

**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' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY DETERMINATION**

COME NOW Respondents Green Hills Telecommunications Services and Mark Twain Communications Company ("Respondents" or "Rural CLECs") and for their memorandum of law in support of their motion for summary determination regarding the Complaint filed by T-Mobile USA, Inc. ("T-Mobile") pursuant to Rule 4 CSR 240-2.117, state to the Missouri Public Service Commission ("Commission" or "PSC") as follows.

I. INTRODUCTION AND SUMMARY

Commission Rule 4 CSR 240-2.117(2) authorizes the Commission to decide any case or issue on the pleadings under appropriate circumstances and provides that "the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest."¹ The Commission's rule for determination on the pleadings is "similar to judgment on the pleadings," and it is designed to "make litigation before the

¹ See e.g. *Staff of the Missouri PSC v. Port Perry Service Co.*, Case No. WC-2006-0062, *Determination on the Pleadings*, issued Nov. 10, 2005.

Commission more efficient and less costly for each entity and each person involved.”²

Judgment on the pleadings is appropriate where the moving party has clearly established that no material issue of fact remains to be resolved and “if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law.” *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000). In this case, there are no material issues of fact that remain to be resolved, and Respondents are entitled to judgment as a matter of law. Therefore, Respondents respectfully request that the Commission issue an order as soon as possible that specifically authorizes Respondents to block T-Mobile’s traffic over the LEC-to-LEC network pursuant to both: (a) the Commission’s Enhanced Record Exchange (ERE) Rules; and (b) longstanding state and federal law that allow a carrier to discontinue service for nonpayment.

II. MATERIAL FACTS

A. T-Mobile’s Traffic and Respondents’ Tariffs

1. T-Mobile f/k/a VoiceStream delivered wireless calls to Respondents’ exchanges during the time period at issue in this case.³
2. T-Mobile did not have a Commission-approved agreement with the Respondents during the time period at issue in this case.⁴
3. T-Mobile does not currently have an agreement with the Respondents.⁵
4. Both of the Respondents had wireless termination service and intrastate exchange access tariffs that were lawful and in effect at all times.⁶

² *In the Matter of the Proposed Rulemaking*, 4 CSR 240-2.117, Case No. AX-2002-159, *Order Finding Necessity for Rulemaking*, issued Sept. 27, 2001.

³ See Motion for Summary Determination and the Attached Affidavits of Renee’ Reeter for Green Hills Telecommunications Services and Bill Rohde for Mark Twain Communications Company.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

5. The Mark Twain Communications wireless service tariff was approved by the Commission in Case No. TT-2001-646 and became effective on October 23, 2001. The Green Hills Telecommunications Services Tariff became effective by operation of law on March 13, 2002.

B. T-Mobile's Unpaid Bills

6. T-Mobile has not paid its bills for service between the effective date of Respondents' wireless service tariffs and April 29, 2005.⁷

C. Notice of Blocking

7. On June 12, 2006, Respondents advised T-Mobile that they intended to begin blocking calls made by T-Mobile's customers over the LEC-to-LEC network beginning on June 21, 2006.⁸

D. Alternative Network Connections

8. Respondents' May 12, 2005 letter states that T-Mobile's wireless-originated calls "will be blocked over the LEC-to-LEC network on and after June 21, 2006."⁹ The "LEC-to-LEC network" involves a specific set of network connections between Respondents and large incumbent local exchange carriers (ILECs) such as AT&T Missouri and Sprint Missouri, but there are other ways to deliver wireless calls to Respondents' rural exchanges, such as through an interexchange or "long distance" carrier.¹⁰ T-Mobile will remain free to deliver its calls to Respondents' exchanges through any long distance

⁷ *Id.*

⁸ See T-Mobile's Complaint, Exhibit A.

⁹ *Id.* (emphasis added).

¹⁰ 4 CSR 240-29.010; see also Attached Affidavits of Renee' Reeter for Green Hills Telecommunications Services and Bill Rohde for Mark Twain Communications Company.

carrier, and the ERE Rules expressly allow carriers such as T-Mobile to deliver traffic via such alternate methods.¹¹

E. Prior Blocking of T-Mobile Traffic

9. T-Mobile's traffic was previously blocked pursuant to wireless tariffs between December 15, 2004 and April 29, 2005. During this prior blocking on the LEC-to-LEC network, T-Mobile simply delivered its calls over the facilities of other interexchange or "long distance" carriers, as documented in a newspaper article from the ST. LOUIS POST-DISPATCH:

T-Mobile USA, based in Bellevue, Wash., said it would route calls through long distance carriers to avert potential disruption.

