

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

T-Mobile USA, INC.,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2006-0558
)	
Green Hills Telecommunications Svcs. and)	
Mark Twain Communications Company)	
)	
Respondents)	

RESPONDENTS' RESPONSE TO COMMISSION ORDER DIRECTING FILING

COME NOW Green Hills Telecommunications Services and Mark Twain Communications Company ("Respondents" or "Rural CLECs") and for their Response to the Missouri Public Service Commission's ("Commission" or "PSC") July 3, 2006 *Order Directing Filing* regarding the Complaint filed by T-Mobile USA, Inc. ("T-Mobile"), respectfully state to the Commission as follows.

I. INTRODUCTION AND SUMMARY

T-Mobile is the only wireless carrier in Missouri that has failed to pay for its use of Respondents' networks during the period of time between 2001 and 2005 when Respondents' wireless service tariffs were in effect. Every other wireless carrier operating in this state has played by the rules and paid for the traffic that it sent to Respondents during this time period. T-Mobile has also refused to establish an agreement with Respondents for traffic on a going-forward basis. Accordingly, on June 12, 2006, Respondents notified T-Mobile (and PSC Staff) that T-Mobile's traffic would be blocked over the LEC-to-LEC network beginning on July 21, 2006. In response, T-Mobile filed the formal complaint which gave rise to this case.

The Commission's July 3, 2006 *Order* directs the parties to respond to two questions. As for the first question, Respondents believe that the Commission's Enhanced Records Exchange (ERE) Rules apply to this situation. Therefore, Respondents intend to follow these rules and cease their preparations for blocking T-Mobile's traffic until the Commission has issued its decision. Respondents concur in T-Mobile's request for expedited treatment and ask that the Commission resolve this matter as soon as possible. As for the second question, Respondents state that T-Mobile has refused to establish an agreement for the exchange of traffic, so there is currently no interconnection agreement between the parties. Therefore, there is no provision in any agreement between the parties that would affect Respondents' proposed blocking of traffic. Rather, longstanding state and federal law allow the Respondents to simply disconnect service to T-Mobile for failure to pay past due bills.

II. DISCUSSION

A. Commission Rule 4 CSR 240-29.130(10)

The Commission's ERE Rule establishes rules and procedures for the use of Missouri's local exchange ("LEC-to-LEC") network. T-Mobile's complaint asks the Commission to require Respondents to cease blocking T-Mobile's calls under the ERE Rule, but at the same time T-Mobile claims that the ERE Rules do not even apply to wireless traffic. T-Mobile cannot have it both ways, and T-Mobile's claims that the ERE Rules do not apply to wireless traffic have already been rejected by the Commission:

The ERE Rules “do not regulate wireless carriers, as [T-Mobile] and Sprint suppose. Rather, **what the rules would regulate is the use of the LEC-to-LEC network – not the wireless carriers.** . . . We reject [T-Mobile’s] apparent contention that nonregulated carriers may use the Missouri LEC-to-LEC network without regard to service quality, billing standards, and in some instances, with **an apparent disregard for adequate compensation.**”¹

Thus, Respondents believe that the ERE Rules apply to this situation, and Respondents intend to follow these rules and cease their preparations for blocking T-Mobile’s traffic until the Commission has issued its decision.

B. Interconnection Agreements

There are no interconnection agreements between the Respondents and T-Mobile. On April 29, 2005, the Respondents sent a request for negotiations of such an agreement with T-Mobile. When the negotiations failed to produce such an agreement, the Respondents filed a petition for arbitration with the Commission on October 4, 2005 and included T-Mobile’s past due bills as an arbitration issue. In response, T-Mobile filed a motion to dismiss the Respondents from the arbitration proceeding in Case No. TO-2006-0147. T-Mobile argued that rural competitive LECs (CLECs) did not have the same right to pursue arbitration of an agreement with wireless carriers before the Commission as rural ILECs.² On December 20, 2005, the PSC granted T-Mobile’s motion to dismiss the Respondents from arbitration. As a result, even though Respondents sought to establish an agreement through both negotiations and arbitration, there are currently no agreements between the Respondents and T-Mobile.

¹ *Order of Rulemaking*, 30 Mo. Reg. 1373, 1377, June 15, 2005 (emphasis added).

² See T-Mobile’s Nov. 16, 2005 motion to dismiss the Respondents and T-Mobile’s Dec. 7, 2005 reply in support of dismissing Respondents in Case No. TO-2006-0147.

