BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

Northeast Missouri Rural Telephone Company And Modern Telecommunications Company,	)	
Petitioners,	)	
v.	)	Case No. TC-2002-57 *et al.* consolidated
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.	)	

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

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INTRODUCTION

Complainants Northeast Missouri Rural Telephone Company ("Northeast"), Modern Telecommunications Company ("Modern"), Chariton Valley Corporation (Chariton Valley"), Choctaw Telephone Company ("Choctaw"), MoKan Dial, Inc. ("MoKan"), Mid-Missouri Telephone Company ("Mid-Missouri"), Alma Telephone Company ("Alma"), (jointly, "Complainants") brought their Complaints against Southwestern Bell Wireless LLC d/b/a Cingular Wireless ("Cingular")[1] and several other wireless carriers, and the Complaints were consolidated in this action. The Commission should dismiss or deny the Complaints because they are based on a theory of liability -- the application of access charges to intraMTA wireless traffic -- that this Commission and other controlling authorities such as the FCC have already rejected. The Commission should also dismiss or deny the Complaints because their premise is contradicted by the record evidence, *i.e.*, the claim that Complainants need relief from this Commission because they cannot obtain relief through the negotiation of appropriate interconnection agreements with the wireless carriers under the Telecommunications Act of 1996.

The evidence shows that Complainants are themselves the primary obstacle to the negotiation of interconnection agreements. The evidence also shows that Complainants have a simple and effective remedy if they are truly interested in obtaining reciprocal compensation: They may engage in good faith negotiations with the wireless carriers. If Complainants are not satisfied with the results of those negotiations, they may arbitrate interconnection agreements before this Commission.

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[1] For consistency of reference and to avoid confusion with SWBT, Southwestern Bell Wireless LLC will refer to itself in this Brief by its d/b/a, "Cingular."

In addition to their repeated demands for switched carrier access, three of the Complainants assert claims for unpaid amounts under their wireless service termination tariffs, although the evidence shows Cingular and the other wireless carriers are paying appropriately rendered bills under those tariffs.

BACKGROUND

The Complainants are each independent local exchange carriers ("ILECs") operating in the State of Missouri. Cingular and the other wireless carriers are cellular providers or personal communication service providers, jointly referred to as "wireless carriers." Each of the wireless carriers serves customers in the State of Missouri, although each has different serving areas within the State of Missouri.

The customers of the Complainants originate calls to customers of wireless carriers and receive calls from customers of wireless carriers. In 1996, Congress enacted the Telecommunications Act of 1996 ("TA96"). Among its provisions, TA96 clarified the obligation of all local exchange carriers to arrange for reciprocal compensation for the transport and termination of local calling. 47 U.S.C. § 251(b)(5). It also obligated incumbent local exchange carriers to negotiate arrangements for reciprocal compensation. *Id.* at § 251(c)(1). In response to TA96, the FCC clarified the local calling scope of wireless carriers to include all calls that originated and terminated within the same Metropolitan Trading Area ("MTA") for purposes of intercarrier compensation. 47 C.F.R. § 51.701(b)(2).

Until late 1997, Cingular (operating under its prior d/b/a, Southwestern Bell Wireless) arranged for the termination of calls its customers made to the Complainants through SWBT's transport and termination tariff. In October of 1997, Cingular opted into a reciprocal compensation agreement that SWBT had negotiated with other wireless carriers, under which

SWBT's only obligation was to transport traffic bound to other ILECs in the State of Missouri. *See* Ex. 38. That agreement was approved by the Commission in early 1998. *See* Commission Order in Docket No. TO-98-219.

At or around the same time, Cingular solicited from the Complainants and other ILECs in the State of Missouri reciprocal compensation agreements that would have provided an explicit basis for both Cingular and these ILECs to terminate traffic on one another's network. None of the ILECs undertook to negotiate. Moreover, the Complainants, through their counsel, affirmatively rejected the invitation to negotiate. *See* Ex. 48. From around that time and through the present, other wireless carriers have made similar overtures and have been similarly rejected. For example, in addition to informal efforts to solicit negotiations, Cingular sent a letter to counsel for the Complainants in August of 1999. *See* Ex. 49. Again, Complainants' counsel rejected Cingular's effort. *See* Ex. 50. Cingular has maintained it's willingness to negotiate an interconnection agreement and, within the context of the hearings on this matter, has committed to participate in negotiations and, if necessary, arbitration with any of the Complainants. Transcript at 1212.

Rather than pursue negotiations, a number of Missouri ILECs, including the Complainants attempted to amend their access tariffs to include the termination of wireless traffic. The Commission, however, rejected that attempt. Order in Docket TT-99-428 (*Report & Order*, iss'd January 27, 2000) (the *Alma* case). Next, in August of 2000, a number of Missouri ILECs, including three of the Complainants, filed wireless service termination tariffs ("WST tariffs"). In February of 2001, these tariffs were approved by the Commission over the objection of Cingular and other wireless carriers. Order in Docket TT-2002-139 (consol.). The WST tariffs unilaterally imposed a rate for the termination of wireless traffic to the filing companies'

customers. The rate was comprised of the traffic sensitive elements of the filing companies' access rates plus an admittedly arbitrary $0.02/minute adder for maintenance of the filing companies' local loop.

In the current Complaints, the three Complainants that have WST tariffs -- Alma, Choctaw and MoKan Dial -- claim that Cingular and the other wireless carriers have not been paying them under the WST tariffs. However, at the core of Complainants' claims is -- yet again -- the assertion that the wireless carriers should be forced to pay full access charges in the absence of a Commission-approved interconnection agreement or a WST tariff for all periods since 1998.

By contrast, at no time since the beginning of Cingular's operations in the State of Missouri have any of the Complainants or any other Missouri ILECs ever compensated Cingular or any other wireless carrier (other than their own affiliates) for terminating local traffic originated by the ILEC's customers. *E.g.*, Transcript at 314, 396-97; 419. Rather, the Complainants have opted to treat all such traffic as long distance. Transcript at 266-69; 396-97. As a result, calls to numbers associated with Cingular's customers -- whether the Cingular customer is across the state, across the county, across the town or across the street -- have uniformly been routed to interexchange carriers ("IXCs"), which, in turn, have compensated the Complainants at their full access charge rate. *Id.* at 267-69; 315-18; 419.

As a result of Complainants' rejections of Cingular's solicitations, Cingular has not directly compensated any of the Complainants for terminating calls from any of Cingular's customers (*e.g.*, Transcript at 396), other than those call subject to applicable WST tariffs. Rather, as a result of the Complainants' refusal to negotiate interconnection agreements, Cingular has operated either under the WST tariffs or under a *de facto* bill and keep -- *i.e.*, it has billed its

customers for originating calls bound for the Complainants' customers and kept that revenue as part of the compensation for the cost incurred in terminating calls from Complainants' customers as an offset. The ILECs including Complainants, however, have been operating under a bill and collect -- *i.e.*, they have been compensated for originating calls to Cingular's customers at their full originating access rates, which more than offsets their costs to terminate traffic from wireless carriers.

TABLE OF ARGUMENT

According to the Procedural Order in this docket, briefs are supposed to follow the List of Issues agreed among the parties. Unfortunately, the List of Issues was not ordered with an eye toward the cogent organization of facts and arguments. Therefore, mindful of the Commission's Order, the following table indicates the substance of Cingular's response to each position and the Sections of the brief that primarily respond to that issue.

ISSUE I
TRAFFIC SUBJECT TO A WIRELESS TERMINATION TARIFF

I.1 FOR EACH WIRELESS CARRIER RESPONDENT NAMED IN THE RESPECTIVE COMPLAINTS, HAVE EACH OF THE PETITIONERS WITH WIRELESS TERMINATION SERVICE TARIFFS ESTABLISHED THAT THERE ARE ANY AMOUNTS DUE AND OWING FOR TRAFFIC THAT WAS DELIVERED AFTER THE EFFECTIVE DATE OF ANY OF THE WIRELESS TERMINATION SERVICE TARIFFS?

FOR THE REASONS SET FORTH IN **SECTION I.** BELOW, COMPLAINANTS HAVE NOT ESTABLISHED THAT THERE ARE ANY AMOUNTS DUE AND OWING FOR TRAFFIC DELIVERED UNDER THE WST TARIFFS.

ISSUE II
TRAFFIC NOT SUBJECT TO A WIRELESS TERMINATION TARIFF

II.2. IN THE ABSENCE OF A WIRELESS TERMINATION SERVICE TARIFF OR AN INTERCONNECTION AGREEMENT, CAN PETITIONERS CHARGE ACCESS RATES FOR INTRAMTA TRAFFIC ORIGINATED BY WIRELESS CARRIERS AND TRANSITED BY A TRANSITING CARRIER FOR TERMINATION TO THE PETITIONERS' RESPECTIVE NETWORKS?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION II.a.** BELOW, COMPLAINANTS CANNOT CHARGE ACESS RATES FOR INTRAMTA TRAFFIC.

II.3. FOR EACH WIRELESS CARRIER RESPONDENT NAMED IN THE RESPECTIVE COMPLAINTS, DOES THE RECORD SUPPORT A FINDING THAT THE TRAFFIC IN DISPUTE IS INTRAMTA WIRELESS TRAFFIC?

FOR THE REASONS SET FORTH PRIMARILY IN SECTION **SECTION IV.** BELOW, THE RECORD SUPPORTS A FINDING THAT SUBSTANTIALLY ALL OF THE TRAFFIC IN DISPUTE IS INTRAMTA TRAFFIC.

