BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

In the Matter of the Petition of	**)**	
Alma Telephone Company	**)**	
for Arbitration of Unresolved	**)**	**Case No. IO-2005-0468, et al.**
Issues Pertaining to a Section 251(b)(5)	**)**	**(consolidated)**
Agreement with T-Mobile USA, Inc.	**)**	

Petitioners' Comments,
Arbitrator's September 23, 2005 Final Arbitration Report

Petitioners Alma Telephone Company, Chariton Valley Telephone Corporation, Mid-Missouri Telephone Company, and Northeast Missouri Rural Telephone Company submit these comments with respect to the Arbitrator's Final Arbitration Report (**FAR**) of September 23, 2005.

Introduction

Petitioners disagree with the FAR's conclusion that Petitioners must pay T-Mobile reciprocal compensation for intraMTA landline-to-mobile IXC carried traffic. The FCC has determined that IXC traffic is access traffic.[1] It is not subject to reciprocal compensation. The FAR erred in that it only evaluated whether the traffic originated and terminated within an MTA. The FAR failed to evaluate whether IXC traffic is within the scope of the federal reciprocal compensation rules. The FAR failed to evaluate whether Petitioners are financially responsible to compensate T-Mobile for IXC traffic.

[1] The FAR also approved a 65%/35% "net billing" factor. This net billing factor is a secondary IXC traffic issue, and will be addressed towards the end of these comments.

The FCC in its *Local Competition First Report and Order*[2] excluded IXC traffic from reciprocal compensation. The FCC's reciprocal compensation rule 47 CFR 51.701 (2) defines telecommunications traffic subject to reciprocal compensation as that ***exchanged between a LEC and a CMRS provider***. IXC traffic is not the Petitioners' traffic. It is not "exchanged" between a Petitioner and T-Mobile. This traffic belongs to the IXC, and the IXC is financially responsible to T-Mobile for paying terminating compensation.

Contractual Provisions at Issue

Petitioners propose the same introductory paragraph, and the same Section 1.1, as has been negotiated, submitted, and approved in many Missouri Traffic Termination Agreements between rural ILECs and CMRS providers[3], including T-Mobile.[4] The language in the introductory paragraph of the agreement reads:

> "ILEC is a local exchange carrier operating in Missouri. TMUSA is a commercial mobile radio service carrier operating in Missouri. TMUSA terminates traffic originated by its end user customers and terminating to ILEC through the facilities of another local exchange carrier in Missouri. ILEC may terminate traffic originated by its end user customers and terminating to TMUSA through the facilities of another local exchange carrier in Missouri. TMUSA and ILEC recognize their responsibilities to compensate the other pursuant to Section 4 of this Agreement for termination of the traffic originated by and under the responsibility of each Party."

Section 1.1 of the introductory paragraph reads:

> "1.1 This Agreement shall cover traffic originated by, and under the responsibility of, one of the Parties and terminated to the other Party without the

[2] August 6, 1996 First Report and Order in CC Docket No. 96-98 and 95-185.

[3] See the July 26, 2005 Summary of Agreements attached hereto.

[4] See the T-Mobile Agreements approved with Ozark, Goodman, Seneca, Choctaw, and MoKan Dial in case numbers TK-2004-0166, TK-2004-0165, TK-2004-0167, TK-2005-0461, and TK-2005-0462 respectively.

> direct interconnection of the Parties' networks, and which terminates to the other Party through the facilities of another local exchange carrier in Missouri. "Traffic originated by and under the responsibility of," a Party means traffic that is originated by a Party pursuant to that Party's rate schedules, tariffs, or contract with the end-user customer. This Agreement does not cover traffic for which the originating party has contracted with an Interexchange Carrier ("IXC") to assume responsibility for terminating the traffic, or traffic originated by an IXC pursuant to the IXC's rate schedules, tariffs, end-users contracts, or presubscription rules. This Agreement shall cover both Local and Non-local Traffic as those terms are defined in Section 2 of this Agreement."

This language recognizes the right of T-Mobile to send traffic to Petitioners through its SBC interconnection, thereby making that traffic subject to the agreement. Section 5.1 likewise recognizes the right of Petitioners to likewise do so, and if they do, then that SBC transited traffic likewise becomes subject to the agreement. The language also recognizes that IXC traffic is not within the scope of a reciprocal compensation agreement. This language is a correct statement of the law, and should be applied to the agreement in arbitration here.

If This Commission agrees with Petitioners, Petitioner's Introductory Paragraph, and Section 1.1 to the Agreement should be ordered inserted. T-Mobile's section 5.1.3 regarding "net billing" should be ordered deleted.

