTA places on incumbents the duty to "negotiate in good faith the terms and conditions of such agreements." *Id.* at § 251(c)(1). However, either party to the negotiation may ask the relevant state commission to mediate any unresolved issues. *Id.* at § 252(a)(2). If negotiation between the incumbent and the competitor does not produce an agreement, the FTA provides that either party can, during a specific time period, ask the state commission to undertake binding arbitration of any open issues, and the FTA provides specific guidelines for such arbitration. *Id.* at § 252(b)-(d).

Once an interconnection agreement is reached, either through negotiation or arbitration, the FTA requires the relevant state commission to approve or reject the agreement, and it provides specific guidelines for the approval process. *Id.* at § 252(e). If the state commission does not act within a prescribed time period, the FTA provides for the Federal Communications Commission (FCC) to decide, which action preempts the state commission. *Id.* at § 252(e)(5). If the state commission makes a determination on the proposed interconnection agreement within the required time, the FTA provides that a party aggrieved by the commission's determination may bring an action for review in federal district court. *Id.* at § 252(e)(6).

The MPSC order at issue here establishes a different route for competitors to obtain services and network elements from incumbents. The order requires Verizon to file tariffs with the state, "set[ting] forth the rates, terms, and conditions" under which competitors might acquire network elements and services. MPSC Feb. 25, 1998 Order at 9-10, J.A. at 264-65. As the district court in this case explained, the order requires incumbents "to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants *without the necessity of negotiating an interconnection agreement.*" *Verizon North, Inc.*, 140 F.Supp.2d at 809 (emphasis added). In this way, the MPSC order permits competitors to purchase the services and elements directly off of the tariff menu, obviating the need to negotiate or arbitrate an interconnection agreement.

After surveying the provisions of the FTA discussed herein, the district court wrote:

> Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and arbitration system created by Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring Verizon to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase Verizon's network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act. Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.

*4 *Verizon North, Inc.*, 140 F.Supp.2d at 810.

We agree with the district court. The central question in preemption analysis is always "whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). By its terms, the FTA does not preempt state commission rules "if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261(b). *See also id.* at § 261(c) (permitting state commissions to impose certain additional requirements on telecommunications carriers, "as long as the State's requirements are not inconsistent with [the FTA]"). Therefore, Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the FTA. *See Verizon I*, 209 F.3d at 923 ("it is precisely because state utility commissions play such a critical role in administering the FTA's regulatory framework that they must operate strictly within the confines of the statute"); see also *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343 (7th Cir.2000) ("Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms."). Further, as the district court in this case pointed out, state law provisions can be inconsistent with, and therefore preempted by, federal law even if the federal and state laws share a common goal. *See Verizon North, Inc.*, 140 F.Supp.2d at 809. Even in the case of a shared goal, the state law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). [FN3]

FN3. Amici contend that the district court erred in relying on *Gade*, as *Gade* involved preemption under the Occupational Safety

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and Health Act ("OSH Act"), which does not permit supplemental state regulation. In contrast, amici explain, the FTA expressly permits supplemental state regulation. However, it is irrelevant that the FTA permits state regulation whereas the OSH Act does not, because the FTA only permits state regulation that is "not inconsistent with [its] provisions." 47 U.S.C. § 261(b). This is exactly the question facing this court: whether an alternative route to interconnection, bypassing the negotiation/arbitration of an interconnection agreement, is so inconsistent.

In the present case, the MPSC order completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review. This is "inconsistent with the provisions of [the FTA]," and therefore preempted.

The best argument to the contrary, set out by the MPSC and amici, is that while the interconnection agreement process set out in § 252 presents competitors one option for achieving interconnection, it is not necessarily the *only* permissible process. Under this theory, Congress set out the negotiation/arbitration/approval/federal review process, not as the central method for market entry, but as one method. Therefore, state commissions, armed with the power granted them by 47 U.S.C. § 251(d)(3) to "establish access and interconnection obligations of local exchange carriers" and by 47 U.S.C. § 261(c) to impose "requirements on a telecommunications carrier for intrastate services that are necessary to further competition" as long as such obligations and requirements are consistent with the Act, would be free to devise alternative methods under which competitors could acquire services and network elements from incumbents.