II.4. WHAT COMPENSATION, IF ANY, IS DUE PETITIONERS WITHOUT WIRELESS TERMINATION SERVICE TARIFFS OR AN INTERCONNECTION AGREEMENT FOR INTRAMTA TRAFFIC ORIGINATED BY WIRELESS CARRIERS AND TRANSITED BY A TRANSITING CARRIER FOR TERMINATION TO THE PETITIONERS' RESPECTIVE NETWORKS AFTER THE DATE OF AN ORDER BY THE COMMISSION IN THIS CASE?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION II.** BELOW, NO ADDITIONAL COMPENSATION IS DUE FOR INTRAMTA TRAFFIC *AFTER* THE DATE OF AN ORDER BY THE COMMISSION IN THIS CASE.

II.5. WHAT COMPENSATION, IF ANY, IS DUE PETITIONERS WITHOUT WIRELESS TERMINATION SERVICE TARIFFS OR AN INTERCONNECTION AGREEMENT FOR INTRAMTA TRAFFIC ORIGINATED BY WIRELESS CARRIERS AND TRANSITED BY A TRANSITING CARRIER FOR TERMINATION TO THE PETITIONERS' RESPECTIVE NETWORKS PRIOR TO THE DATE OF AN ORDER BY THE COMMISSION IN THIS CASE?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION II. AND III.** BELOW, NO ADDITIONAL COMPENSATION IS DUE FOR INTRAMTA TRAFFIC *BEFORE* THE DATE OF AN ORDER BY THE COMMISSION IN THIS CASE.

II.6. FOR EACH WIRELESS CARRIER RESPONDENT NAMED IN THE RESPECTIVE COMPLAINTS, DOES THE RECORD SUPPORT A FINDING THAT THE TRAFFIC IN DISPUTE IS INTERMTA TRAFFIC?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION IV.** BELOW, THE RECORD SUPPORTS A FINDING THAT NO MORE THAN A *DE MINIMIS* AMOUNT OF THE TRAFFIC IN DISPUTE IS INTERMTA TRAFFIC.

II.7. TO THE EXTENT THAT THE RECORD SUPPORTS A FINDING THAT ANY OF THE TRAFFIC IN DISPUTE IS INTERMTA TRAFFIC FOR EACH WIRELESS RESPONDENT, WHAT AMOUNT IS DUE UNDER PETITIONERS' APPLICABLE INTRASTATE ACCESS TARIFFS?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION IV.** BELOW, THE RECORD SUPPORTS A FINDING THAT NO MORE THAN A *DE MINIMIS* AMOUNT OF THE TRAFFIC IN DISPUTE IS INTERMTA TRAFFIC. SINCE THAT TRAFFIC IS *DE MINIMIS* AND THERE IS NO COMPETENT EVIDENCE AS TO EXACTLY WHAT THE AMOUNT OF TRAFFIC IS, THERE IS NO BASIS TO ASSESS AMOUNTS FOR SUCH TRAFFIC.

II.8. IS IT APPROPRIATE TO IMPOSE SECONDARY LIABILITY ON TRANSITING CARRIERS FOR THE TRAFFIC IN DISPUTE?

AS CINGULAR **STATED IN ITS POSITION STATEMENT** AND WILL NOT OTHERWISE DISCUSS IN THIS BRIEF, IT IS NOT APPROPRIATE FOR THE COMPLAINANTS TO ATTEMPT TO IMPOSE SECONDARY LIABILITY ON SWBT FOR TRAFFIC TERMINATED TO THEIR CUSTOMER AND ORIGINATED BY CINGULAR BECAUSE THE COMPLAINANTS ARE BEING COMPENSATED THROUGH A BILL AND KEEP ARRANGEMENT AS DESCRIBED IN SECTIONS II.b.2. BELOW AND BECAUSE THE COMPLAINANTS HAVE REFUSED TO ENGAGE IN GOOD FAITH NEGOTIATIONS TO ESTABLISH INTERCONNECTION AGREEMENTS DIRECTLY WITH CINGULAR.

II.9. DOES THE RECORD SUPPORT A FINDING THAT PETITIONERS ARE BARRED FROM COLLECTING COMPENSATION FOR TRAFFIC IN DISPUTE UNDER THE PRINCIPLES OF ESTOPPEL, WAIVER, OR ANY OTHER AFFIRMATIVE DEFENSE PLED BY ANY OF THE WIRELESS CARRIER RESPONDENTS?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION II.b** BELOW, COMPLAINANTS ARE BARRED FROM COLLECTING COMPENSATION FOR TRAFFIC IN DISPUTE UNDER THE PRINCIPLES OF ESTOPPEL AND WAIVER FOR THEIR FAILURE TO PURSUE THEIR AVAILABLE REMEDY UNDER TA96 AND THEIR FAILURE TO NEGOTIATE IN GOOD FAITH.

II.10. ARE PETITIONERS OBLIGATED TO NEGOTIATE INTERCONNECTION AGREEMENTS WITH WIRELESS CARRIERS ON AN INDIRECT BASIS THAT PROVIDE FOR RECIPROCAL COMPENSATION FOR TRAFFIC EXCHANGED BETWEEN THEIR RESPECTIVE NETWORKS THROUGH A TRANSITING CARRIER?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION II.b.** BELOW, COMPLAINANTS ARE OBLIGATED TO NEGOTIATE INTERCONNECTION AGREEMENTS WITH WIRELESS CARRIERS ON AN INDIRECT BASIS THAT PROVIDE FOR RECIPROCAL COMPENSATION FOR TRAFFIC EXCHANGED BETWEEN THEIR RESPECTIVE NETWORKS THROUGH A TRANSITING CARRIER.

II.11. WHAT, IF ANY, RELEVANCE DO ANY OF THE TERMS AND CONDITIONS OF SOUTHWESTERN BELL TELEPHONE COMPANY'S WIRELESS INTERCONNECTION TARIFF (PSC MO. NO. 40) HAVE IN CONNECTION WITH THE DETERMINATION OF ANY OF THE ISSUES IN THIS PROCEEDING?

FOR THE REASONS SET FORTH IN **SECTION V.** BELOW, SWBT TARIFF PSC MO. NO. 40 HAS NO RELEVANCE TO THE DETEERMINATION OF ANY ISSUE IN THIS CASE.

II.12. WHO IS RESPONSIBLE TO PAY COMPENSATION DUE, IF ANY, TO THE PETITIONERS FOR INTRAMTA TRAFFIC TERMINATED PRIOR TO THE EFFECTIVE DATE OF AN PETITIONER'S WIRELESS TERMINATION TARIFF?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION II.b.** BELOW, COMPLAINANTS HAVE ALREADY BEEN COMPENSATED FOR THAT TRAFFIC THROUGH THEIR COLLECTION AND RETENTION OF FULL CARRIER ACCESS CHARGES FOR CALLS ORIGINATED BY THEIR LOCAL EXCHANGE CUSTOMERS AND TERMINATED TO WIRELESS CARRIERS.

II.13. (A) SHOULD SWBT BLOCK UNCOMPENSATED TRAFFIC?
(B) SHOULD SWBT BE COMPENSATED FOR BLOCKING?

FOR THE REASONS SET FORTH PRIMARILY IN **SECTION VI.** BELOW, BLOCKING TRAFFIC IS CONTRARY TO THE PUBLIC INTEREST AND SWBT IS PROHIBITED BY ITS INTERCONNECTION AGREEMENT WITH CINGULAR FROM BLOCKING TRAFFIC THAT CINGULAR ORIGINATES.

ARGUMENT

The Complaints in this case are neither legally nor factually sufficient. As discussed in Section I, below, Cingular has paid, and continues to pay, properly rendered invoices under the WST tariffs in place for three of these Complainants. Nevertheless, all Complainants assert that Cingular and other wireless carriers should compensate Complainants at full carrier access rates for all minutes terminated to Complainants' customers in the absence of an interconnection agreement or a WST tariff, despite directly on-point holdings of this Commission and other authorities that access charges are not appropriate. Complainants assert that they need this relief because they have no other means of obtaining appropriate reciprocal compensation.

The Complainants have failed to state a claim in the law and have failed to meet their burden of proving facts that would support their Complaints if the Complaints truly stated a cause of action. Not only the wireless carriers, but also Staff has identified the fundamental flaws on Complainants positions. Mr. Scheperle on behalf of Staff enumerated the points on which Staff and the wireless carriers agree.

1. MITG Companies [Complainants] may charge switched access rates for terminating *inter*MTA traffic.

2. MITG Companies are entitled to compensation for terminating *intra*MTA traffic.

3. It is not lawful for MITG companies to apply switched access charges for terminating intraMTA wireless traffic "transported" by SWBT and/or Sprint.

4. SWBT and Sprint transport wireless originated traffic to MITG companies as a transport service and not as an Interexchange Carrier (IXC).

5. Wireless traffic may terminate on MITG network(s) absent an Interconnection Agreement (IA) between Commercial Mobile Radio Service (CMRS) providers and MITG companies.

Ex. 12 (Scheperle's Rebuttal Testimony) at 2-3 (emphasis added).

In terms of the issues to be resolved by the Commission in this proceeding, there appear to be only two material differences between Cingular and the Staff. The first is whether it is appropriate, when evaluating inter-carrier compensation, to look at only one side of the equation in a vacuum or whether it is necessary to evaluate the entire wireless-wireline relationship, both sides. Stated another way, Cingular disagrees with Staff's approach under which the Commission is forced to limit its consideration to the "burden" on wireline carriers of wireless-to-wireline traffic outside of reciprocal compensation, while ignoring the more-than-offsetting benefits that small wireline carriers like Complainants enjoy from avoiding payments to wireless carriers on wireline-to-wireless calls, while collecting full carrier access on all such calls.