The IXC traffic at Issue

Like other wireless carriers, T-Mobile has decided to directly connect with SBC at LATA access tandems. T-Mobile does not directly connect with Petitioners. As a consequence T-Mobile customer numbers do not "reside" in Petitioners' switches, and are not within the local calling scopes of Petitioners' local customers.[5] As Petitioners are

[5] In a prior arbitration between an ILEC and CMRS provider, This Commission ruled that landline to mobile traffic is a local reciprocal compensation call only if the ILEC and

not authorized to provide, and do not provide, interexchange service, calls from landline customers to T-Mobile customers must be dialed "1+". Such 1+ calls are carried by the IXC selected by the customer to carry his or her 1+ calls.

The traffic in question is IXC provisioned traffic. Petitioners are required by federal and state rules to deliver IXC traffic to the IXC chosen by the end user.[6] Petitioners are subject to slamming penalties for not directing this traffic to the appropriate IXC.[7] (Tr. 67-69, 72-73, 90, 96).

CMRS provider were locally interconnected, and the vertical and horizontal coordinates of the CMRS provider lie within the local calling area of the landline exchange:

> "The Commission agrees with SWBT that a call from a SWBT landline subscriber to an MMC cellular subscriber is properly rated as a local call only where: (1) the landline and cellular exchanges are locally interconnected; and (2) the V&H coordinates of the cellular exchange lie within the local calling area of the landline exchange. ... The Commission agrees with SWBT that local rating without local interconnection is inappropriate because the interexchange facilities of SWBT and of Sprint, a stranger to this action, would necessarily be employed in completing such calls." [5]

In the Matter of Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular's Petition for Arbitration Pursuant to 47 U.S.C. Section 252 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Case No. TO-99-279, Arbitration Order, p. 5 (Apr. 8, 1999).

[6] T-Mobile witness Pruitt agrees, Tr. 265:

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 1        Q.   Would you agree with me that if I am an ILEC
 2   customer and if I dial a call with a 1, that the ILEC has to
 3   give that call to the interexchange carrier I have chosen to
 4   carry that call for me?
 5        A.   I believe that's -- that that's the case.
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[7] The FCC slamming rules are found at 47 CFR 64.1120-1150. The Missouri slamming rule is 4 CSR 240-240-33.150. These rules make it clear that the choice of IXC belongs to the customer, and that the IXC traffic belongs to the IXC chosen by the customer.

T-Mobile's position regarding IXC traffic was driven by the fact it is not getting compensated by the IXC. T-Mobile agrees that, under FCC precedent, it is entitled to be compensated *by the IXC* for this traffic. However, because it has been unsuccessful in collecting from the IXCs, T-Mobile asks Petitioners to pay.[8]

The key points of the relationships for IXC traffic are as follows[9]:

1. End users are customers of Petitioners for local service. They are not customers of the ILEC for toll service. For toll service, the IXC is the calling party's network provider.
2. Petitioners' local tariffs determine their local customers' local calling scopes. Calls outside of these areas are "toll" calls Petitioners must route to the presubscribed IXC.
3. Customers making 1+ calls pay their IXC for toll services under that IXC's toll tariffs or price schedules.
4. IXC's purchase the use of Petitioners' facilities to originate these calls.

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[8] Transcript pages 271:

Q. So you pay access compensation on an intraMTA call?
A. Yes.
Q. Carried by an IXC?
A. Yes.
Q. With respect to the landline to T-Mobile IXC carried call, do you agree that the FCC has ruled that T-Mobile is entitled to recover compensation from the interexchange carrier, the Sprint PSC versus AT&T declaratory judgment ruling?
A. That's a qualified yes.
Q. Yeah. I mean --
A. Because the FCC basically said that, in theory, there's a right to bill for that traffic, but there had to be a contract between the parties.
Q. Welcome to our world. We say you're entitled to compensation, but you've got to go get into a contract after the fact with the person that's sending the traffic. It's not an easy situation, is it?
A. Well, in that particular case, it wasn't.

[9] Exhibit 8, Schoonmaker Direct, pages 31-48; Exhibit 9, Schoonmaker Rebuttal, pages 31-32.

5. IXC's purchase the use of T-Mobile's facilities to terminate these calls.

FAR Determinations with Respect to IXC Traffic

The FAR simply concluded that IXC traffic is subject to reciprocal compensation because it originates and terminates within the same Major Trading Area. The FAR erred in refusing to review the FCC's *Local Competition First Report and Order* in order to ascertain whether the FCC's rules intend reciprocal compensation to apply to IXC traffic. The FAR erred in not evaluating whether IXC traffic meets the definition under FCC Rule 701 of telecommunications traffic subject to reciprocal compensation.