See Motion, Exhibit A, *Companies ask SBC to Block T-Mobile Calls*, ST. LOUIS POST-DISPATCH, ¶2 (Dec. 15, 2004). This is exactly what happened, and there was no disruption of service for anyone's customers.¹² It is misleading for T-Mobile to suggest that its calls will be disrupted, especially when it has already successfully rerouted its calls during the prior four-month period of blocking on the LEC-to-LEC network.

F. Eighth Circuit Decision

10. On June 20, 2006, the Eighth Circuit reviewed most of the arguments now raised by T-Mobile before the Commission and denied T-Mobile's request for an injunction to prevent Respondents' affiliates from blocking T-Mobile's traffic over the LEC-to-LEC network. See Motion, Exhibit B. Thus, the Eighth Circuit has already rejected the arguments T-Mobile now seeks to revive before this Commission.

¹¹ 4 CSR 240-29.130(1).

¹² Alternatively, T-Mobile could contract with another wireless carrier to terminate traffic on the LEC-to-LEC network.

III. DISCUSSION

Both state and federal law authorize a telecommunications carrier to block or discontinue service to another carrier that has failed to pay its bills. The challenges to Respondents' blocking that T-Mobile seeks to resurrect in its complaint have already been rejected by this Commission and the FCC, as well as state and federal courts. Accordingly, the Commission should deny or dismiss T-Mobile's complaint and issue an order expressly authorizing Respondents to implement blocking of T-Mobile's traffic over the LEC-to-LEC network pursuant to both the Commission's ERE Rules and longstanding state and federal law that allows service to be discontinued for nonpayment.

A. Blocking/Disconnection is Allowed by State and Federal Law

1. State Law

The right to block calls or disconnect service for failure to comply with Commission-approved tariffs has been consistently upheld by the Missouri Court of Appeals. For example, in *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Service Comm'n*, 806 S.W.3d 432 (Mo. App. 1991), the Missouri Court of Appeals held that a telephone company was entitled to discontinue service to another telecommunications company upon nonpayment of bill. In *Tel-Central*, the Court explained:

To hold otherwise would mean that a telephone company would be required to serve every customer so long as service was requested whether the customer paid the bill or not.

Id. at 435 (emphasis added). Likewise, in *Allstates Transworld Van Lines v. Southwestern Bell*, 937 S.W.2d 314 (Mo. App. 1996), a business customer with cash flow problems failed to make timely payments for service, so Southwestern Bell Telephone Company (SWBT)

interrupted service at various intervals. In *Allstates*, the Court held that “**SWBT was authorized to discontinue service for ‘any sum due,’ as long as proper notice was given.**” *Id.* at 318 (emphasis added).

More recently, the Court of Appeals specifically upheld the right to block traffic for nonpayment of tariff rates when it examined wireless service tariffs:

We disagree that the Act prohibits blocking the traffic of a carrier in default of applicable tariff provisions, such failing to pay approved rates. . . . It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.

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

In *Sprint Spectrum*, the Court specifically held that the intraMTA wireless traffic at issue in this case could be blocked for failure to pay the wireless tariff rates.

Thus, the right for a Missouri telephone company to block or disconnect service to another telecommunications company that has failed to pay its bill has been consistently recognized by Missouri Courts.

2. FCC Decisions and Federal Law

The Federal Communications Commission (FCC) and the federal courts have also been consistent in recognizing the right of carriers to disconnect service for failure to pay tariffed rates. In *Tel-Central of Jefferson City, Missouri v. United Telephone Co. of Missouri*,¹³ Tel-Central filed a complaint against United Telephone (now known as “Embarq”) with the FCC and sought damages allegedly suffered from the disconnection of service of numerous WATS¹⁴ lines for nonpayment of disputed charges.¹⁵

¹³ *In the Matter of Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri*, File No. E-87-59, *Memorandum Opinion and Order*, 4 FCC Rcd 8338, rel. Nov. 29, 1989.