The second is whether this Complaint proceeding is the appropriate forum for resolving the highly complex problem of quantifying the *de minimis* amount of interMTA traffic that is being passed between wireless and wireline carriers. As discussed in Section V. below, there is

no compelling evidence indicating that the amount of interMTA traffic is substantial or will have a material impact on Complainants' claims. Reporting, if the Commission wishes to pursue it outside of appropriately negotiated interconnection agreements, should be the subject of a separate proceeding where the parties who will need to cooperate to implement it do not have the incentives presented by this docket to game the outcome.

Thus, viewed from the total exchange of traffic between the wireless and wireline carriers, the evidence shows that Complainants are currently being compensated for the wireless traffic they are terminating through the windfall they are earning from the origination of wireless-bound traffic. Based on all available evidence, the separate measurement of non-local, interMTA traffic will have no material impact on the compensation that Complainants obtain. Therefore, not only is it inappropriate for the Commission to award Complainants the carrier access charges they seek, it is unnecessary for the Commission to create some other recovery mechanism as Staff suggests.

After discussing why Alma, Choctaw and MoKan Dial failed to demonstrate that they are not being paid under their WST tariffs, Cingular will turn to the failure of all the Complainants to make a legally or factually supportable claim to assess carrier access rates on the termination of wireless calls.

I. CINGULAR HAS BEEN PAYING PROPERLY RENDERED INVOICES UNDER THE WIRELESS SERVICE TERMINATION TARIFFS

The Complainants have the burden of proof to show that Cingular failed to pay properly invoiced amounts under the WST tariffs. At the hearing, it became clear that Cingular paid the properly rendered invoices from two of the carriers with WST tariffs -- Choctaw and MoKan Dial. According to the evidence, the third carrier with a WST tariff, Alma, has *never* rendered a bill under its WST tariff. Instead, Alma continued (and continues still) to send bills clearly

rendered under its access tariff at a rate higher than its WST tariff. *See* Ex. 68. Therefore, the few invoices that Cingular did pay were overpayments. Cingular is prepared to pay properly invoiced amounts under the WST tariff until such time as the tariff is no longer in force.[2]

Choctaw and MoKan Dial did send invoices properly referencing their WST tariff rates. The evidence shows that Cingular promptly paid those invoices through March of 2002, when Cingular sent a notice to each company changing Cingular's billing address. *See* Exs. 54, 55. Neither Choctaw nor MoKan Dial updated its invoice address until July of 2002. Since Cingular did not receive the bills for March, April, May or June, it had not paid those invoices as of the date of the hearing in this matter. (Choctaw and MoKan Dial have now sent those invoices to Cingular's current and proper address and Cingular has now paid them. Cingular has also paid all invoices through October 2002.) At the hearings on this matter, Choctaw and MoKan conceded that Cingular was "fairly current. It would be just for the last month or so." Transcript at 531.

In summary, the evidence shows that Cingular paid the invoices that were properly rendered by Choctaw and MoKan Dial under the WST tariffs and that the bills it has not paid were not rendered under the WST tariffs. Therefore, Complainants have not established claims against Cingular under the WST tariffs and the Commission should reject the Complaints of Alma, Choctaw and MoKan Dial as they relate to such claims.

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[2] Although Cingular respectfully disagrees with the Commission's Order approving those tariffs and is pursuing an appeal, Cingular is nonetheless paying the tariffed rates under protest. *See* Ex. 15 (Rebuttal Testimony of William H. Brown) at 2.

II. THE COMPLAINANTS ARE STILL NOT ENTITLED TO IMPOSE THEIR ACCESS TARIFFS ON INTRAMTA WIRELESS TRAFFIC

The Commission should see these Complaints for what they are, yet another demand to be paid full carrier access for the termination of intraMTA (local) wireless calling. As Staff recognized in listing the several areas where it is in agreement with the wireless carriers:

> *It is not lawful* for [Complainants] to apply switched access charges for terminating intraMTA wireless traffic "transported" by SWBT and/or Sprint.

Schepperle Surrebuttal, Ex. 12 at 3 (emphasis added).

Consistent with the orders and rulings of courts and other state commissions, this Commission has already rejected this claim in the *Alma* case. Moreover, while Complainants argue that they have no alternative to seeking Commission relief, the fact is that they have repeatedly rejected their opportunities to obtain reciprocal compensation from wireless carriers. The evidence makes clear that Complainants have rejected those opportunities in furtherance of their ultimate goal of obtaining full carrier access to the exclusion of reciprocal compensation. The Commission should not reverse its position in response to the baseless claims of victimization by the Complainants.

a. The FCC, The Missouri Commission And Other State Commissions Have Already Determined That Access Charges Are Inappropriate For Termination of IntraMTA Traffic

This Commission has twice concluded that access charges are inappropriate for terminating intraMTA wireless traffic. *See In the Matter of Mid-Missouri Group's Filing to Revise its Access Service Tariff, P.S.C. Mo. No. 2*, Case No. TT-99-428 *et al.*, Report and Order of January 27, 2000; *In the Matter of Mid-Missouri Group's Filing to Revise its Access Service*

Tariff, P.S.C. Mo. No. 2, Case No. TT-99-428 *et al.*, Report and Order of April 9, 2002 (the "*Alma* decisions"). Other courts and state commissions have reached the same conclusion.

1. This Commission Has Already Ruled On The Merits Of Complainants' Claims

These Complaints are premised on the contention that Complainants are entitled to payment for intraMTA traffic originated by wireless service providers, and terminated to Complainants from February 5, 1998 to present. Most Complainants contend that, for traffic delivered to them between February 5, 1998 and February 18, 2002, they are entitled to compensation based upon application of their tariffed carrier access rates. For traffic delivered after February 18, 2001, three Complainants base their claims on the application of their WST tariffs. The other four Complainants, which do not have WST tariffs, seek compensation based upon their carrier access rates for the entire period.

As explained above, Cingular has paid the invoices properly rendered under the WST tariffs. To the extent, however, that Complainants are seeking to recover carrier access rates for the termination of intraMTA traffic, this Commission has already rejected those claims. Those claims are therefore barred by the doctrines of *res judicata* and collateral estoppel. The judicial doctrines of *res judicata* and collateral estoppel preclude parties or those in privity with them from relitigating the same cause of action or the same issues. *See, e.g.*, *Killian Const. Co. v. Jack D. Ball & Associates*, 865 S.W. 2d 889 (Mo. App. S.D. 1993). These Complaints are an attempt to relitigate claims and issues previously decided by the Commission. In the *Alma* case, the Commission rejected proposed tariffs filed by these same Complainants that would have applied switched access rates to local traffic (intraMTA) exchanged with wireless carriers. The Commission held that those proposed tariffs were unlawful under TA96 and under the FCC's

"Interconnection Order."[3] Many of the wireless carriers here were Intervenors in the *Alma* proceeding.

The Missouri Supreme Court applies a four-part test to determine whether the application of collateral estoppel is appropriate: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party to the prior adjudication; (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior case. *See, e.g., Oates v. Safeco Ins. Co., 583 S.W.2d 713 (Mo. banc 1979).*

The issue decided in the *Alma* case is identical to the issue presented by the instant Complainants. The Commission's original Report and Order in *Alma* indicates that ". . . the only issue in this case was whether the local telephone companies involved are allowed to amend their tariffs so that they can apply their switched access rates to traffic originating on a commercial mobile radio service (CMRS) that terminates in their territory." *Report and Order* at 9. The Commission repeated that holding in its rehearing of the *Alma* case in April of this year. Thus, the present claim that Complainants are entitled to apply carrier access rates to wireless originated traffic terminating to them is clearly identical to the issue addressed two years and again several months ago in *Alma*. The *Alma* case decisions resulted in a judgment on the merits. Having fully considered the evidence, the Commission found and concluded that it would be unlawful to allow the imposition of switched access charges to wireless originated intraMTA (local) traffic.

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[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*; FCC No. 96-325, 11 FCC Rcd 15499; 1996 FCC LEXIS 4312 (rel. Aug. 1, 1996) (the "*FCC Interconnection Order*").

Complainants Alma, Choctaw, MoKan Dial, Mid-Missouri, and Chariton Valley were all moving parties in the *Alma* case. To the extent that the remaining Complainants, Northeast and Modern were not parties to the *Alma* proceeding, they nonetheless must be bound by its determination. All Complainants are local exchange companies with carrier access tariffs which differ substantively only in the rate charged. All Complainants seek to impose those tariffs on intraMTA wireless originated traffic. Because the Complainants are identically situated to the LECs that prosecuted and participated in the *Alma* case, they should be deemed privies of those entitles. Of course, even if these additional Complainants are not barred by *collateral estoppel*, under principles of *stare decisis* these claims are barred by the *Alma* decision.

All parties to the *Alma* proceeding had a full and fair opportunity to litigate the issue of whether switched access rates could be applied to intraMTA wireless originated traffic. Neither the facts or law have changed since the date of the *Alma* decision. Moreover, the *Alma* decision remains in the appellate process, with the Commission's order on rehearing having recently been re-appealed. Until that process is complete, the Commission should leave undisturbed its determination that switched access rates may not lawfully be applied to wireless originated intraMTA traffic.