There is an established difference between the transiting service a LEC such as SBC provides, and the toll service an IXC provides. At hearing T-Mobile's seemed to agree that only LEC transited traffic is proper for interconnection agreements, not IXC transported traffic. [10]

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[10] Tr. Pages 268-269:

Q. And do you agree with me that when Bell does that, they provide that transit function in their rule as a local exchange company?
A. Yes, I believe that to be the case.
Q. Now, do you also agree with me that we don't negotiate reciprocal compensation arrangements with interexchange carriers such as AT&T, MCI, Sprint long distance?
A. Could you define for me we? I'm --
Q. Under the act --
A. Certainly you can talk to an IXC and, you know, do

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a wholesale agreement to transport traffic that's -- that's, you know, not traditional IXC traffic.
Q. Have you ever seen an interexchange carrier in Missouri submit to the Missouri Commission for approval a Section 251(b)(5) reciprocal compensation agreement in which it was a party?
A. No, I have not.
Q. So I guess my question to you is, do you think that when an IXC provides a transport function, it's the same thing as when a LEC provides a transit function?
A. No, I don't believe it's the -- the -- the same thing.
Q. Okay.

Potential Consequences of the FAR

There are no approved interconnection agreements in Missouri which include IXC landline to mobile traffic as reciprocal compensation traffic. Missouri approved interconnection agreements do not treat IXC traffic as reciprocal compensation traffic.[11] The Attached Summary of approved agreements between CMRS providers and rural ILECs indicates approximately 70 such agreements are in place. None of these agreements include landline to mobile IXC traffic as reciprocal compensation traffic. T-Mobile is a party to five of these agreements, and none of them include IXC traffic.[12]

The FAR would change the Missouri status quo. Such a result has the potential to dramatically affect future negotiations and agreements concerning all ILECs operating in Missouri.[13]

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[11] At hearing, T-Mobile admitted SBC, the largest ILEC in Missouri, does not pay reciprocal compensation for IXC traffic. Tr. 263. SBC is the entity in Missouri with by far the most experience with reciprocal compensation. SBC has numerous negotiated and renegotiated interconnection agreements with CMRS providers, including T-Mobile. Yet in those agreements, approved by this Commission, SBC does *not* pay reciprocal compensation for IXC traffic. This strongly suggests, contrary to the language of the FAR, that excluding IXC traffic is not a "new exception". It suggests that Petitioners are correct, and that IXC traffic is not reciprocal compensation traffic.

[12] See footnote 3 above.

[13] It is not clear from the FAR whether IXC traffic would be subject to <u>both</u> access and reciprocal compensation, or whether reciprocal compensation would <u>replace</u> access compensation. If the latter is to be the case, there will be significant revenue losses to

The FAR is Contrary to Prior Decisions of This Commission

Previous decisions indicate This Commission understands that landline to mobile traffic is the compensation responsibility of the IXC, not of the LEC.[14]

LECs, significant new compensation expenses for LECs. IXCs would stand to receive free use of LEC originating and terminating facilities.

[14] In 2001 the Commission approved wireless termination tariffs for most small rural ILECs. In doing so it rejected wireless carrier arguments that the rural carriers had been compensated by "defacto bill and keep" for landline to mobile IXC carried traffic. The Commission held the rural carriers were not obligated to compensate wireless carriers for such IXC traffic:

> "At present, with the termination of the PTC Plan, it is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. This is because traffic to CMRS subscribers from the small LECs' subscribers is transported by IXCs and treated as toll traffic. ... [I]f the traffic is being carried by an IXC, the IXC must compensate the CMRS carrier for the termination of the call."

Similarly, in 2001 AT&T Wireless opposed a CLEC's wireless termination tariff in part because it did not recognize the LEC's responsibility to pay reciprocal compensation for landline to mobile IXC calls. The Missouri Commission rejected AT&T's argument, relying upon the fact that all of the CLEC's landline to wireless traffic was provisioned by an IXC:

> "All of Mark Twain's traffic that is destined for the NXXs of wireless carriers operating in Missouri, including AT&T Wireless and Sprint PCS, is currently dialed: (a) on a 1+ basis and carried by Mark Twain's customers' presubscribed interexchange carrier ("IXC"); or (b) on a 101XXX basis and carried by an IXC."