¹⁴ *Id.* at ¶1. Wide Area Telecommunications Service (WATS) was an outbound, direct-dial telephone

Tel-Central had vigorously disputed and refused to pay certain tariff charges for the WATS lines that United claimed were outstanding. After first providing notice that United would terminate service to Tel-Central if it did not pay the full amount of the claimed charges, United suspended service. The FCC denied Tel-Central's complaint for damages resulting from the discontinuance of service and held that "**the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties.**"¹⁶ The FCC's decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit in *Tel-Central of Jefferson City, Missouri, Inc. v. FCC*, 920 F.2d 1039 (D.C. Cir. 1990)(concluding that United "was **authorized to disconnect Tel-Central's lines for nonpayment of charges.**")(emphasis added).

In *Business WATS, Inc. v. AT&T*,¹⁷ Business WATS sought an order from the FCC to prevent AT&T from: (1) requiring Business WATS to pay disputed charges; (2) disconnecting service to Business WATS; and/or (3) imposing security or advance payment requirements on Business WATS.¹⁸ The FCC denied the petition and stated, "**The [FCC] generally is disinclined to intervene in matters involving a carrier's decision to terminate service of a particular customer that has failed to pay legally effective and overdue tariffed charges for tariffed service that the carrier has duly rendered....**

Such determinations properly are matters within the carrier's business judgment and, as such, ordinarily will be left undisturbed, absent a showing that the carrier acted

calling service for calls placed nationwide or to a pre-specified geographical area.

¹⁵ *Id.* See also the Missouri Court of Appeals *Tel-Central* decision discussed above at 806 S.W.3d 432 (Mo. App. 1991).

¹⁶ *Id.* at ¶9 (emphasis added).

¹⁷ *In the Matter of Business WATS. v. AT&T*, File No. E-93-011, *Memorandum Opinion and Order*, 7 FCC Rcd 7942, rel. Dec. 7, 1992.

¹⁸ *Id.* at ¶1.

unreasonably or unduly discriminated.”¹⁹ The FCC explained that “a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier’s applicable tariffed charges and regulations.”²⁰ Accordingly, the FCC denied the petition for emergency relief.

In *MCI Telecom. Corp. v. AT&T*,²¹ MCI filed a “Petition for Emergency Relief” asking the FCC to order Pacific Telephone not to terminate service for nonpayment of past-due bills for private line service under Pacific Telephone’s tariffs.²² The FCC found that MCI was “legally obligated” to pay all charges properly billed pursuant to Pacific Telephone’s tariffs, and the FCC added that MCI’s “self-help approach” was contrary to both the Telecommunications Act and existing case law.²³ The FCC denied MCI’s Petition.

These FCC and federal court decisions demonstrate that Respondents are entitled to block T-Mobile’s calls because T-Mobile has failed to pay for service under the tariff rates. T-Mobile is not entitled to withhold payment as it continues its “transparent litigation strategy” and delay.

¹⁹ *Id* at ¶3.

²⁰ *Id* at ¶2.

²¹ *In the Matter of MCI Telecommunications Corp. v. AT&T and Pacific Telephone*, Rel. No. FCC 76-2119, *Memorandum Opinion and Order*, 62 F.C.C. 2d 703, rel. July 30, 1976.

²² *Id* at ¶1.

²³ *Id* at ¶6.

B. T-Mobile's Self-Help Is Prohibited by the FCC.

T-Mobile has not challenged or disputed Respondents' tariffs before this Commission or any court. Rather, T-Mobile has simply refused to pay its bills. T-Mobile's only explanation for its failure to pay its past due amounts is that T-Mobile "is currently in litigation" with the Respondents' ILEC affiliates, but T-Mobile concedes that "the CLECs are not parties to this litigation."²⁴ Thus, T-Mobile has absolutely no legal authority for its failure to pay Respondents' bills.

Moreover, even if T-Mobile had challenged Respondents' tariffs or believes that this complaint is a challenge to the tariffs, T-Mobile is not entitled to refuse payment of the Respondents' tariffed charges pending the outcome of such an appeal. On the contrary, the proper procedure is for T-Mobile to pay its bills under protest. Specifically, Federal law and FCC precedent require T-Mobile to pay the disputed amounts and prohibit T-Mobile from engaging in self-help.

For example, in *National Communications Ass'n v. AT&T*,²⁵ National Communications Association (NCA), a reseller of long distance services, sought to receive service on a going-forward basis from AT&T under a more favorable tariffed rate. However, NCA disputed and refused to pay a deposit as required by AT&T's tariff for customers that did not meet AT&T's payment history conditions. As a result, AT&T did not provide service to NCA under the more favorable tariff rate. The U.S. District Court held:

The dispute between NCA and AT&T was over the applicable rates. **The clear line of authority regarding rate disputes is that the customer may not resort to self-help; that is, the customer may not merely refuse payment of the disputed rate but must pay the rate and then bring an action to determine the validity of the carrier's actions.**²⁶

²⁴ See *Complaint*, ¶15.

