BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with T-Mobile USA, Inc.	)))	Case No. TO-2006-0147
In the Matter of the Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with Cingular Wireless.	)))	Case No. TO-2006-0151

Petitioners' Arbitration Brief

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I. INTRODUCTION

These consolidated arbitration cases involve petitions filed by a group of small rural local exchange carriers ("LECs" or "Petitioners") for arbitration of the remaining terms and conditions necessary to complete traffic termination agreements with two commercial mobile radio service ("CMRS" or "wireless") carriers, Cingular and T-Mobile ("Respondents").

The first set of issues is common to both wireless carriers and involves the appropriate rate for the transport and termination of intraMTA wireless traffic. Each Petitioner has prepared and filed the Missouri Public Service Commission (Commission) a company-specific cost study using the HAI forward-looking cost model has been approved for use in developing forward looking costs by both this Commission and various federal courts. Accordingly, the Commission should adopt Petitioners' proposed $0.035 rate in this case.

Another major issue is the question of whether petitioners must pay reciprocal compensation for land-to-mobile intraMTA traffic that is carried by an IXC. Only T-Mobile has taken a position on this second issue, and Cingular has expressly taken "no position" on this issue. Petitioners' position that small rural LECs are not obligated to pay reciprocal compensation on IXC-carried calls is consistent with FCC's March 2005 *Notice of Proposed Rulemaking* in CC Docket No. 01-92, as well as prior Commission decisions, approved agreements, and industry practice (including the practice of Missouri's largest ILEC SBC/AT&T). Accordingly, this issue must be resolved in Petitioners' favor as to both Cingular and T-Mobile.

Finally, Petitioners' positions on various other issues are consistent with their dozens of other approved Missouri agreements, so these positions should be adopted by the Commission in this matter.

II. DISCUSSION

A. COMMON ISSUES

Issue 1. Must Petitioners individually establish a separate transport and termination rate based upon their own separate costs?

Petitioners propose a transport and termination rate of $0.035 per minute of use. The $0.035 rate is proposed for each Respondent Wireless Carrier, T-Mobile and Cingular, which is terminating traffic on an indirect connection basis to the Petitioners. (Schoonmaker Direct, Ex. 1, p. 6) This rate is supported by substantial evidence in the record which demonstrates that the uniform rate for each Petitioner is less than the average forward-looking cost for the small Missouri companies. *Id.*; Tr. 253. However, if the Commission feels that rates set on the individual company forward-looking costs are more appropriate, those costs are shown in Schoonmaker Direct, Ex. 1, Schedules RCS 4 and 5.

The Federal Communications Commission ("FCC") exercises its authority through rulemaking to establish a pricing methodology under the Telecommunications Act of 1996. *Verizon, et al. v. FCC, et al.*, 535 U.S. 478, 495, 122 S. Ct. 1646 (2002). The U.S. Supreme Court upheld the rules of the FCC summarizing forward-looking costs as both "(1) the total element long-run incremental cost of the element [TELRIC]; and (2) a reasonable allocation of forward-looking common costs". *Verizon, et al. v. FCC, et al.*, 535 U.S. 478, 495, 122 S. Ct. 1646 (2002)(*citing* 47 CFR Section

51.505(a)). The TELRIC incorporates three components, the operating expenses, the depreciation cost, and the appropriate risk-adjusted cost of capital. *Id*. 535 U.S. at 496. Common costs are those costs incurred in providing a group of elements that cannot be attributed to individual elements. *Id*. 535 U.S. at 495.

The rates for each of the small Missouri telephone companies were developed using a methodology that meets these legal requirements. The Petitioners identified their forward-looking costs employing the HAI 5.0a cost model (hereinafter "the HAI model").[1] (Schoonmaker Direct, Ex. 1, p. 7; Tr. 255) The HAI model uses data related to the wire centers of the individual companies in developing the individual company results. (Tr. 255) The HAI model has been used in a number of states in developing the TELRIC, or forward-looking costs of service, for incumbent local exchange carriers (ILECs). (Schoonmaker Direct, Ex. 1, p. 7)

The HAI model is consistent with prior submittals by Missouri small local exchange carriers (LECs) in prior Missouri Commission proceedings. For example, the Petitioners used the HAI model to calculate forward-looking costs as part of their presentation in the *Mark Twain* wireless termination tariff case (MoPSC Case No. TT-2001-139, et al.), and the HAI model was also used in the earlier arbitration case involving Alma Telephone Company et al. (MoPSC Case No. IO-2005-0468, et al.). (Schoonmaker Rebuttal, Ex. 2, p. 2) As recognized by this Commission, the HAI model is an established method of identifying the forward-looking costs for the transport and