In a 2005 complaint case T-Mobile contended that it was due compensation for landline to mobile IXC carried traffic because such traffic was "equivalent in volume" to wireless to landline traffic which was the subject of state wireless termination tariffs. The Missouri Commission rejected this contention because the landline to mobile traffic was carried by an IXC:

The FAR is Contrary to Federal Law

FCC Decisions

The FCC first announced the reciprocal compensation rules in its *Local Competition First Report and Order.* Paragraphs 1033 and 1034 of the FCC *Local Competition First Report and Order* reveal that IXC traffic was not intended by the FCC to be reciprocal compensation traffic. These paragraphs contain the FCC's distinction between the new "transport and termination" rules (for local reciprocal compensation traffic) and the existing access rules.

First, the FCC recognized that, at the time of adoption of the new rules, traffic between LECs and CMRS providers carried by an IXC was subject to access. Paragraph 1043 of the *Local Competition First Report and Order* stated:

> "Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC..."

> "The Wireless Respondents maintain that the intraMTA traffic that they exchange with the Complainants is symmetrical, that is, that equivalent volumes flow in both directions. ... The record shows, and the Commission finds, that the Complainants routed all traffic originating on their networks and intended for subscribers of the Wireless Respondents through an IXC."

The Commission addressed the issue again in its May 6, 2005 Order of Rulemaking adopting the Enhanced Record Exchange Rule (4 CSR 240-29.040(4). Wireless carrier's argued that calling party number (CPN) should be included on landline to mobile IXC traffic simply because it was required of mobile to landline traffic traversing the LEC to LEC network. The Commission rejected this argument as "frivolous and unsubstantiated" as the wireless carriers failed to establish "any instance where rural carriers transmit compensable calls to wireless carriers."

The FCC ruled in paragraph 1033 that its new transport and termination rules applicable to reciprocal compensation traffic would *not* replace the existing rules for traffic subject to access charges:

> "The Act preserves the legal distinction between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic."

This conclusion was repeated by the FCC at the end of paragraph 1034:

> "Pursuant to section 251(g), LECs must continue to offer interstate access services just as they did prior to enactment of the 1996 Act. We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic ***do not apply*** to the transport or termination of interstate of intrastate interexchange traffic."

Based on its Section 254 (g) authority to preserve the access charge regime, in paragraph 1043 the FCC concluded that IXC traffic would *continue* to be subject to the access regime, not reciprocal compensation:

> "Based on our authority under section 251(g) to preserve the current interstate access 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 access charges."

The FCC recognized in paragraph 1034 that in the access regime, the caller pays the IXC long-distance charges, and the IXC pays both the originating and terminating LEC for access service. The FCC contrasted this with the new regime for reciprocal compensation. In the new regime the local caller pays charges to the originating carrier and the originating carrier must compensate the terminating carrier.

These excerpts from the FCC's *Local Competition First Report and Order* unmistakably establish the FCC's intent for access to continue to apply to IXC carried

traffic. These excerpts also suggest that IXC traffic and reciprocal compensation traffic are mutually exclusive.

The FCC decision not to allow IXCs to have reciprocal compensate, but instead to continue to pay access, was affirmed by the 8th Circuit Court of Appeals in the *Comptel* decision.[15]

In 2000, four years after issuing the *Local Competition First Report and Order*, the FCC repeated the conclusion that IXC traffic is not subject to reciprocal compensation, but falls under access rules[16]:

> Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. ***Such traffic falls under the reciprocal compensation rules if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier.***

There is no mistaking this underscored language. Access charges apply to IXC traffic, not reciprocal compensation.

Consistent with the decision that IXC traffic is not reciprocal compensation traffic, the FCC in 2002 ruled that IXCs are responsible to pay CMRS providers *access* compensation for IXC provisioned traffic.[17]

In 2005 the FCC issued a Further Notice of Proposed Rulemaking in the *Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92,

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[15] *Comptel v FCC*, 117 F.3d 1068 (1997).

[16] *TSR Wireless, LLC v. U S West Communications, Inc.,* Memorandum Opinion and Order, Released June 21, 2000 FCC 00-194 ("*TSR Wireless Order"*), paragraph 31.

[17] See *In the Matter of Sprint PCS and AT&T's Petitions for Declaratory Ruling on CMRS Access Charge Issues*, WT Docket No. 01-316, Declaratory Ruling, 2002 FCC LEXIS 3262, released July 3, 2002.

Released March 3, 2005. The language of this NPRM announces, in several places, that the FCC is inviting comments with respect to ***changing*** the rules to allow IXC traffic to become reciprocal compensation traffic.[18] As the FCC stated it would be necessary to ***change*** its access/reciprocal compensation regimes to make IXC traffic subject to reciprocal compensation, this means that IXC traffic currently is not subject to reciprocal compensation.