²⁵ 2001 U.S. Dist LEXIS 951 (S.D.N.Y. 2001).

²⁶ *Id.* at *19 (emphasis added); see also *AT&T v. Iowa Utils Bd.*, 687 N.W.2d 554, 562 (Iowa 2004)(A

Accordingly, the District Court granted AT&T's motion for summary judgment and dismissed NCA's claims.

C. Response to T-Mobile's Arguments

T-Mobile offers a number of reasons why its wireless calls should not be blocked over the LEC-to-LEC network, but all of these arguments have been considered and rejected by this Commission, the FCC, Missouri courts, and/or the Eighth Circuit.

1. Prior FCC Approval Is Not Necessary

T-Mobile claims that the Respondents must seek and secure FCC approval before blocking T-Mobile's traffic.²⁷ T-Mobile's argument lacks merit for a number of reasons.

(a) The FCC Found Wireless Tariffs Lawful between 2001 and April 29, 2005.

Apparently, T-Mobile has forgotten that it previously challenged the lawfulness of wireless tariffs during the time period at issue here before the FCC. Specifically, T-Mobile filed a motion for declaratory judgment with the FCC that raised the same arguments before the FCC that had already been rejected by the PSC and Missouri courts. In February of 2005, the FCC denied all of T-Mobile's arguments. The FCC's decision held, "By routing traffic to LECs in the absence of a request to establish reciprocal mutual compensation, **[wireless] providers accept the terms of otherwise applicable state tariffs.**"²⁸ This FCC decision simply confirmed what the prior PSC and Missouri court decisions had already held: Respondents' wireless tariffs were neither preempted by nor in conflict with federal law or FCC rules during the time period in question. Therefore, the

telecommunications carrier "cannot institute a challenge to the [tariffed] rate merely by not paying the bill.").

²⁷ See e.g. *Complaint*, ¶¶ 11-14.

²⁸ *Id.* at ¶12 (emphasis added).

FCC has already held that T-Mobile must comply with Respondents' wireless tariffs, and Respondents do not have to seek additional FCC authority.

(b) Interstate Traffic

T-Mobile argues that this Commission has no jurisdiction to allow Respondents to block traffic that may be interstate in nature, but the Commission has already rejected this argument in the *ERE Rulemaking Order*.

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.**”²⁹

* * *

We also reject the apparent notion of some commentators that the jurisdiction of the FCC is exclusive in matters pertaining to calls that begin in one state and end in another. We cite *Southwestern Bell Telephone Co. v. United States et al.* 45 F.Supp. 403 (W.D. Mo. 1942). There, the FCC attempted to exert jurisdiction of interzone calls traversing between Missouri and Kansas. The court ruled that the Federal Communications Commission was without jurisdiction to regulate such interstate activity. Hence, we find that our local interconnection rules that include intraLATA and intraMTA calls do not infringe on interstate matters, even though LATA and MTA boundaries extend slightly into other states.³⁰

Thus, this Commission has already recognized and dismissed T-Mobile’s challenges to its jurisdiction and claims that some of the traffic is interstate. This case is not a dispute about Respondents telling wireless carriers how to route their calls. On the contrary, every other wireless carrier in Missouri has routed calls over the LEC-to-LEC network and paid for those calls between 2001 and 2005. The question presented by this case is whether or not

²⁹ *Order of Rulemaking*, 30 Mo. Reg. 1373, 1377, June 15, 2005 (emphasis added).

³⁰ *Id.* at 1379 (emphasis added).

the only wireless carrier in this state that has refused to pay its bills should be allowed to continue using a network connection that it has abused for nearly five years.

(c) Section 214 of the Act deals with exit of service territory, not disconnecting a carrier that has failed to pay its bills.

T-Mobile claims that §214 of the Federal Act requires Respondents to seek and obtain authorization from the FCC before blocking or discontinuing service to T-Mobile for failure to pay tariff rates. T-Mobile is mistaken because §214 does not apply in this situation. Section 214 provides:

... No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the [FCC] a certificate that neither the present nor public convenience and necessity will be adversely affected thereby....