*5 In support of this reading, the MPSC points out that the FTA does not expressly state that the negotiation and arbitration of interconnection agreements is the *sole* method for competitors to gain access to incumbents' network elements and services. In this way, according to the MPSC, the present case is like the situation faced by the Supreme Court in *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646 (2002) ("*FCC* "), wherein the Court held that the Act's requirement that incumbents provide network elements that may be bundled by competitors did not foreclose an FCC rule requiring incumbents to also combine elements at the competitors' request. In so holding, the Court wrote that "it takes a stretch to get from permissive statutory silence to a statutory right" for the incumbents, and the Court refused to read the Act's silence on any obligation or lack thereof on the part of incumbents to bundle elements as an affirmative statement that the imposition of any such obligation would be inconsistent with the Act. *Id.* at 1684. The MPSC would have this court hold similarly with respect to the interconnection agreement process contained in § 252 of the Act-that Congress's affirmative statement of that method was not intended to foreclose any alternative methods designed by state commissions.

The difference between the bundling obligation in *FCC* and the interconnection agreement process in the present case is that the detailed procedural scheme--including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review--set out in § 252 is central to the FTA in a way that a bundling requirement is not. One strong sign that the interconnection agreement process is central to the Act, and is therefore not to be evaded by state rule-making is the requirement of federal judicial review of state commission determinations. As explained above, § 252(e)(1) of the Act provides that all interconnection agreements must be reviewed, and approved or rejected, by the relevant state commission. After this review, § 252(e)(6) provides that any party aggrieved by the state commission's determination may appeal that determination in the federal district courts. Emphasizing the importance to Congress of this federal review, § 252(e)(4) states that "[n]o state court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S .C. § 252(e)(4). However, there is no provision for federal court review of state tariff orders. Therefore, aside from bringing a federal law preemption action pursuant to 28 U.S.C. § 1331 to challenge each tariff order, an incumbent aggrieved by a state commission tariff decision might not be able to seek federal review.

In asserting that the interconnection agreement process is not central to the Act, the MPSC proffers § 252(f) as an example of a situation in which competitors can acquire services from incumbents without engaging in the interconnection agreement process. However, the MPSC's reliance on this section is misplaced. [FN4]

FN4. The MPSC comes closer with its

> reliance upon *Michigan Bell Telephone v. Strand,* 26 F.Supp.2d 993, 1000 (W.D.Mich.1998), to support the same proposition. In rejecting an incumbent's challenge to an MPSC order that altered existing interconnection agreements, the district court in that case held that the commission's actions in amending the existing agreements were permissible because, among other reasons, "the Section 252 negotiation procedure is not the sole means for the MPSC under the federal statutes to order and regulate telecommunications." *Id.* at 1000. The MPSC argues that this language provides support for the proposition that the §§ 251 and 252 process is not the sole process by which competitors can acquire services and network elements from incumbents. However, as the district court in the present case pointed out, the tariff in *Michigan Bell Telephone v. Strand* merely served to amend an existing interconnection agreement. *See Verizon North, Inc.*, 140 F.Supp.2d at 809. The order at issue in that case did not completely displace the existing interconnection agreement between the parties or, as the MPSC order in the present case does, make unnecessary future interconnection agreements between other parties.

*6 Bell operating companies have long been prohibited from offering long distance telephone service; however, § 271 of the FTA permits these companies to enter the long distance market if they can demonstrate that they have opened their local exchanges to competition. The Bell companies can demonstrate that they have done so in one of two ways. They can enter into a qualifying interconnection agreement, 47 U.S.C. § 271(c)(1)(A), (c)(2)(B), or, in the event that no market competitors request such an agreement, they can file a qualifying "statement of the terms and conditions that the company generally offers to provide" with the relevant state commission. *Id.* at § 271. Section 252(f) provides the procedure under which the Bell companies may file, and the state commissions may review, these statements. As with the interconnection agreement process, § 252(e)(5) requires the FCC to review the statement if the state commission fails to do so. Also, again, as with the interconnection process, § 252(e)(6) provides for federal district court review of the state commission's determination.