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[18] Paragraphs 120-134 discuss the issues of the MTA rule, reciprocal compensation, and whether reciprocal compensation should be applied to IXC traffic. In particular, at paragraphs 136-138 the FCC invited comment as to whether its current rules requiring 1+ calls to be routed to the IXC, and the IXC to pay access compensation, should be changed. Paragraph 136 and excerpts from paragraph 138 confirm it is the FCC's view that currently IXC traffic is access traffic, not reciprocal compensation traffic:

> "2. CMRS Issues
>
> The IntraMTA Rule
>
> 136. ……Can these methods be applied to transited traffic, such that terminating incumbent LECs will be able to distinguish reliably between terminated traffic subject to reciprocal compensation *(for which they will charge the CMRS carriers)* and ***access traffic (for which they would presumably charge the IXC***)? We seek comment on these questions.
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> 138. For instance, we recognize that the current Commission rules may require that intraMTA calls dialed on a 1+ basis be routed through IXCs. Specifically, section 51.209 of the Commission's rules requires LECs to implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer's line will be routed automatically. Should this rule be ***changed***? We ask parties to explain what technical or network changes would be needed if all intraMTA CMRS traffic were routed to CMRS providers. We also seek comment on whether, in the alternative, all intraMTA calls can be ***made*** subject to reciprocal compensation without requiring LECs to alter the routing of their originated traffic. We ask parties supporting a particular approach to address any other Commission rules that may be implicated."

FCC Rules

FCC Rule 51.701subpart (2) defines telecommunications traffic as that ***exchanged between a LEC and a CMRS provider*** that, at the beginning of the call, originates and terminates within the same Major Trading Area. The FAR fails to consider whether IXC traffic is "exchanged between a LEC and a CMRS provider".

The word "exchanged" is a term of art used by the FCC to denote reciprocal compensation traffic. Reciprocal compensation was intended for two interconnected competitors who compete for local customers. The term "exchanged" refers to a swapping of local traffic originated by the LEC as the caller's network provider and sent to the CMRS provider for termination, or vice versa.

The term "exchanged" does not apply to IXC traffic. As explained above, the IXC offers toll to the end user, receives toll revenue from the end user, and purchases the use of LEC facilities to originate the call. The IXC provides service to the customer, the LEC does not. The IXC provides the 1+ call, the LEC does not. The IXC is not competing with the LEC or the CMRS provider for local service, it is providing toll service. The IXC has no local traffic to "exchange" with the LEC or CMRS provider. The IXC is not terminating local traffic "exchanged" with another carrier. As IXC traffic fails to meet this aspect of the definition of reciprocal compensation traffic found in rule 701, the traffic at issue here is not subject to reciprocal compensation.

Rule 51.701(e) further defines reciprocal compensation as an "***arrangement between two carriers in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of***

telecommunications traffic that originates on the network facilities of the other carrier".

The FAR fails to apply this definition to IXC traffic. In its IXC traffic does not meet this definition. IXC traffic is not handled pursuant to an arrangement; it is handled pursuant to tariff. As the FCC set forth in paragraph 1034 of its *Local Competition First Report and Order*, IXC traffic requires the collaboration of three carriers, not two. With respect to IXC traffic, there is not compensation flowing both ways between the IXC and LEC, or between the IXC and CMRS provider. The IXC pays compensation to the originating LEC and terminating CMRS carrier. The IXC does receive compensation from either.

T-Mobile Arguments

T-Mobile has made arguments as to why excerpts of the FCC rules support T-Mobile's position. None of these arguments disagree that the IXC is financially responsible to compensate for IXC traffic. None of these arguments directly meet the question of whether IXC traffic has been excluded from the reciprocal compensation rules. These arguments do not address the language of Rule 701 that excludes IXC traffic because it is not a reciprocal arrangement between two carriers. These arguments do not address the language of rule 701 that excludes IXC traffic because it is not traffic exchanged by a LEC and CMRS provider.

Precedent

The FAR relies on four cases for the proposition that IXC traffic is subject to reciprocal compensation. The FAR relies most upon the Oklahoma "*Atlas*" decision.[19].

[19] Atlas Telephone v Oklahoma Corporation Comm'n, 400 F. 3d at 1264.

The FAR also cites *WWC License*[20], *Rural Iowa*[21], and *3 Rivers*[22]. Two of these cases do not concern landline-to-mobile IXC traffic, instead they involved traffic transited by RBOCs to rural ILECs for termination. Two of the cases did concern landline-to-mobile IXC traffic, however they failed to engage in an adequate legal analysis.