47 U.S.C. §214. This provision deals with a carrier seeking to exit or reduce service in its certificated area, but Respondents do not seek to either exit or reduce providing service. Rather, Respondents seek to block the traffic of a carrier that has failed to pay its bills, and the FCC has determined that §214 does not apply under such circumstances.

For example, in *Bell Telephone Company of Pennsylvania*,³¹ Bell filed an application with the FCC for authority to discontinue interchange of traffic with Philadelphia Mobile Telephone Company (PMTTC) and Pennsylvania Radio Telephone Company (PRTC) pursuant to Section 214 of the Act for non-payment of tariffed rates.³² The FCC held that Section 214 simply did not apply to the facts.

³¹ *In Re Applications of The Bell Telephone Company of Pennsylvania for Authority and Certificate for Discontinuance, Reduction and Impairment of Service pursuant to Section 214 of the Communications Act*, Files No. W-P-D-81 and W-P-D-105, *Memorandum Opinion and Order*, 66 FCC 2d 227, rel. Sept. 28, 1977.

³² *Id.* at ¶1.

PMTC's argument that Bell must obtain authority under Section 214 of the Act, 47 U.S.C. 214, prior to taking its proposed action is simply in error. Section 214 authority is required when a carrier intends to "discontinue, reduce, or impair service." Bell intends to take no such action. Bell is not attempting to rescind a tariff offering. Rather, it is simply doing what is mandated by Section 203 of the Act, 47 U.S.C. 203, and accepting no "greater or less or different compensation" than specified in its tariff. **No one is being denied service by the carrier; even petitioners may receive service if and when they determine to pay the tariff rate. There is no requirement under Section 214 for a carrier to obtain prior approval from this Commission [the FCC] before it takes an action mandated by the Communications Act. Accordingly, Bell does not require Section 214 authority to terminate service to PMTC or PRTC for non-payment of charges made pursuant to tariff.**³³

Thus, there is no need to "secure FCC approval" under §214 before blocking T-Mobile's calls over the LEC-to-LEC network.

(d) T-Mobile has made no showing of discrimination or unreasonableness.

T-Mobile has made no showing that Respondents' proposal to block T-Mobile's calls on the LEC-to-LEC network is discriminatory or otherwise unreasonable. On the contrary, Respondents have made repeated efforts to resolve the matter through negotiations and arbitration. Again, T-Mobile is the only wireless carrier in Missouri that has refused to pay its bills, so the FCC is unlikely to intervene in this matter:

The [FCC] generally is disinclined to intervene in matters involving a carrier's decision to terminate service of a particular customer that has failed to pay legally effective and overdue tariffed charges for tariffed service that the carrier has duly rendered. Nor is the [FCC] inclined to second guess a carrier's decision, with respect to a particular customer, to impose deposit, advance payment or other security arrangements provided for in its tariff. **Such determinations properly are matters within the carrier's business judgment and, as such, ordinarily will be left undisturbed, absent a showing that the carrier acted unreasonably or unduly discriminated.**³⁴

³³ *Id.* at ¶7 (emphasis added).

³⁴ *In the Matter of Business WATS. v. AT&T*, File No. E-93-011, *Memorandum Opinion and Order*, 7 FCC

Therefore, it is unnecessary for the Respondents to seek relief from the FCC.

2. T-Mobile's Preemption and Jurisdiction Claims Were Rejected by the PSC.

T-Mobile argues that the FCC has preempted states from regulating how wireless carriers route their mobile-to-land traffic and raises a host of other jurisdictional challenges to the ERE Rule.³⁵ T-Mobile's arguments were expressly rejected by the PSC in the ERE *Order of Rulemaking*. In that case, T-Mobile was one of three wireless carriers (along with Cingular and Nextel) to file comments in opposition to the ERE Rule, and T-Mobile's comments in opposition to the ERE Rule raised the same challenges that T-Mobile seeks to revive before the Commission in this case.

When it adopted the ERE Rule, the Commission expressly rejected T-Mobile's preemption and jurisdictional challenges:

We note the comments of Joint Wireless Carriers who cite 386.020(53)(c), 386.030, and 386.250(2), RSMo as precluding our authority over the LEC-to-LEC network when such network is used by wireless carriers not subject to our jurisdiction. Sprint, likewise, questions the commission's authority in this area. Section 386.020(53)(c) excludes wireless service from the definition of telecommunications service. Section 386.030 precludes the commission's authority over interstate commerce unless specifically authorized by the Congress, and section 386.250(2) limits the commission's jurisdiction to telecommunications between one point and another point within Missouri. We also note Joint Wireless Carriers' reference to 47 U.S.C. Section 152(b), Section 251(a), 251(b)(5), Section 332(c)(3) and Section 253(a).