2. This Commission's Earlier Decision is Consistent with Controlling Authority

In addition, a number of authorities, including the Iowa Utilities Board, the Oklahoma Corporations Commission, the FCC and a federal district court have interpreted and applied federal law in exactly the same manner as the Commission's *Alma* decisions. In its seminal ruling, the FCC specifically disallowed access charges as a basis for local reciprocal compensation, which, between LECs and CMRS carriers, includes all intraMTA traffic. *See* 47

C.F.R. § 51.701(b)(2). For example, at paragraph 1036 of the *FCC Interconnection Order* (emphasis added; footnotes omitted), the FCC stated:

> . . . in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, *traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.*

After reiterating the propriety of treating as local intraMTA calling to and from CMRS carriers, paragraph 1043 of the *FCC Interconnection Order* (emphasis added; footnotes omitted) concludes:

> Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue *not* to pay interstate access charges for traffic that currently is *not* subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges.

There can be no question that these LECs are prohibited from applying access charges to CMRS traffic for intraMTA traffic. *See Mid Rivers Telephone Cooperative Inc. v. Qwest Corporation*, (D. Mont. April 3, 2002); *3-Rivers Telephone Coop., Inc. v. U.S. West Communications, Inc.*, 125 F.Supp. 2d 417 (D. Mont. 2000), *remanded for further findings by the district court*, No. 013565, Mem. Op. (9th Cir., August 27, 2002). Iowa Utility Board Docket No. SPU-00-7 *et al.*, *In Re: Exchange of Transit Traffic*. (Iowa Utils. Bd. March 18, 2002).

As recently as August of this year, the Oklahoma Corporation Commission reached the same conclusion. *See* 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) ("*Oklahoma Arbitration Order*") (a copy is attached as Appendix 1). In that case, the Oklahoma Commission heard a consolidated arbitration among several wireless carriers and a number of rural LECs. Among other conclusions of the arbitrator that the Commission affirmed was the conclusion that "calls made to and from CMRS Providers within the [MTAs] are subject to transport and termination charges rather than interstate and intrastate access charges." Oklahoma Arbitration Order at 4.

Complainants argue that their claim here is different because the wireless carriers have "violated" the Commission's Order in Docket No. TT-97-524. However, as discussed in Section V. below, neither Cingular nor the other wireless carriers acquire transport services from SWBT's wireless service tariff. Rather, Cingular acquires its transport service from SWBT through an October 13, 1997 Interconnection Agreement. Other wireless carriers also obtain their transport from interconnection agreements. Moreover, as discussed below, Cingular and the other wireless carriers have repeatedly solicited the negotiation of interconnection agreements and Complainants have rejected each such attempt.

In summary, no matter how Complainants seek to dress it up, the Commission has already decided the central issues in this case against Complainants. The Commission's decision is consistent with other controlling authority. The Commission should dismiss the Complaints on the basis of its own prior decisions and the controlling decisions of the FCC.

b. The Complainants Are Not Entitled To Relief From This Commission When They Have Actively Avoided Obtaining Appropriate Relief Under The Federal Act

At the very heart of Complainants' action before this Commission is their assertion that they are powerless to force the wireless carriers to negotiate appropriate interconnection agreements and that the only way Complainants can obtain compensation from the wireless carriers is through this Complaint proceeding. This assertion is directly contradicted by the evidence presented to this Commission. The evidence shows that Cingular and the other wireless carriers have repeatedly solicited negotiations with the Complainants and other Missouri ILECs. The evidence also shows that the Complainants have repeatedly rejected those solicitations. As Complainants readily admit, once a wireless carrier solicits negotiations, federal law gives the Complainants the same rights as the wireless carriers to force negotiation and arbitration and imposes on the wireless carriers the same obligations as Complainants have to negotiate in good faith and respond to arbitration. *E.g.*, Transcript at 271-72; 758-59.

But, instead of responding to the numerous solicitations of the wireless carriers with negotiations and, if necessary, arbitrations as they should have, Complainants have imposed on wireless carriers a Hobson's choice: Either pay full access charges on all retroactive minutes and commit to establishing a direct interconnection as a condition of initiating negotiations or (if Complainants are successful in this Complaint) pay full carrier access charges on all minutes indefinitely and still face the demand for direct interconnection as a condition of initiating negotiations. Of course, both sides of this choice are illegal. The point, however, is that Complainants are demanding that this Commission provide them with relief from a situation that is totally of Complainants' own making and still within Complainants' control to resolve within the parameters of TA96.

The Complainants have a sufficient remedy under the TA96 for their only legitimate interest, *i.e.*, obtaining an explicit interconnection agreement if they want to have one. Their resort to these Complaints reveals their ulterior motive and true goal. Specifically, Complainants' are using this proceeding to advance their goal of *avoiding* appropriate reciprocal compensation while forcing wireless carriers to pay Complainants' exorbitant levels of carrier access charges. Moreover, by avoiding the negotiation of appropriate reciprocal compensation, the Complainants are also attempting to avoid drawing any attention to their unilateral decision to treat all calls to wireless carriers as 1+ toll traffic, thus forcing their own local exchange customers to pay per-minute toll charges on calls to wireless carriers while collecting full originating carrier access from the interexchange carriers to which they send the traffic.

1. Complainants Are Avoiding The Negotiation Of Appropriate Interconnection Agreements And Reciprocal Compensation

The evidence showed that Cingular has made more than one attempt to solicit negotiations with Complainants. The evidence also shows that other wireless carriers have made the same solicitations with the same results. For the most part, Complainants have fended off these negotiations through the imposition of preconditions, particularly the preconditions that wireless carriers agree to direct interconnection and the precondition that wireless carriers pay full access rates for all prior terminated minutes (with no offsetting compensation for wireline traffic terminated to wireless carriers).

For example, as early as 1997, a Cellular One entity made a written request for negotiations and Complainants' counsel rejected it. In his letter, counsel for the "Mid-Missouri Group" acknowledged Cellular One's request "regarding interconnection." *See* Ex. 48. After suggesting to Cellular One that it would have to find out how many minutes terminated to each of the Mid-Missouri Group members before his clients would "be in a position to determine if

[direct] interconnection with any or all of the LECs in the Mid Mo Group is justified" (*id.*), counsel asserted his clients' demand for full carrier access charges in the absence of an explicit interconnection agreement:

> We do not wish to begin negotiations until all amounts due for terminating cellular traffic to our exchanges has been paid, and assurance provided that payments will continue to be made until any approved interconnection agreement supersedes our Missouri tariffs. *Id.*

Complainants' witness Mr. Biere confirmed that this was the position of the Complainants in 1997. Transcript at 414. As Mr. Stowell stated, "negotiations were contingent on some type of settlement for [outstanding traffic]." Transcript at 515.

In 1999, Cingular solicited an interconnection agreement, and even attached a form of agreement as a starting point. Ex. 49. Again, counsel for Complainants rejected Cingular's offer, asserting that they "do *not* consider this a request to negotiate an interconnection agreement." Ex. 50 (emphasis added). Counsel went on to list what Complainants viewed as shortcomings to the draft interconnection agreement, including assertions that Complainants wanted actual recording of traffic (which would require direct interconnections), that Complainants did not originate any traffic to Cingular (since they direct all wireless traffic to IXCs), and that Complainants wanted to be compensated at their carrier access rates for past traffic. *Id.* Again, Mr. Biere confirmed that this was an accurate portrayal of the position of the Complainants in 1999. Transcript at 416-17.

Cingular was not alone in this circumstance. Verizon Wireless and Sprint PCS also put into the record evidence of their repeated attempts to negotiate interconnection agreements with Complainants. On more than one occasion, Sprint PCS engaged in negotiations with Complainants. Yet, Complainants did not pursue the solicitations from various wireless

companies or the negotiations with Sprint PCS to an interconnection agreement or to an arbitration. Rather, they insisted on their demands for direct interconnection and full retroactive compensation as preconditions for negotiation *E.g*, Transcript at 389. As Mr. Stowell on behalf of Complainants Choctaw and MoKan Dial summed it up in answer to the question whether Complainants insisted on direct interconnections, "That was -- that was one of the issues. The other issue and the issue that usually shut the thing down was our position that we needed to be compensated for the retro piece since February of 1998 [based on access]." Transcript at 508; *see id.* at 574-75 (Complaints took the position that there would be no negotiations until they were compensated for past traffic at access rates "[a]nd that usually ended the negotiations").

Complainants also attempt to justify their actions through the "Goldilocks" equation. Some solicitations, they argue, were too indefinite because the wireless carriers did not use the right words (although Complainants could not be clear about what those "right words" were). For example, Mr. Jones on behalf of Mid-Missouri indicated at one point that wireless carrier should state "we'd like to engage in formal interconnection negotiations pursuant to the telecommunications Act of 1996. * * * [A]s long as I clearly understood their intent, yes." Transcript at 272-73. However, when confronted with a letter from Sprint PCS requesting interconnection, he responded that it was inappropriate because it requested indirect interconnection and therefore "Sprint wasn't truly requesting formal interconnection at that time. It was more or less a letter, can we get some sort of agreement. And I don't believe it rose to the level of a formal interconnection request." *Id.* at 288-89.

Similarly, Mr. Biere on behalf of Chariton Valley thought that it would take "a formal request that explicitly asks for it" and that "it must contain the words that we're requesting an interconnection agreement." Transcript at 410. Yet, Chariton Valley's counsel responded to a

letter seeking an "interconnection agreement" with the statement that Chariton Valley and the other Complainants did not view this as an appropriate request to negotiate reciprocal compensation. *Compare* Ex. 49 *with* Ex. 50. Mr. Biere also claimed to have difficulty understanding whether a letter from Sprint PCS "offering to continue negotiations for an interconnection agreement" constituted an offer based on what he considered to be an inconsistent message in a phone call from another Sprint PCS representative a year prior to the letter. Transcript at 430-31.