Comptel

In *Comptel v FCC*, 117 F.3d 1068 (1997), the 8th Circuit US Court of Appeals specifically held that the FCC's refusal to subject IXC traffic to the reciprocal compensation regime was lawful:

> "..it is clear from the Act that Congress did not intend all access charges to move to cost-based pricing, at least not immediately. The Act plainly preserves certain rate regimes already in place. (references to Section 251(g) omitted) ….In other words, the LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates……..Comptel also challenges the FCC's interpretation of interconnection as having a discriminatory impact, by permitting LECs to charge different rates for the same service based on whether the carrier who is seeking interconnection and other network services is a long-distance provider or a local service provider. But the two kinds of carriers are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service."

Comptel confirms that the FCC's *Local Competition First Report and Order*, and Rules, intended to keep access for IXC traffic separate and distinct from reciprocal compensation. Unlike the four decisions the FAR recites, *Comptel* is binding precedent in

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[20] WWC License v Anne C. Boyle, et al., No. 4:03CV3393, slip op at 5-6 (D.C. Neb., Jan 20, 2005).

[21] Rural Iowa Independent Telephone Ass'n v Iowa Utilities Board, No. 4:02-cv-40348.

[22] 3 Rivers Telephone v U.S. West, 2003 U.S. Dist. LEXIS 24871 *67.

Missouri. At page 18 of the FAR, the arbitrator rejected *Comptel* because it was not an arbitration of a LEC-wireless carrier agreement. The point is missed. *Comptel* stands for the proposition that the FCC was within its authority in ***retaining*** access for IXC traffic while applying reciprocal compensation to interconnection agreement traffic. *Comptel* affirmed the FCC's refusal to permit IXC traffic to be subject to reciprocal compensation.

3 Rivers

The *3 Rivers* case was a dispute between RBOC Qwest and rural telephone companies. The traffic under scrutiny was not IXC traffic--it was traffic Qwest delivered for termination to the rural telcos. The court ruled that Qwest was not responsible to pay for traffic it transited for termination on landlines. The *3 Rivers* case has nothing to do with the landline-to-mobile IXC traffic at issue here.

Rural Iowa

The *Rural Iowa* case was also a dispute between rural ILECs and an RBOC with respect to transited traffic terminating on rural ILEC landlines. The case addresses CMRS traffic transited by Qwest to rural ILECs in Iowa. There is no discussion in the case concerning landline-to-mobile IXC traffic. To the contrary the *Rural Iowa* case supports Petitioners here. The Iowa Utility Board and the Court specifically determined that Qwest was not acting as an IXC with respect to the LEC-transited traffic at issue. See *Rural Iowa*, pages 20, 50. The Court in *Rural Iowa* found that for IXC traffic the *IXC* pays access charges to LECs. See page 26, footnote 30.

Atlas

In *Atlas*, the 10th Circuit premised its decision on the conclusion that landline to mobile IXC calls first pass from the rural telephone company network to the IXC. The

Court failed to evaluate the *Local Competition First Report and Order*. *Atlas* failed to consider whether the IXC traffic met the definitions of Rule 701. *Atlas* simply does not address the arguments and evidence of Petitioners. By relying upon *Atlas*, the FAR avoided addressing the arguments and evidence submitted by Petitioners.

WWC License[23]

The Nebraska District Court in *WWC License* relied upon the authority of the *Atlas* decision. There is no analysis of the arguments presented by Petitioners here. WWC License lends nothing to the analysis above and beyond that of *Atlas*.

The 65%/35% "net billing" factor adopted by the FAR

This issue is a function of the IXC traffic issue. If the Commission decides the IXC issue in favor of Petitioners, this net billing factor issue becomes moot. Net billing should be excluded from the agreement.

As the FAR made Petitioners responsible to pay T-Mobile for landline-to-mobile intraMTA IXC traffic, the FAR next addressed quantifying the volume of this traffic for billing purposes. There was no evidence in the record of actual traffic volumes. The solution adopted by the FAR is as follows[24]:

- 1st: quantify the monthly mobile-to-landline traffic volume transited by SBC to Petitioners for termination;
- 2nd: subtract the interMTA traffic required by the interMTA factor adopted;
- 3rd: the result is the total mobile-to-landline intraMTA traffic volume;
- 4th: divide the total mobile to landline intraMTA traffic by 65% to arrive at the total intraMTA traffic, both landline-to-mobile and mobile-to-landline, whether carried by SBC or by an IXC;

[23] FAR, page 20.

[24] FAR, page 19.