C. There is No Bill-and-Keep Agreement.

T-Mobile claims that the parties have been operating under a “bill-and-keep” arrangement,³ but T-Mobile’s “bill-and-keep” argument has been rejected in Missouri by both state and federal courts. As explained above, T-Mobile has not negotiated or arbitrated an agreement with the Respondents, and the Respondents have never agreed to allow T-Mobile to use their facilities for free under a bill-and-keep arrangement. The Telecommunications Act requires agreements to be negotiated or arbitrated and then approved by state commissions, but no such agreements were ever established, filed with, or approved by the PSC as required by 47 U.S.C. §252.

A state commission can only impose a bill-and-keep arrangement after making a specific finding that the traffic between two carriers is roughly balanced and is expected to remain so. See 47 C.F.R. §51.713(b) (“A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so....”). The PSC has made no such finding for these carriers, so there is no factual basis upon which a bill-and-keep arrangement could be imposed.

As a matter of law, there is no provision in the Telecommunications Act or the FCC’s Rules for one carrier to unilaterally impose a bill-and-keep arrangement upon another carrier. On August 24, 2005, the U.S. District Court for the Western District of Missouri issued an *Order* specifically rejecting T-Mobile’s “bill-and-keep” argument:

³ See e.g. T-Mobile’s Complaint, p. 4, ¶4.

T-Mobile also argues that they have a “de facto bill-and-keep arrangement” with the Defendants and that arrangement is effectively a negotiated agreement as contemplated by section 251 of the Act and, therefore, the PSC tariff is unenforceable because it is in conflict with federal law. T-Mobile is defeated by its own language. The term *de facto* means to “have[] effect even though not formally or legally recognized.” BLACK’S LAW DICTIONARY 375 (5th Ed. 1979). A *de facto* arrangement is therefore one that operates as if it had been agreed upon, but when in fact no formal agreement was ever reached by the parties. By definition, a *de facto* mutual compensation arrangement could not be reached as a result of mutual negotiation, and the FCC states that “in the absence of a request [by T-Mobile] to establish reciprocal or mutual compensation, [T-Mobile] accept[s] the terms of otherwise applicable state tariffs.” 20 F.C.C.R. 4855, ¶12..... **The FCC’s order clearly establishes that termination tariffs are lawful in the absence of an actual, negotiated agreement, not a de facto arrangement that exists solely because T-Mobile sends its calls through to the LECs. . . . Again, the FCC states that by sending the calls to the LECs, T-Mobile “accept[s] the [alternative] terms of otherwise applicable tariffs.”**

T-Mobile v. BPS Telephone et al., U.S. District Court for the Western District of Missouri
Case No. 05-4037, Order, issued Aug. 24, 2005.

The Missouri Court of Appeals has also rejected T-Mobile’s arguments and explained:

The wireless companies have failed to follow prior Commission orders to establish agreements with the rural carriers before sending wireless calls to their exchanges. The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. **The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction.** The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.

Sprint Spectrum v. Missouri PSC, 112 S.W.3d 20, 26 (Mo. App. 2003)(citations omitted).

D. Expedited Resolution

Respondents concur in T-Mobile's request for expedited treatment and ask that the Commission resolve this matter as soon as possible.

III. CONCLUSION

Ultimately, the question presented by T-Mobile's complaint is whether the Commission is going to enforce its final orders and rules, or not. T-Mobile has failed to pay for service under Respondents' tariffs that were approved by and on file with the Commission between 2001 and April 29, 2005. Every state and federal agency and court to review T-Mobile's challenges has rejected them. Moreover, the U.S. District Court for the Western District of Missouri stated, "**There has already been an unreasonable delay in the resolution of this matter because of T-Mobile's transparent litigation strategy."**

On June 20, 2006, the U.S. Court of Appeals for the Eighth Circuit refused to grant T-Mobile's request for an injunction to prevent blocking on the LEC-to-LEC network that raised the same challenges that T-Mobile seeks to resurrect before the Commission in this case. Thus, Respondents are entitled to block T-Mobile's traffic pursuant to the Commission's ERE Rules. The ERE Rules have the force and effect of law, and Respondents have complied with those rules. T-Mobile, on the other hand, has pursued a constant course of delay and litigation. Every other wireless carrier in Missouri has played by the rules and paid for its calls. The Commission should decline to reward T-Mobile's "transparent litigation strategy."

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 7th day of July, 2006, to the following parties:

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