While Mr. Stowell on behalf of Choctaw and MoKan agreed that a letter titled "Request for Interconnection" making a request pursuant Sections 251, 252 and 332(c) "sounds like it could be" a formal request, he was unclear on whether Sprint PCS had formally requested interconnection despite being confronted with two different letters including those elements. *See* Transcript at 511-12; Sprint PCS Schedules 1.17 and 1.18. In the view of Mr. Glasco on behalf of Alma, any request for interconnection, no matter how formal, that mentioned indirect interconnection couldn't be a proper request, agreeing with the characterization that "it's direct connection or nothing." Transcript at 619-20.

On the other side of the Goldilocks equation, some requests were too strong. For example, when confronted with a letter specifically requesting "establishment of a reciprocal compensation arrangement governing the exchange of traffic between our companies," Mr. Jones concluded that it was not an offer to negotiate because:

> A. . . . they had a pre-negotiated agreement that they were wanting us to sign. It wasn't -- it is my recollection that it was -- wasn't a request to start formal negotiations because that agreement was pretty much negotiated, they just wanted us to enter into that agreement.

> Q. So you didn't think you had any ability to affect the terms of the agreement? You either had to accept it or reject it; is that correct?
>
> A. Well, I didn't view it as a formal request for interconnection under the Act.
>
> Q. Okay.
>
> A. I viewed it as [a] reciprocal compensation arrangement.
>
> Q. Under the Federal Act?
>
> A. Under Sprint PCS's -- I mean, it was just something you requested us to enter into and negotiate with you. I don't know what it was -- I didn't view it as formal negotiations under the Act.

Transcript at 291-92.

Unfortunately, Complaints did not view any of these requests as "just right." The fact is that Complainants took every opportunity and made every excuse to avoid the obvious conclusion that Cingular and several other wireless carriers in this case were soliciting negotiations. Complainants were simply avoiding negotiations.

And, even if Complainants received a request for negotiations that was "just right," they were still unwilling to forego the potential of raising their rural exemptions, which would require the wireless carriers to go through an entire procedure with the Commission before even starting negotiations. *See*, *e.g.*, Transcript at 322-23 (Mid-Missouri would make decision whether or not to interpose rural exemption based on whether terms of interconnection were acceptable); *id.* at 448 (Chariton Valley would not waive rights at this juncture); *id.* at 512-14 (Choctaw and MoKan Dial asserted rural exemption and their inclusion in Kansas City MCA as an exemption); *id.* at 564 (Choctaw and MoKan "don't know" if they would assert the exemption to other requests for negotiation.); *id.* at 608 (Alma has asserted the exemption).

There can be no doubt, however, that each of the Complainants have had opportunities to pursue interconnection agreements. For example, Mr. Jones discussed three different negotiations in which he was involved on behalf of Mid-Missouri. Transcript at 271, 273, 382. In response to a data request from Verizon Wireless, Mid-Missouri admitted that it had engaged in negotiations with wireless carriers after the amendment to SWBT's transport tariff in 1998. Transcript at 334. At page 13 and 14 of Mid-Missouri's testimony, its witness stated that Mid-Missouri entered into several negotiations. *See* Transcript at 336. Similarly, Chariton Valley's witness stated on cross examination that they had engaged in negotiations with wireless carriers. *Id.* at 410.

Despite their current pleas for help, Complainants acknowledge that, once they received these requests for negotiation, they were as entitled as the wireless carriers to demand continued negotiations and, if appropriate, to force arbitrations. *E.g.*, Transcript at 271-72; 758-59. Complainants are forced to admit that both TA96 and FCC rules place the obligation to participate in negotiations in good faith on carriers requesting to negotiate a reciprocal compensation agreement. Specifically, Section 251(b)(1) extends the duty to negotiate in good faith to the requesting carrier:

> *Duty to negotiate.*-- The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. *The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.*

That obligation is reiterated in the FCC's Rules. 47 CFR § 51.301. Moreover, Section 252(b)(5) of TA96 explicitly states:

> The refusal of *any other party* [other than the LEC] to the negotiation to participate further in the negotiations, *to cooperate with the State commission in carrying out its function as an*

> *arbitrator*, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered *a failure to negotiate in good faith*. (Emphasis added.)

Clearly, Complainants' assertion that they have been forced to pursue this action because they are helpless under the procedures TA96 and the FCC is meritless and should be rejected out of hand by this Commission.[4]

The Commission should also see the preconditions that Complainants have imposed on negotiations for what they are: uneconomic and illegal attempts to thwart any real negotiations. Specifically, the demand that a wireless carrier pay all outstanding terminating minutes at full carrier access rates and commit to pay all terminating minutes pending approval of an interconnection agreement at full carrier access rates is exactly the demand made and rejected in the *Alma* cases, *i.e.*, that carrier access rates would apply to the termination of wireless traffic until superseded by an interconnection agreement. Noticeably absent from this demand has been the suggestion that carrier-to-carrier payment for terminated minutes would be reciprocal, that wireline would pay wireless carriers for terminated minutes.[5] Cingular has never refused to include in reciprocal compensation negotiations a discussion of compensation for minutes exchanged prior to the approval of an interconnection agreement. It is inappropriate and illegal, however, for Complainants to insist on payment of one-way, full carrier access rates as a precondition for the discussion of any other point.

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[4] As to Cingular, any assertion by Complainants that they are not now in a position to pursue negotiations and, if necessary, arbitrations was wholly dispelled by Cingular's commitment made to this Commission from the stand that it will participate in any negotiations and will respond to any demand for arbitrations. Transcript at 1212.

[5] Some Complainants have suggested that wireless carriers may have been or could have been compensated for terminating wireline originated minutes through carrier access charges. The fact is Cingular has not been so compensated. As a wireless provider in Missouri, it is not a telecommunications carrier and is not entitled to file tariffs, including intrastate access tariffs. Section 386.020 (51) and (53)(c), RSMo 2000. Moreover, as the FCC recently held, wireless carriers are not entitled to file access tariffs and can only recover access charges through negotiated agreements with interexchange carriers. *In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, WT Docket 01-0316, FCC 02-203 (Rel. July 3, 2002) at ¶ 18 ("*Petition of Sprint PCS*"). The ultimate responsibility for paying the cost of originating local calls, including intraMTA calls to wireless carriers, belongs to the originating carrier. That does not change where the originating carrier chooses to route the call through an interexchange carrier.

Complainants also insist on direct interconnections. That demand is also neither economic nor legal. As this Commission recognized in its Order in Case No. TT-2001-139 (the "*Mark Twain* Order") at p. 15 (emphasis added):

> Given the number of small ILECs, *indirect interconnection* between CMRS carriers and small LECs, through a large LEC's tandem switch, is the *only economically feasible means* of interconnection available.

The indisputable correctness of the Commission's conclusion in the *Mark Twain* Order was confirmed by the evidence in this docket. For example, Sprint's witness, Mr. Idoux determined that direct interconnections between each of the wireless carriers and each of the Complainants' exchanges would result in approximately 560 direct interconnections and between each of the wireless carriers and each ILEC exchange in Missouri would result in approximately 4,900 additional direct interconnections in this Missouri. *See* Ex. 14 at 10-11. The cost of maintaining each such interconnection could easily exceed $6,000 per month. Transcript at 669.

Even the roughest comparison of the Complainants' minutes per month against the benchmarks for establishing direct connections demonstrates the wastefulness of direct interconnections. Complainants' claim that, among the seven of them, approximately 13 million uncompensated wireless minutes have been terminated to their customers since February of 1998 (about four years). Schedule 1 to Ex. 1. By comparison SWBT's witness, Mr. Hughes stated that it would normally require approximately 1,400 minutes per busy hour of the day of traffic between two offices consistently over the course twenty days before a carrier would even consider the economics of establishing a direct interconnection. Transcript at 936-37. Complaints' entire claim of 13 million minutes divided by the seven Complainant carriers and 48 months would average slightly under 40,000 minutes per month per Complainant[6] or about

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[6] 13 million ÷ 7 carriers ÷ 48 months = 38,690 minutes/month/carrier.

1,300 *minutes per day* per Complainant.[7] That does not even take into account the fact that the traffic is coming from several different wireless carriers, many of which are originating traffic from multiple switches.

It is clear that Complainants fully understand the economic impact of demanding direct interconnection. Mr. Biere on behalf of Chariton Valley insisted on direct interconnection even after agreeing that the monthly cost for establishing a direct interconnection between his company and Sprint PCS would exceed what Chariton Valley's claims is owed to them from Sprint PCS for the *past four years*. Transcript at 431-32. It is clear that a demand that the wireless carriers establish interconnection is completely contrary to any reasonable economics and is a transparent attempt to prevent negotiations.

Not only are Complainants' demands for direct interconnections economically unfeasible, they are not legal. The interconnection obligations of TA96 do not distinguish between direct interconnection and indirect interconnection. TA96 defines the very first duty of all telecommunications carriers as the duty "to interconnect *directly or indirectly* with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1) (emphasis added). Section 251(b)(5) obligates local exchange carriers to establish reciprocal compensation, and Section 251(c)(1) requires incumbent local exchange carriers to engage in good faith negotiations to establish those arrangements. Nothing in TA96 or the FCC's rules requires wireless carriers to directly interconnect as a prerequisite to negotiating an interconnection agreement. *See also Oklahoma Arbitration Order* at 4 ("each carrier must pay each other's reciprocal compensation for all intra-MTA traffic *whether the carriers are directly or indirectly connected*, regardless of an intermediary carrier"; emphasis added).