5th: multiply the total intraMTA traffic "exchanged" by 65% to compute the amount of mobile-to-landline traffic T-Mobile is to pay Petitioners;

6th: multiply the total intraMTA traffic "exchanged" by 35% to compute the amount of landline-to-mobile traffic Petitioners are to pay T-Mobile:

7th: Petitioners subtract the 35% from the 65% and "net bill" T-Mobile for the difference.

T-Mobile's net billing formula uses as its starting point the amount of mobile-to-landline traffic transited by SBC. There is no evidence that traffic carried by IXCs bears any proportionate relationship to traffic transited by SBC. It does not stand to reason that the proportion of traffic T-Mobile sends to IXCs is the same as that it sends to SBC. The undisputed evidence in the record is that Petitioners send ***no*** traffic to T-Mobile via SBC, ***all*** of the landline-to-mobile traffic is sent via IXCs.

In its testimony, T-Mobile had testified that the Commission should reject any traffic factors not substantiated by empirical studies. See the Direct Testimony of Mr. Pruitt, Ex 16, page 14, lines 13-14. Prior to hearing, Petitioners requested the wireless-to-landline traffic volumes from T-Mobile, but T-Mobile objected to providing this information.[25] Instead of placing the traffic studies in the record, T-Mobile witness Pruitt

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23 Tr., pages 256-257:

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19        Q.   Is there any evidence in the record to support the
20   conclusion that the total amount of traffic is accurately
21   estimated by dividing the Bell terminating traffic by
22   65 percent?
23        A.   There is no empirical evidence; however, that's a
24   standard that's commonly used throughout the industry.
25   And -- and certainly wireless carriers and rural LECs in other
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 1   states have agreed to factors in that range.
 2        Q.   Well, whenever I say I want company-specific
 3   information, you tell me about industry standards; when I say
 4   I want to use an industry standard, you say, oh, we've got to
 5   have company-specific costs.
 6             I'm -- do you have to support that 6 -- that
 7   65 percent with empirical evidence under your own standard
 8   you'd apply to us?
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simply testified that the 65/35 proportion was "a standard that's commonly used throughout the industry".

His testimony is not correct. T-Mobile's approved agreement with SBC provides for an 80%/20% factor.[26] SBC is the dominant ILEC in Missouri, serving perhaps 70% of the landlines in Missouri. If there is an 80/20 ratio between T-Mobile and SBC, it is difficult to accept the FAR's conclusion that 65%/35% is the "common standard" in Missouri.

Petitioners' Requested Changes to the FAR

Petitioners request that the FAR be modified to remove landline to wireless IXC traffic from the scope of the arbitrated agreements, and to eliminate the "net billing" decision. This can be done by inserting Section 1.1 as proposed by Petitioners.

Respectfully submitted,

A. Yes.
Q. And you failed to do that; is that right?
A. Yes, we failed to provide any empirical data. But again, that could be an item that's subject to negotiation between the parties.
Q. Did you help T-Mobile prepare answers to my Data Requests in this case?
A. I reviewed them, but I did not actually provide any input to the responses.
Q. Did you see the Data Requests where we asked for your information with respect to the traffic coming over the Bell trunks to us, as well as the traffic being carried by the IXCs?
A. Yes, I -- I remember reviewing that.
Q. And is it correct that T-Mobile objected to providing us that data?
A. I believe that's the case, yes.

[26] TO-2001-489, Agreement approved by Order of April 17, 2001.

/s/_____
Craig S. Johnson, Atty.
Mo Bar # 28179
1648-A East Elm St.
Jefferson City, MO 65101
(573) 632-1900
(573) 634-6018 (fax)
craig@csjohnsonlaw.com
ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 27th day of September, 2005, to the following representatives of Respondent:

Mark P. Johnson
Trina R. LeRiche
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, Mo 64111
Email: mjohnson@sonnenschein.com
Email: tleriche@sonnenschein.com

/s/ Craig S. Johnson

Summary Approved Indirect Interconnection Traffic Termination Agreements between Missouri Small Rural LECs and CMRS Providers

As of July 26, 2005:

LEC	CMRS Provider	Docket #	Intra MTA Rate	Date Approved
NewLon	ATTW	TO-2002-72	.019540	10-2-01
Stoutl	ATTW	TO-2002-72	.014760	10-2-01
OrchFarm	ATTW	TO-2002-72	.019655	10-2-01
GrRiver	Alltel	TO-2002-147	.041227	10-16-01
BPS	VerizW	IO-2003-0207	.035	2-3-03
Cass	VeriW	IO-2003-0210	.035	2-3-03
Kingd	VerizW	IO-2003-0201	.035	2-3-03
Lathrop	VerizW	IO-2003-0214	.035	2-5-03
Stllvll	VerizW	IK-2003-0222	.035	2-5-03
NewFlo	VerizW	IO-2003-0211	.035	2-5-03
PeacVal	VerizW	IK-2003-0223	.035	2-5-03
Iamo	VerizW	IO-2003-0209	.035	2-6-03
RockP	VerizW	IK-2003-0259	.035	3-4-03
Le-Ru	VerizW	IK-2003-0255	.035	3-12-03
GrRiver	VerizW	IO-2003-213	.035	3-17-03
GrHills	VerizW	IO-2003-0208	.035	3-17-03
Citiz	VerizW	IK-2003-0254	.035	3-20-03
Fidel	VerizW	IK-2003-0284	.035	3-25-03
Fid2(CLEC)	VerizW	CK-2003-0285	.035	3-25-03
Fid1(CLEC)	VerizW	CK-2003-0287	.035	3-27-03
CrawKan	VerizW	IK-2003-0245	.035	4-4-03
Miller	VerizW	TK-2003-0315	.035	4-7-03
Ellington	VerizW	TK-2003-0307	.035	4-9-03
Choctaw	SprPCS	TK-2003-0373	.025	6-20-03
MoKan	SprPCS	TK-2003-0427	.025	7-3-03
Citizens	SprPCS	TO-2003-0533	.035	8-20-03
CrawKan	SprPCS	TO-2003-0577	.035	8-27-03
Fidelity	SprPCS	TO-2003-0539	.035	8-20-03
Fid1(CLEC)	SprPCS	TO-2003-0541	.035	8-20-03
Gr.River	SprPCS	TO-2003-0537	.035	8-20-03
Gr.Hills	SprPCS	TO-2003-0532	.035	8-20-03
Iamo	SprPCS	TO-2003-0536	.035	8-20-03
Kingdom	SprPCS	TO-2003-0534	.035	8-20-03
Cass	SprPCS	TO-2003-0572	.035	8-27-03
NewFlo	SprPCS	TO-2003-0552	.035	8-27-03
OreFarm	SprPCS	TK-2003-0571	.035	8-27-03

Ozark	T-Mobile	TK-2004-0166	.035	11-5-03
Goodman	T-Mobile	TK-2004-0165	.035	11-5-03
Seneca	T-Mobile	TK-2004-0167	.035	11-5-03
Fid1(CLEC)	Cingular	TO-2004-0446	.035	3-26-04
Fid2(CLEC)	Cingular	TO-2004-0447	.035	3-26-04
Fidelity	Cingular	TO-2004-0445	.035	4-6-04
Northeast	SprPCS	TK-2004-0544	.035	5-31-04
MidMo	SprPCS	TK-2004-0550	.035	6-4-04
Alma	Cingular	TK-2004-0522	.035	6-4-04
ChVall	Cingular	TK-2004-0518	.035	6-4-04
Choctaw	Cingular	TK-2004-0514	.035	6-4-04
MidMo	Cingular	TK-2004-0516	.035	6-4-04
MoKan	Cingular	TK-2004-0515	.035	6-4-04
Northeast	Cingular	TK-2004-0513	.035	6-4-04
Alma	SprPCS	TK-2004-0551	.035	6-7-04
ChVall	SprPCS	TK-2004-0543	.035	6-7-04
ChVall	Alltel	TK-2005-0189	.035	2-7-05
Choctaw	Alltel	TK-2005-0230	.035	2-7-05
MidMo	Alltel	TK-2005-0227	.035	2-27-05
MoKan	Alltel	TK-2005-0231	.035	2-27-05
Northeast	Alltel	TK-2005-0226	.035	2-27-05
Alma	Alltel	TK-2005-0262	.035	3-18-05
PcVall	SprPCS	TO-2005-0322	.035	4-27-05
Stllvll	SprPCS	TO-2005-0322	.035	5-3-05
Granby	SprPCS	TO-2005-0339	.035	5-3-05
BPS	SprPCS	TO-2005-0333	.035	5-6-05
Miller	SprPCS	TO-2005-0381	.035	5-25-05
Choctaw	T-Mobile	TK-2005-0461	.025	7-5-05
MoKan	T-Mobile	TK-2006-0462	.025	7-6-05
Alma	USCel	TO-2005-0378	.035	7-21-05
ChVall	USCel	TO-2005-0374	.035	7-21-05
Choctaw	USCel	TO-2005-0377	.025	7-21-05
MidMo	USCel	TO-2005-0376	.035	7-21-05
MoKan	USCel	TO-2005-0379	.025	7-21-05
Northeast	USCel	TO-2005-0375	.035	7-21-05