As we have stated, we trust that elimination of certain portions of the draft rules will alleviate the wireless carriers' concerns. However, to the extent the commentators continue to question the commission's authority to establish interconnection requirements of incumbent local service providers, we will first rely upon the commission's general authority over all telecommunications companies found throughout Chapters 386 and 392 and, in particular, section 386.320.1, RSMo 2000. This section sets forth the commission's general supervision of all telephone companies including the manner in which their lines and property are managed, conducted and operated. As stated by

Rcd 7942, rel. Dec. 7, 1992, ¶3 (emphasis added).

³⁵ *Complaint*, ¶¶16-29.

counsel for Staff, **the Enhanced Record Exchange Rules do not regulate wireless carriers, as the Joint Wireless Carriers and Sprint suppose. Rather, what the rules would regulate is use of the LEC-to-LEC network-not the wireless carriers. We find that section 386.320.1, in particular, places an obligation upon the commission to assure that all calls, including calls generated by nonregulated entities, are adequately recorded, billed, and paid for. 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.** We find this particularly so in the case of transiting traffic because terminating carriers often have little or no knowledge of those carriers placing traffic on the network. Given that terminating carriers are left to bear one hundred percent (100%) of the liability in such situations, we find that minimally invasive rules are necessary to reduce such instances as far as practical.

Joint Wireless Carriers also rely on 47 U.S.C. Section 251 as prohibiting the commission's authority over the transiting traffic generated by wireless carriers. Joint Wireless Carriers specifically cite Sections (a) and (b)(5). We acknowledge the prerogative of wireless carriers to connect to the LEC-to-LEC network with reciprocal compensation agreements based upon the most efficient technological and economic choices. And we acknowledge that wireless carriers may sign, and submit to the commission for approval, agreements to interconnect directly or indirectly with landline carriers. Indeed, we encourage all carriers to sign agreements and submit them to the commission for approval pursuant to federal and state law. However, the record before us is one of far less than complete agreements, signed or otherwise. **We are not convinced that one carrier's most technological and efficient interconnection should extend to another carrier's financial loss without an agreement.** Moreover, we would note another aspect of Section 251 not cited by Joint Wireless Carriers. **Section (d)(3) preserves a state's interconnection regulations.** Specifically, this section holds that the FCC may not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers. We find that the obligation we are imposing on incumbent local exchange carriers is a necessary interconnection obligation on incumbent carriers. Moreover, we can see nothing in our rules that prevents interconnection in the most efficient technological and economic manner, nor do we find anything in our modified rules that is otherwise inconsistent with federal law.

We also note Joint Wireless Carriers' reliance on 47 U.S.C. Section 152(b) as giving the FCC authority over intrastate wireless service and Sections 332(c)(3) and 253(a) as preempting state regulation of wireless entry. We note Joint Wireless Carriers' comment that all wireless traffic is interstate, because it is impossible or impractical to determine the end points of wireless

calls. Moreover, Joint Wireless Carriers hold that "entry" prohibitions extend to "any" regulation--regardless of whether it prohibits market entry. As we have previously stated, we anticipate that removal of certain proposed rules will lessen concern on the part of wireless carriers. But while we acknowledge federal preemption in the area of wireless services, **we do not believe our rules conflict with federal law, because they have nothing to do with the relationship between a wireless carrier and its customers. Rather, our proposed rules have only to do with the terms and conditions that may be required by those who provide services to a wireless carrier, and in particular, transiting service. Our rules are not targeted to the practices of wireless carriers; rather, our rules are targeted to the practices of regulated local exchange carriers and the network employed by them--a matter that is under the jurisdiction of this commission. In particular, our proposed rules address use of the LEC-to-LEC network, especially that traffic which is transited to terminating carriers who are not a party to agreements made between originating carriers (including but not limited to wireless carriers) and transiting carriers.**³⁶

Thus, this Commission has rejected the challenges to the ERE Rule that T-Mobile now seeks to resurrect in this case.