Moreover, as the FCC has observed:

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[7] 38,690 ÷ 30 days = 1,290 minutes/day.

> The availability of interconnection cannot . . . be divorced from its price. Interconnection that is priced too high can be the marketplace equivalent of no interconnection. An interconnection obligation is undermined if the charges imposed for interconnection are excessive, and society will not enjoy the benefits described above."

In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, FCC No. 95-505 (rel. Jan. 11, 1996). Complainants here advocate a direct interconnection requirement that, if accepted by the Commission, would simply take reciprocal compensation off the table other than between a wireless carrier and the physically closest tandem switch. Such a result would also gut the FCC's determination that MTA-wide wireless calling should be treated as local, since that result, too, would be dependent on the construction of costly facilities. The Commission should reject a decision that is so entirely at odds with the goals of TA96.

2. Complainants Are Appropriately and Sufficiently Compensated Under The Current Bill And Keep

The evidence shows the Complainants have rejected and thwarted repeated opportunities to negotiate or arbitrate appropriate reciprocal compensation agreements with the wireless carriers, despite the admissions of their witnesses that they have the ability to do so. The Commission may wonder why Complainants would work to avoid the form of compensation which they are entitled to establish and negotiate under TA96. The answer is, despite their loud protestations about bill and keep, bill and keep has provided Complainants with more than adequate compensation and will continue to provide Complainants with adequate compensation whether or not they obtain their ultimate goal of full carrier access.

Bill and keep provides more than adequate compensation because what the Complainants do not currently collect in terminating charges from the wireless carriers is more than balanced

by the windfall that Complainants receive in originating carrier access charges on *every* call that Complainants originate to the wireless carriers. Mr. Jones summarized the Complainants' position on originating access this way.

> Q. So you collect toll or you collect long-distance interexchange access -- or exchange access on that call even though its 30 feet in distance?
>
> A. Okay. Yeah. The long-distance carrier would be get the long distance or toll revenue for that call. We would charge the long-distance carrier, the interexchange carrier access for that call.

Transcript at 318.

A wireless carriers like Cingular terminate that call at its own cost.[8] Even Complainants recognize that *they will incur a net loss in revenue by negotiating appropriate reciprocal compensation arrangements* to replace the current bill and keep arrangement. As Mr. Jones reasoned:

> . . . as a result of the interconnection agreement, the lost originating access revenue is -- is just kind of a put and take of the interconnection request. Hopefully, you would make some of that up off the lease of facilities, direct facilities, to the wireless carrier. I doubt that you would make it all up.

Transcript at 740-41.

Rather than negotiate interconnection agreements that will result in less income than the Complainants currently enjoy, Complainants are leveraging their current income. With that money already in their pockets, they are asking the Commission to secure for them yet an additional income stream in the form of carrier access charges on calls from the wireless carriers, while arguing that the Commission should not or cannot examine the Complainants' own practices or consider Complainants' revenues in originating calls to the wireless carriers.

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[8] In fact, the FCC recently ruled that wireless carriers are not entitled to charge access or set access rates without a negotiated agreement with the IXC terminating the traffic. *Petition of Sprint PCS* at ¶ 18.

Stated another way, a wireless carriers operate under a bill and keep, where it bills its own customers a rate recognizing origination and termination of the calls those customers originate, but it does not bill the wireline carriers to terminate calls to the wireless carrier's customers. Instead, what a wireless carrier collects to provide service is used to offset its own costs to terminate calls from other carriers' customers. By comparison, Complainants have been operating under a *collect* and keep. Complainants treat their customers' calls to wireless customers as long distance, and collect full carrier access on those calls, which currently more than defrays the cost to terminate calls from the wireless customers. What the Complainants are now asking the Commission to impose is "collect *and* bill *and* keep." Complainants would not only collect full carrier access on the calls their customers originate to wireless carriers, but the Complainants would also collect full carrier access on the calls wireless customers terminate to their customers. By this same request, Complainants would increase astronomically the cost incurred by the wireless carriers to terminate calls to customers of Complainants without any offset in what the wireless carriers would obtain for terminating calls that originate from customers of Complainants.

Complainants defend their practice of directing traffic bound for wireless carriers to IXCs by proclaiming themselves to be legally bound to direct this traffic to IXCs and claiming that, to do otherwise, would constitute "slamming." Similarly, Complainants suggest that they are technically limited because the traffic is dialed as 1+ and therefore must be routed to an IXC and suggest that they have no ability to route traffic back through common trunks. *E.g.*, Transcript at 709; 761. None of these "justifications" withstand scrutiny.

For example, the Complainants argue that they are bound by presubscription rules to direct wireless traffic to an IXC. *See, e.g.*, Transcript at 265; 316. Curiously (and without basis),

they assert that only an interconnection agreement would exempt them from presubscription. *Id.* at 266, 316. Faced with this same issue, the Iowa Utilities Board recently rejected the position of the Complainants. *See In re Exchange of Transit Traffic*, No. SPU-00-7 (Iowa Utils. Bd. March 18, 2002). In that case, an ILEC (INS) argued that an administrative law judge's Proposed Decision erroneously required INS to treat intraMTA calls traveling from the ILEC's network to a wireless carrier as local traffic subject to reciprocal compensation, even though the calls were being transported by an IXC. Rejecting that argument, the Iowa Utilities Board held that ILECs could not avoid treating intraMTA calls as local by choosing -- like Complainants -- to route this traffic through an IXC.

> INS also argues that the Proposed Decision and Order failed to recognize that the customers of the independent LECs have the right to dial 0+ or 1+ to reach wireless customers with an intra-MTA wireless number, thereby using their preferred interexchange carrier (IXC) to complete the call.
>
> [The wireless carrier] argues . . . the independent LECs are engaged in an "egregious practice" of forcing their customers to make calls to local wireless numbers using 1+ or 0+ in order to "rack up charges and long distance fees for calls that the FCC has deemed local, and not subject to access charges or toll charges."
>
> *INS's argument assumes that customers should pay toll charges in order to make local calls to wireless customers.* However, it is obvious that if the customers were given the choice between making a local call to a wireless customer or making a toll call to the same wireless customer, most customers would likely waive their "right" to make a toll call using their preferred interexchange carrier in favor of making the same call as a local one, with no additional charges. The Board will affirm the Proposed Decision and Order on this issue and *direct the independent LECs to allow their customers to dial these local calls as local calls.*

Id. at 20-21, App. 20a-21a (emphasis added; record citations omitted). This Commission should reject Complainants' legal argument for the same reason.

Complainants also attempt to obfuscate the issue by claiming that they are bound by their switch technology and their tariffs to direct these calls to IXCs because they are dialed as 1+. *E.g.*, Transcript at 316, 319. However, on further cross examination, Complainants conceded that the decision whether particular NXXs would be handled on a 7-digit basis or 1+ basis is *controlled* only *by their own tariffs*, tariffs which they have the authority to change and could change to include wireless carrier NXX codes as local. For example, as Mr. Jones explained on cross examination, the Complainants have the authority to change their tariffs subject to Commission approval. Transcript at 803. Moreover, associating the call with local or 1+ is a function of switch translation done by the local carrier. *Id.* at 810-12; *see also id.* at 1003-04. Similarly, Mr. Biere conceded that, even as a 1+ call, a call to a wireless carrier could be directed to a trunk -- dedicated or common -- to be terminated to a wireless carrier. *Id.* at 697.

Complainants have also argued that they have no means of transporting calls to the wireless carriers other than through IXCs because the trunking between SWBT's tandem and their tandems or switches is one way, inbound only. This is yet another example of Complainants' practice of tying their own hands and yelling for help. In fact, as Complainants conceded in cross examination, the choice to make the trunking between their switches and SWBT's tandems one-way was a choice wholly within the control of the small companies and reversible with only a few switch translations. Transcript at 659; 694-95. Their decision not to send traffic to SWBT's tandem and not to obtain common trunking to Cingular and other wireless carriers is a business choice they have made. Transcript at 695. It is not one the Commission must or should accede to.

3. Complainants Have Voluntarily Chosen To Hold Out For Carrier Access

The simple reason for the Complainants' intransigence in the face of numerous opportunities to negotiate reciprocal compensation is their belief that, in the absence of interconnection agreements, they can obtain an order from this Commission for full carrier access charges. In responding to their Complaints, the Commission should take careful note that the substantial resources Complainants' have invested in several different Commission actions to obtain carrier access charges in the absence of interconnection agreements would be of no use if Complainants had any real or serious intention of negotiating appropriate interconnection agreements.

Mr. Jones made Complainants' priorities very clear in his direct testimony, where he responded to a question about why Mid-Missouri never requested arbitration after initiating negotiations with a wireless carrier:

> First, Mid-Missouri believed it was entitled to compensation pursuant to its access tariff for traffic delivered in the absence of an Interconnection Agreement in violation of the Commission Order. Mid-Missouri has been striving to obtain that determination but it was not final during those conversations with the wireless carriers. Ex. 1 at p. 14, lns 4-8.