According to the MPSC, competitors of Bell companies that have filed such statements may choose to purchase services directly from these statements without first entering into an interconnection agreement with the incumbent; the MPSC contends that this proves that the interconnection agreement process is not central to the FTA. Verizon disputes this characterization, and contends that competitors still must enter into an interconnection agreement in order to acquire the services; the competitor will simply be able to refer to the § 252(f) statement in seeking an agreement.

As an initial matter, nothing in the language of § 252(f) suggests that it provides an alternative route around the interconnection agreement process for competitors of Bell companies that have filed § 252(f) statements. More importantly, however, § 252(f) is not at issue in the present case, because Verizon is not a Bell operating company. Therefore, whether Congress intended the interconnection agreement process to be the sole method of interconnection for competitors of Bell companies that have filed § 252(f) statements is simply irrelevant to this case.

Moreover, contrary to the MPSC's contention, a review of § 252(f) actually illustrates why Michigan's tariff procedure is inconsistent with, and therefore preempted by, the Act. As mentioned above, the same subsections of § 252 provide the same carefully-designed review process for a § 252(f) statement as they do for an interconnection agreement--the statement is to be presented to the relevant state commission for approval, the FCC can step in to approve the statement if the state commission does not act, and the state commission's actions are subject to federal court review. As discussed above, Michigan's tariff procedure bypasses all of this procedure.

The proper focus for the preemption analysis in this case is on the § 252 process as a whole. The important point is not the narrow issue of negotiation/arbitration as the means for molding the business relationship between the incumbent and its competitors, but rather that the MPSC order provides an alternative route around the entire interconnection process (with its attendant negotiation/arbitration, state commission approval, FCC oversight, and federal court review procedures). The Tenth Circuit appears to have recognized this in a recent decision upholding a provision in an interconnection agreement under which a competitor could purchase services at the rates and terms set forth in state tariffs filed by the incumbent in addition to purchasing them pursuant to the rates and terms set forth in its interconnection agreement with the incumbent. *See U.S. West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241 (10th

Cir.2002). The district court in that case had invalidated the provision as violative of the Act, because the competitor gained the terms and conditions outside of the negotiation/arbitration process set forth in § 252. *See id.* at 1249-50. The court of appeals, distinguishing the case before it from the district court decision in the present case, wrote that

> *7 the challenged provision does not eliminate interconnection agreements, but rather is a part of one. A decision by [the competitor] to purchase services at the rates and terms set forth in one or more of [the incumbent's] tariffs does not result in abandonment of the interconnection agreement between itself and [the incumbent]. It simply means that the interconnection agreement is amended to include the terms of the particular tariff(s). The parties remain bound by the interconnection agreement at all times, as anticipated by the Act.

Id. at 1251. Further, the Tenth Circuit went on to allay the concern expressed by the district court in that case, that incorporation of a tariff provision would not provide a basis for federal court review, by noting that under that court's jurisprudence, "state commissions have inherent authority to interpret and enforce previously-approved interconnection agreements, and ... federal courts have jurisdiction to review state commission decisions interpreting and enforcing previously-approved interconnection agreements." *Ibid.* Therefore, the fact that an interconnection agreement already existed between the parties was important to the validity of the state commission's plan.

The only other court that appears to have considered the specific question presented by this case also recognized the centrality of the § 252 process. An Oregon district court held that a state commission's tariff requirement conflicted with the FTA, because it would require incumbents to offer their services to competitors "via a procedure that bypasses the Act entirely and ignores the procedures and standards that Congress has established." *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157, 1178 (D.Or.1999). [FN5] In so holding, that court pointed out that the state commission had not "merely adopted a short-form interconnection agreement, along with a list of resale and unbundled element prices that will be incorporated in those agreements. Rather, the [commission had] dispensed with the interconnection agreement altogether and [allowed competitors] to order services 'off the rack' without an interconnection agreement." *Ibid.* The Oregon district court held that designing an alternative system, under which competitors might acquire services and network elements from incumbents without engaging in the § 252 process, was impermissible under the FTA.