Likewise, in *Sprint Spectrum v. Missouri PSC*, the Missouri Court of Appeals rejected the argument that federal law preempted the Commission's authority to approve or enforce the tariffs at issue in this case:

We disagree that federal law preempted the Commission's authority to approve tariffs in the instant case. The Commission determined that the Act's 'reciprocal compensation arrangements' were inapplicable because no agreements were ever entered into by the wireless companies and the rural carriers. . . . **We agree with the Commission's determination that federal law does not preemptively govern under the facts of this case.**³⁷

Accordingly, the Missouri Court of Appeals held that the Commission was within its authority to approve Respondents' wireless tariffs, and the Commission therefore has the

³⁶ *Order of Rulemaking*, 30 Mo. Reg. 1373, June 15, 2005 (emphasis added).

authority to apply and enforce those tariffs with regard to T-Mobile's use of Respondents' networks between 2001 and April 29, 2005.

3. T-Mobile's "Prospective Rule" Blocking Argument

T-Mobile argues that the Respondents seek to apply the PSC's rules retroactively,³⁸ but T-Mobile is wrong. First, Respondents are not seeking to take any retroactive action against T-Mobile. Rather, Respondents intend to block T-Mobile's traffic over the LEC-to-LEC network on a going-forward basis under PSC Rules that T-Mobile concedes have been in effect since July of 2005. T-Mobile's "retroactive" rulemaking argument is simply inapplicable here.

Second, the blocking of T-Mobile's traffic under the ERE Rule does not involve a new "substantive" right, but simply another procedural vehicle by which to exercise a right to disconnect service for non-payment that telecommunications carriers have had for many years. *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Service Comm'n*, 806 S.W.3d 432 (Mo. App. 1991); *Allstates Transworld Van Lines v. Southwestern Bell*, 937 S.W.2d 314 (Mo. App. 1996); *Sprint Spectrum v. Missouri PSC*, 112 S.W.3d 20, 26 (Mo. App. 2003); *Tel-Central of Jefferson City, Missouri v. United Telephone Co. of Missouri*,³⁹ *Tel-Central of Jefferson City, Missouri, Inc. v. FCC*, 920 F.2d 1039 (D.C. Cir. 1990); *Business WATS, Inc. v. AT&T*,⁴⁰ *MCI Telecom. Corp. v. AT&T*.⁴¹

Moreover, even if blocking T-Mobile's traffic were to have some retroactive implication (which it does not), those effects are entirely reasonable given the

³⁷ 112 S.W.3d 20, 25 (Mo. App. 2003)(emphasis added).

³⁸ Amended Complaint, ¶31.

³⁹ *In the Matter of Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri*, File No. E-87-59, *Memorandum Opinion and Order*, 4 FCC Rcd 8338, rel. Nov. 29, 1989.

⁴⁰ *In the Matter of Business WATS. v. AT&T*, File No. E-93-011, *Memorandum Opinion and Order*, 7 FCC Rcd 7942, rel. Dec. 7, 1992.

⁴¹ *In the Matter of MCI Telecommunications Corp. v. AT&T and Pacific Telephone*, Rel. No. FCC 76-2119,

circumstances of this case. “Where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable.” *General Telephone Co. of Southwest v. United States*, 449 F.2d 846, 863 (5th Cir. 1971). At some point, any reasonable telephone customer should expect to be disconnected if they fail to pay their bills. “It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.” *Sprint Spectrum*, 112 S.W.3d at 26. Thus, T-Mobile’s retroactive rulemaking argument is both inapplicable and unreasonable.

4. Statute of Limitations

T-Mobile argues that some of Respondents’ claims are barred by the statute of limitations. T-Mobile is mistaken for a number of reasons.

First, the Commission does not need to make any determination on the statute of limitations in a complaint case such as this. For example, in *Paige v. KCPL*,⁴² the widow of baseball legend Satchel Paige filed a complaint alleging that Kansas City Power and Light (KCPL) had improperly billed her for service. KCPL raised a statute of limitations defense, but the Commission found it unnecessary to address the statute of limitations in a complaint case context:

After careful review, the Commission believes it is unnecessary to make a determination regarding the appropriate statute of limitations. The Commission is aware it cannot order any monetary or pecuniary award, refund, or reparation. Therefore, the Commission believes a determination of any applicable statute of limitations, in the instant case, falls within the province of the court system and need not be determined herein.⁴³

Memorandum Opinion and Order, 62 F.C.C. 2d 703, rel. July 30, 1976.

⁴² *LaHoma Paige v. KCPL*, Case No. EC-84-274, *Report and Order*, May 15, 1985 (Attached).

⁴³ *Id.* (internal citations omitted).

Thus, there is no need for the Commission to address T-Mobile's statute of limitations argument.