If Complainants' real goal had been to obtain appropriate interconnection agreements, it would have made no sense to forego arbitration in favor of pursuing claims for carrier access that would apply only in the absence of an agreement. Clearly, interconnection agreements are not Complainants' goal.[9]

Complainants also do not view the goal of obtaining carrier access as simply a bargaining position from which to negotiate interconnection agreements. Rather, by making even the

[9] Similarly, several Complainants refused to file a WST tariff, not because of any disparity between their probable WST tariff rate and reciprocal compensation rates, but because of the disparity between the probable WST tariff rate and its carrier access rate. Transcript at 320.

negotiation of interconnection agreements too expensive, Complainants hope to force wireless carriers to redirect their traffic to traditional IXCs and thus allow Complainants to collect carrier access charges indefnitely. Complaintants' witness, Mr. Godfrey no doubt had this computation in mind when he pointed out, that wireless carriers should finder it cheaper simply to route or "pop out" their traffic to IXCs, which would, in turn, deliver the traffic to Complainants at full carrier access rates. Transcript at 480. Similarly, when asked to evaluate the cost of a direct connection, Mr. Biere summed up his view this way:

> A. . . . Given the amount of traffic that transits between your [wireless] company and ours, I cannot imagine that you would do this [directly connect]. I cannot imagine that you have any interest in connecting -- in doing anything other than just popping it out to an IXC to deliver it to us.
>
> Q. And paying you access. Right?
>
> A. I'm making that assertion from your side of the fence.

Transcript at 669-70.

The Commission should not turn a blind eye toward the real game here, stonewalling real reciprocal compensation negotiations until the only real solution for wireless carriers is to hand off all of their traffic to IXCs from which Complainants can continue to obtain carrier access. Not only will the wireless carriers be losers, since they do not collect carrier access to originate or terminate such traffic, but customers will be losers since Complainants will have absolutely defeated the goal of Congress and the FCC to treat intraMTA calling as local and, instead, will have guaranteed that customers will continue to pay toll charges for wireless calling for the indefinite future.

Access rates are not appropriate for the termination of intraMTA wireless traffic. If the Commission makes any statement in this Complaint case other than to dismiss or deny the

Complaints, the Commission should make a clear and unambiguous statement to the Complainants that they have an obligation to negotiate appropriate interconnection agreements, and that illegal preconditions are not proper predicates for good faith negotiations. Moreover, until Complainants are willing to negotiate in good faith for an appropriate interconnection agreement or, at least, file a WST tariff, *de facto* bill and keep is their only available means of compensation.

III. STAFF'S RECOMMENDED COMPENSATION PROPOSAL FOR PRE-WIRELESS TERMINATION TARIFF INTRAMTA TRAFFIC VIOLATES THE WELL-ESTABLISHED PROHIBITION AGAINST RETROACTIVE RATEMAKING

While supportive of the wireless carriers' position on what Staff characterizes as "the heart of the complaints by MITG companies" -- that Complainants may not charge switched access rates for terminating intraMTA wireless traffic unless carried by an IXC[10] -- the Staff apparently felt compelled to offer the Commission a vehicle to address compensation for wireless intraMTA traffic originated prior to the establishment of WST tariffs by Complainants. In addition to recommending that the Commission order Complainants Mid-Missouri, Chariton Valley, Northeast and Modern to file a WST tariff and thereby establish a rate for intraMTA traffic, Staff offers the recommendation that wireless carriers pay the WST tariff rate, less the arbitrary two-cents per minute adder, to the Complainants as "an option for compensation of traffic delivered prior to the effective date of Wireless Termination Tariffs." Ex. 12 (Scheperle Surrebuttal) at 10.

Staff's recommendation clearly violates the well-established prohibition against retroactive ratemaking. Even if the Commission were to find that the rate level advocated by Staff to be appropriate (which the wireless carriers certainly oppose because the rate is not

[10] Ex. 12 (Scheperle Surrebuttal) at 4.

supported by forward-looking cost data), it can only apply such rates prospectively and is banned by law from doing so on a retroactive basis. For the Commission to determine what a reasonable rate would have been and then apply it to traffic already delivered in the past, would deprive the wireless carriers of their property without due process, in contravention of the prohibition against retroactive ratemaking explained by the Missouri Supreme Court in *State ex rel. Utility Consumers Council of Missouri, Inc., et al. v. Public Service Commission*, 585 S.W.2d 41, 58 (Mo. 1979).

As reflected in Staff Witness Scheperle's testimony offered in this proceeding, Staff was clearly struggling with the constraints presented by case law and the Missouri statutes when formulating their "option":

> Staff is concerned with developing a compensation proposal for terminating intraMTA wireless traffic prior to establishment of a Wireless Termination Tariff as referenced by Mr. Krajci. Also, Staff is concerned with retroactive ratemaking as stated by Mr. Brown and more specifically, Staff is concerned about compliance with the provisions of § 392.220 RSMo, as a Commission approved Wireless Termination Tariff is only effective going forward or when established. However, Staff recommends that compensation is appropriate for traffic originated prior to the effective dates of Wireless Termination Tariffs.

Ex. 12 at 9.

Yet, in order to justify an option for a compensation mechanism, Staff rationalizes that since specific components of the Complainants' access tariffs were in effect at the times in question, it will cobble together a couple of distinct elements, suggest they apply, and an option is created. While piece parts of existing tariffs were utilized to construct the WST tariffs – the proponents clearly recognized, and advocated, that the resulting tariff was a new rate for a new service that would be *prospective* in its application. Staff's reliance on the WST tariff process is sorely misplaced and totally irrelevant to the unlawful "option" it advocates in this proceeding.

What do the Complainants think of Staff's option? One only has to go to the Opening Statement of Complainants' Counsel, Mr. Johnson. In describing four choices that he thinks the Commission is confronted with in this proceeding, Mr. Johnson clearly portrays the Staff's recommendation in terms that suggest unlawful retroactive ratemaking.

> So trying to turn what is a very complicated set of facts around and express this to you in terms of the choices that I think you're confronted with or the possible rulings that you, as a Commission, are confronted with, I think you have four choices.
>
> * * *
>
> The second choice for a ruling that you have is *Staff's suggestion that a new rate be created and applied retroactively. We don't want to spend too much time discussing that. The biggest problem we have is that no one's ever agreed to the rates and the rates weren't in effect at the time this traffic was terminated.*
>
> If we can complete the negotiation process or the arbitration process, we could obtain the functional equivalent of what Staff is proposing, but that needs to be done in the context of reciprocal compensation agreement.

Transcript 144, 150-51 (emphasis added).

In addition to being unlawful, the Commission should consider the poor public policy ramifications of starting down the "slippery slope" that Staff's recommendation presents. For all of the above reasons, Staff's recommended compensation mechanism must be rejected.

IV. *DE MINIMIS* AMOUNTS OF INTERMTA WIRELESS TRAFFIC DO NOT JUSTIFY THE WHOLESALE CONVERSION OF INTRAMTA MINUTES INTO INTERMTA MINUTES

As the petitioners in this Complaint case seeking carrier access payments, Complainants have the burden of proof of showing that the traffic at issue is subject to their access tariffs. Complainants concede that they do not know whether the traffic they are receiving is interMTA traffic subject to carrier access or intraMTA traffic, which the FCC defines as local and has

excluded from the coverage of carrier access charges. *E.g.*, Transcript at 404. Moreover, what evidence there is supports the finding that the traffic is overwhelmingly *intra*MTA and that any interMTA traffic is *de minimis*. Complainants' reliance on the current lack of reporting about the exact division of interMTA and intraMTA is no more than an attempt to obscure the issues in this docket and inappropriately reverse the burdens of proof in this Complaint case.

The preponderance of the evidence is that substantially all of the traffic complained of is intraMTA. For example, none of the Complainants even bothered to allege in their Amended Complaints that the traffic being terminated to them through SWBT is other than *intra*MTA traffic. Similarly, both of the carriers that invoiced the wireless carriers under their WST tariffs -- Choctaw and MoKan Dial -- billed all of the traffic they received as intraMTA. (The third carrier with a WST tariff, Alma, never rendered a bill under its WST tariff.)

Moreover, as Cingular's witness Mr. Brown observed, reason, logic, experience and personal observation demonstrate that, for wireless customers like wireline customers, most calls are made within a customers' community of interest, within a few miles of his or her home. Transcript at 1204-05. Since the determining points for whether a call is interMTA or intraMTA are the points where the call originates and terminates (Transcript at 864-65), reason, logic, experience and observation also indicate that the overwhelming percentage of calls initiated by wireless customers are intraMTA calls. There is no contrary evidence other than the fact that MTAs have boundaries and some calls cross those boundaries. The small percentage of calls that fall into that category is no basis to reverse established burdens of proof and to make wireless carriers disprove the intraMTA nature of most calling. To paraphrase the concern voiced by Mr. Scheperle, ordering a study to determine the amount of interMTA traffic at issue

in this docket would be "to spend $30,000 [or far more] to solve a $10 problem." Transcript at 875.

Complainants focus on the reporting required by the WST tariffs. It is notable, however, that only three of the Complainants -- Alma, Choctaw and MoKan Dial -- have such tariffs. The other four -- Mid-Missouri, Chariton Valley, Northeast and Modern -- have no WST tariffs and therefore no basis on which to demand reporting. *See* Transcript at 262-63 (Mid-Mo); 410 (Chariton Valley); 470 (Northeast and Modern). It would be wholly inappropriate for the Commission to impose any explicit or implicit burden on the wireless carriers to provide reporting to these carriers that have no tariff basis to demand it.