> FN5. The amici supporting reversal of the district court in this case direct this court's attention to *In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460, ¶¶ 132-39 (1997), wherein the FCC upheld a Texas commission's rule permitting certain competitors to purchase services at a 5% discount to the rate listed in a tariff filed with the state. The amici cite the FCC decision as evidence that the FCC interprets the FTA to permit state commissions to implement tariff schemes that bypass the interconnection agreement provisions of the Act. *See* Brief of Amici Supporting Reversal at 22. According to the amici, this interpretation is entitled to substantial deference, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). However, while the FCC's discussion of the Texas rule may be read to suggest that the rule permitted competitors to acquire services from incumbents without first taking part in the interconnection agreement process, that fact is not discussed, relied upon, or even challenged in that case. Since this court can not tell from the FCC decision whether or not the Texas rule requires interconnection agreements, and since no party seems to have argued that any evasion of the interconnection agreement process violated the Act, this court can not rely upon *In re Public Utility Commission of Texas* as setting forth the FCC's position on the relevant issue in the present case.

We agree. The FTA permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets in America. Indeed, the Act makes clear that state commission regulations are not preempted as long as "such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261(b). However, the MPSC tariff requirement is "inconsistent with the provisions of [the FTA]," and therefore invalid, because it completely ignores and bypasses the detailed process for interconnection set out by Congress in the FTA.

The Bundling Requirement

*8 The second part of the MPSC order at issue in this case requires Verizon to offer "unbundled network elements as combinations or platforms" at competitors' request. MPSC Feb. 25, 1998 Order at 23, J.A. at 278. In invalidating that rule, the district court agreed with

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Verizon's contention that requiring incumbents to combine network elements for requesting competitors is inconsistent with the plain language of the Act, which requires incumbents to provide competitors access to network elements "in a manner that allows *requesting carriers* to combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). In so holding, the district court followed the Eighth Circuit's reasoning in *Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir.2000). In that case, the Eighth Circuit held that a similar rule adopted by the FCC violated the plain language of § 251(c)(3) of the Act, which "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *See Iowa Utilities Bd.,* 219 F.3d at 759.

During the pendency of this appeal, the Supreme Court issued an opinion overturning the Eighth Circuit on this issue. As mentioned above, in *FCC,* 122 S.Ct. at 1684-87, the Court held that the FCC rule requiring incumbents to combine elements at competitors' request did not violate the plain language of the FTA. In relevant part, the Court wrote:

> If Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined. The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal, and within the actual statutory confines it is not self-evident that in obligating incumbents to furnish, Congress negated a duty to combine that is not inconsistent with the obligation to furnish, but not expressly mentioned. Thus, it takes a stretch to get from permissive statutory silence to a statutory right on the part of the incumbents to refuse to combine for a requesting carrier, say, that is unable to make the combination or may even be unaware that it needs to combine certain elements to provide a telecommunications service.

Id. at 1684 (citations omitted). The Supreme Court having foreclosed the reasoning upon which the district court based its invalidation of the MPSC's bundling requirement, we would ordinarily reverse the district court's holding.

However, Verizon argues that there is an alternative ground upon which this court should uphold the district court's invalidation of the MPSC bundling rule. Verizon points to the fact that in *FCC,* the Supreme Court specifically noted that under the FCC bundling requirement, competitors requesting bundling must pay " 'a reasonable cost-based fee' for whatever the incumbent does" to combine elements. *FCC,* 122 S.Ct. at 1685 (quoting Brief for Petitioner Federal Parties in Nos. 00-587, etc. at 34). Verizon alleges that the MPSC rule at issue in the present case provides for no such compensation and is, therefore, distinguishable from the FCC rule upheld by the Supreme Court. The MPSC disagrees, contending that its rule does provide Verizon compensation for the bundling work it requires.

*9 Verizon raised the compensation issue before the district court. *See* Memorandum in Support of Verizon's Motion for Summary Judgment at 3. However, since the district court invalidated the MPSC rule as violating the plain language of the Act, it neither reached nor created a record regarding this more limited alternative argument. Therefore, this court lacks the factual basis upon which to consider this issue. Accordingly, we vacate the district court's holding with respect to this claim and remand the case for further consideration.

III

For the foregoing reasons, we AFFIRM in part and VACATE in part the district court's decision.

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