Second, the statute of limitations does not apply to cases involving disconnection of services for failure to pay bills. Third, even if the statute of limitations did apply here, Missouri law and Commission precedent provide for a five-year statute of limitations. See §516.120 RSMo. 2000; *Viola v. Union Electric*, Case No. EC-82-243, *Report and Order*, 26 Mo.P.S.C. (N.S.) 401, Dec. 8, 1983. Here, the tariffs become effective on October 23, 2001 and March 13, 2002, both within Missouri's five-year statute of limitations.

D. Other Matters

1. Negative Effect

Respondents do not agree that there will be no negative effect if T-Mobile is allowed to further delay payment of its past due bills. On the contrary, Missouri law is clear that the public interest is not served when a customer fails to pay its bills:

It is undeniable that the utility incurs added costs for processing bills not paid currently, which costs include not only the reduction in operating funds from lessened cash flow but billing and accounting expenses associated with follow-up procedures These costs would be unfairly borne by other ratepayers if the late charge schedule were not imposed on the few customers who do not pay bills currently.

Ashcroft v. Public Service Comm'n, 674 S.W.2d 660, 663 (Mo. App. 1984)(emphasis added). Respondents also continue to incur attorneys' fees and litigation expenses.

2. No Customer Disruption

Respondents expressly deny that blocking will prevent Respondents' customers from receiving calls from T-Mobile's customers, as T-Mobile will remain free to deliver its

wireless calls to Respondents' exchanges via other network connections.⁴⁴ In fact, the Commission's Enhanced Records Exchange (ERE) Rule 4 CSR 240-29.130(1) expressly allows T-Mobile to deliver its traffic over other network connections. Thus, T-Mobile customers will suffer no disruption of service if calls are blocked over Missouri's LEC-to-LEC network because the telecommunications network is redundant and T-Mobile will still be able to deliver its calls to Respondents' rural telephone exchanges via alternate connections.

The Commission's ERE rules expressly allow T-Mobile to deliver traffic to Respondents over other network connections. Specifically, "In all instances of traffic blocking, originating carriers and traffic aggregators may **utilize alternative methods of delivering blocked traffic to terminating carriers.**" 4 CSR 240-29.130(1)(emphasis added). Such methods may include "**contracting with interexchange carriers for traffic delivery.**" *Id.* Nothing prevents T-Mobile from sending its traffic over other network facilities. The only difference is that T-Mobile's traffic will be blocked over a LEC-to-LEC network connection that it has abused since 2001.

T-Mobile has already delivered its wireless traffic over such other connections when T-Mobile's traffic was blocked on the LEC-to-LEC network between December 15, 2004 and April 29, 2005. Respondents will continue to allow T-Mobile to deliver its traffic over other network connections after blocking begins. Thus, T-Mobile will not be prevented from delivering wireless calls to Respondents' rural exchanges, and there will be no customer disruption.

⁴⁴ Indeed, T-Mobile appears to admit that it will be able to deliver its traffic via an interexchange carrier ("IXC") later in its Complaint. See e.g. paragraphs 8 and 16.

3. T-Mobile Refused to Arbitrate this Matter.

T-Mobile suggests that Respondents sat on their hands since the PSC's ERE Rule went into effect on July 30, 2005.⁴⁵ T-Mobile is wrong. On April 29, 2005, Respondents requested negotiations with T-Mobile. When negotiations failed to produce an agreement, Respondents requested arbitration under the Telecommunications Act before the PSC and included T-Mobile's past due bills as an arbitration issue. T-Mobile argued strenuously to prevent Respondents from arbitrating an agreement and to have the issue of past due compensation stripped from the arbitration proceedings. On December 20, 2006, the PSC dismissed Respondents from the arbitration in Case No. TO-2006-0147.

IV. CONCLUSION

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 to wireless tariffs during this time period has rejected them. 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 Respondents' affiliates from blocking T-Mobile's traffic on the LEC-to-LEC network. 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.

WHEREFORE, Respondents respectfully request that the Commission grant summary determination in favor of Respondents and against T-Mobile and expressly authorize Respondents to begin blocking T-Mobile's traffic over the LEC-to-LEC network pursuant to both: (1) the Commission's ERE Rules; and (2) longstanding state and federal law allowing Respondents to block or discontinue service for failure to pay tariffed rates.

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⁴⁵ *Complaint*, ¶7.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 31st day of July, 2006, to the following parties:

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