Even as to the Complainants that have a WST tariff, the Commission should note that those Complainants never made a demand on the wireless carriers for reporting outside of the discovery requests in this docket. Transcript at 530. In addition, the call detail that would satisfy the reporting required by the WST tariffs would not provide sufficient information to determine whether particular calls were interMTA or intraMTA. Transcript at 528-33. Moreover, Complainants do not place this recording burden on their own wireless affiliates. Transcript at 434. And even Complainants recognize that their own affiliates do not currently have a mechanism to provide the information necessary to report interMTA versus intraMTA calling. Transcript at 464.

If the Commission is concerned about the lack of a current means of distinguishing between interMTA calling and intraMTA calling, this Complaint case is not an appropriate vehicle to resolve those concerns. The record shows that the reporting issue is not simply a local one and that its solution is complicated. Addressing the reporting issue will require cooperation of the wireless carriers and the Complainants and simply placing the burden for reporting on the

wireless carriers is unlikely to generate any cooperation from the Complainants who have everything to gain and nothing to lose by stonewalling the process. While the Commission may wish to investigate the reporting issues in a separate proceeding, it should not impose a hasty and unreasonable result in these Complaint cases.

V. THE TERMS AND CONDITIONS OF SOUTHWESTERN BELL TELEPHONE COMPANY'S WIRELESS INTERCONNECTION TARIFF (PSC MO. NO. 40) HAVE NO RELEVANCE IN THIS PROCEEDING

Complainants argue vociferously that they are seeking only what SWBT has through its Wireless Interconnection Tariff (PSC Mo. No. 40). This approach fails for several reasons. First of all, whether or not SWBT PSC Mo. No. 40 is an appropriate tariff for SWBT to maintain, it is not an access tariff. It is a wireless interconnection tariff, implemented prior to the enactment of TA96. As a wireless interconnection tariff, it is analogous to the WST tariffs that the Commission approved in the *Mark Twain* cases and that four of the Complainants in this action have declined to file and that none of the Complainants attempted to file until August of 2000.

More importantly, SWBT's PSC Mo. No. 40 is not relevant to this action because none of the wireless carriers that are respondents to this action buy services out of that SWBT tariff. To the contrary, Cingular and each of the other wireless carriers that are respondents in this docket have negotiated interconnection agreements with SWBT for that service. As Staff recognized, the "tariff language is basically bypassed/overruled by an [interconnection agreement] between the CMRS providers and SWBT." Ex. 12 at 7.

At the time that SWBT obtained its modification to PSC Mo. No. 40, Cingular had already negotiated its interconnection agreement. *See* Ex. 15 at 10; *see also* Ex. 16 at 2. Most other wireless carriers had reached similar arrangements with SWBT. *Id.* Therefore, neither Cingular nor any other respondent to this action had any incentive to question the propriety of

SWBT's tariff, its terms or its rates. Given the lack of any interest that the wireless carriers could have had in SWBT's tariff filings, any attempt to use SWBT's tariff ruling to impose unilateral terms and conditions between the Complainants and the wireless carriers raises questions of due process.

In short, SWBT's tariff has no relevance to Cingular because Cingular does not buy transport services from that tariff. As even Complainants recognized, if the wireless carrier doesn't buy service out of the transport tariff, it doesn't apply. Transcript at 270. The Commission should reject any argument based on the application of SWBT's tariff.

VI. THE COMMISSION SHOULD NOT ORDER SWBT TO BLOCK "UNCOMPENSATED" TRAFFIC

The primary reason that the Commission should not order SWBT to block uncompensated traffic is that there is no truly "uncompensated" traffic. As discussed in Section II.b.2. above, Complainants are being adequately compensated through the current bill and keep regime. Moreover, ordering SWBT to block traffic based on the absence of explicit interconnection agreement between the wireless carriers and Complainants would simply reward Complainants for their intransigence. Even if the Commission were to reach the conclusion that Complainants were entitled to additional compensation, ordering SWBT to block traffic would be contrary to the public interest and contrary to SWBT's contractual obligations.

As Mr. Scheperle indicated in the list of Staff positions in his rebuttal testimony:

> 5. Wireless traffic *may terminate* on MITG network(s) *absent an Interconnection Agreement (IA)* between Commercial Mobile Radio Service (CMRS) providers and MITG companies.

Ex. 12 at 6 (emphasis added). In addition, as Mr. Scheperle stated in his initial testimony, "wireless originated calls terminated on [Complainants'] network with SWBT "transporting"

traffic between the [wireless carriers] and the [Complainants'] network *is in the public interest.* Ex. 11 at 17 (emphasis added).

Blocking traffic is also contrary to SWBT's contractual obligations to Cingular and other wireless carriers. According to the interconnection agreement between Cingular and SWBT, "SWBT agree that it will not block traffic through SWBT's network to a Third Party Provider with whom Carrier has not reached agreement." *See* Ex. 38 at 3.3.1. (copies of the relevant pages are attached as Appendix 2). The form of interconnection agreement Cingular uses is shared by many of the wireless carriers. The only appropriate "remedy" for Complainants is to negotiate interconnection agreements with the wireless carriers, which Cingular is willing to negotiate.

VII. RESPONSES TO COMMISSION QUESTIONS POSED DURING THE COURSE OF THE HEARING

Cingular respectfully offers its responses to the following questions posed by Deputy Chief Regulatory Law Judge Thompson during the course of the hearing in this matter:

1. Can the Commission order negotiations between telecommunications carriers? (Transcript at 754)

Commission Rule 4 CSR 240-2.125, Procedures for Alternative Dispute Resolution, Subsection (2) Mediation, provides in part: "(A) The commission may order that mediation proceed in a complaint case before any further proceeding in such case." In addition, Subsection (4) of said Rule states: "The Commission may order parties to engage in alternative dispute resolution with a commission authorized mediator."

While Cingular and most, if not all, of the wireless carriers requested mediation of the instant complaints pursuant to the Commission's Rules, regrettably, the Complainants steadfastly refused to agree to mediation, and the Commission did not order that mediation proceed.

In terms of ordering the types of negotiations contemplated by the Telecommunications Act of 1996, it is not readily apparent whether or not a state commission can order such negotiations; however, it would appear that such an order would not create the right to pursue arbitration under the Act. Nevertheless, Cingular would not object to the issuance of such an order by this Commission, and Cingular has committed to participate in negotiations with the Complainants. Transcript at 1212.

At least one consolidated arbitration has been successful. The *Oklahoma Arbitration Order* (a copy of which is attached as Appendix 1) was the result of a consolidated arbitration among several wireless carriers and a large number of rural ILECs. The arbitrator was able to reach findings on virtually every issue contested in this docket, including the non-applicability of carrier access, the ability of wireless carriers to interconnect indirectly and the propriety of bill and keep in the absence of carrier-specific forward-looking economic cost studies. That arbitration could easily serve as a model of a similar solution in the State of Missouri.

2. Can the Commission order companies to have interconnection agreements? (Transcript at 754-55)

While the Commission may have the authority to order companies to engage in negotiations that would lead to interconnection agreements, it would appear that the Commission cannot order the companies to have interconnection agreements. The Commission should make a determination and find that the Complainants' preconditions to negotiations (direct connection, *etc.*) are unreasonable and unlawful pursuant to Section 251(a)(1) of the Act, which requires providers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. In addition, the Staff has recommended that the Commission expressly find that wireless originated traffic may terminate on the Complainant companies

without an interconnection agreement between the wireless carriers and the complainants, and Staff asserts that this recommendation supports the intention of the Act. Exhibit 12 at 6.

3. Can the Commission order a company to adopt a wireless termination tariff? (Transcript at 755)

It would appear that the Commission may not order a company to adopt a wireless termination tariff. Obviously, through its findings and conclusions set forth in its Reports and Orders, the Commission can provide incentives for action, or inaction, by the companies it regulates. Pursuant to Section 392.240, RSMo 2000, after a hearing had upon its own motion or upon complaint, the Commission can determine that a telecommunications company's rules, regulations or practices are unjust or unreasonable, and make a determination as to the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service thereafter to be observed and used and to fix and prescribe the same.

4. Can the Commission unilaterally modify tariffs? (Transcript at 755)

Pursuant to Section 392.240, RSMo 2000, after a hearing had upon its own motion or upon a complaint, if the Commission is of the opinion and makes the requisite findings as set forth in the statute, it would appear that the Commission can modify tariffs.

5. What authority prohibits wireless companies from filing tariffs? (Transcript at 1103)

In *Petition of Sprint PCS*, at ¶ 18, the FCC held that wireless carriers are not entitled to file access tariffs and can only recover access charges through negotiated interconnection agreements with interexchange carriers.

6. Can wireless carriers file landline-originated traffic termination tariffs in Missouri? (Transcript at 1104)

Wireless carriers are specifically exempted from the jurisdiction of the Commission by virtue of the definitions of "telecommunications company" and "telecommunications service," as set forth in Section 386.020 (51) and (53)(c), RSMo 2000. Accordingly, wireless carriers cannot file tariffs with the Missouri Public Service Commission.

CONCLUSION

The Complainants are seeking relief from the Commission when the only appropriate relief is solely 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.

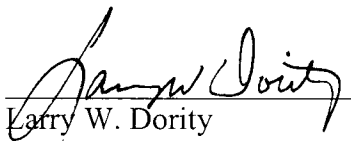
Complainants have also failed to make any case that this Commission should reverse its course and allow carrier access for the termination of intraMTA wireless calls. This Commission has already ruled that carrier access is an inappropriate mechanism for compensation to terminate intraMTA traffic. Complainants 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 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 18th day of October 2002

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



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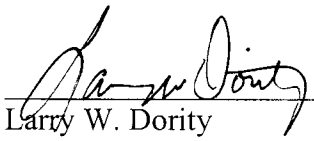

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