[1] HAI model 5.0a is the most recent version available for use in Missouri. (Tr. 273)

termination of telecommunications traffic, and it "has evolved and been subjected to vast amounts of peer review and refinement."[2]

The HAI model was initially known as the Hatfield Model, developed by Hatfield Associates, Inc., a consulting firm in Colorado, at the request of AT&T. The model was developed with the intent of providing a tool to develop the forward-looking cost of the telephone network throughout the United States as the cost basis for universal service support and to develop the estimated cost of unbundled network elements (UNEs) for interconnection proceedings under Section 252 of the federal Telecommunications Act. (Schoonmaker Direct, Ex. 1, p.10)

The HAI model has been widely available throughout the industry and has been carefully studied by industry participants, the FCC, and many state Commissions. The HAI model produces results in formats that are readily available to identify the cost of individual cost elements. Because it includes default input values necessary to produce cost results for each company, the cost of developing appropriate, or at least acceptable, cost inputs are minimized. (Schoonmaker Direct, Ex. 1, p.7)

In this case, the rate was developed using outputs from the HAI model to develop the appropriate rates for each small Missouri telephone company. (Schoonmaker Direct, Ex. 1, p.31-32) The rates were then summarized for each of the Petitioners and combined into a weighted average. (Schoonmaker Direct, Ex. 1, p. 32 and Schedules RCS-4 and 5) Averaging the costs of the rates developed for each Petitioner provides a composite cost for the Missouri small companies that helps offset rate differences at an individual company level because of potential concerns about the model results for

[2] *In the Matter of Alma Telephone Company for Arbitration of Unresolved Issues with T-Mobile*, Case No. IO-2005-0468, *Arbitration Report*, issued Oct. 6.

small companies. Using the average cost data makes the results more comparable to results for large companies that have many exchanges. (Schoonmaker Direct, Ex. 1, p. 9)

The Petitioners' proposed $0.035 rate is substantially less than their indicated forward-looking costs. (Schoonmaker Direct, Ex. 1, p. 34; Tr. 253) For the Petitioners, an average of the forward-looking HAI costs results in an average cost of $0.0871 for T-Mobile and $0.0843 for Cingular. (Schoonmaker Direct, Ex. 1, p. 32, Schedules RCS-4 and 5) The comparison of these costs, developed individually, show that the HAI Model's average forward-looking costs are considerably higher than the proposed rate. *Id.* Thus, the factual record supports Petitioners' lower proposed rate of $0.035. *Id.*

The wireless carriers argue that the rate proposed for each of the small Missouri telephone companies is not sufficiently unique, but the small Missouri telephone companies' rate meets the legal requirements of the Act and the FCC's Rules. Indeed, the wireless carriers' own expert witness, Mr. Conwell, identified FCC Rule 51.505(e), which specifies that a reciprocal compensation rate "**not exceed**" its forward-looking economic costs of transport and termination. (Conwell Direct, Ex. 12, p.22) Mr. Conwell notes that the record must show that "costs are company-specific", "forward-looking", and "include a reasonable allocation of common costs" among other criteria. *Id.* As noted above, the record in this proceeding includes each of these elements. The forward-looking costs were developed on an individual company-specific basis. The costs were averaged for each of the Petitioners resulting in a composite calculation of forward-looking costs. These costs are considerably higher than the Petitioner's proposed rate of $0.035.

The record clearly demonstrates that Petitioners' proposed $0.035 rate is lower than the average of the forward-looking costs produced by the HAI Model for the small Missouri companies. Thus, the Petitioners' proposed $0.035 rate and the method of establishing that rate meet the standards established by the Act and the FCC's Rules.

Issue 2. What is the appropriate transport and termination rate for Petitioners?

Petitioners' proposed transport and termination rate of $0.035 per minute of use is supported by legal authorities and substantial evidence in this case. In addition, the same transport and termination rate has been approved by this Commission in over ninety (90) agreements between small rural companies (including many of the Petitioners) and other wireless carriers. To support the rate, the Petitioners examined the forward-looking costs that the Missouri companies must bear in meeting their responsibility to terminate the telecommunications traffic from the Respondents. The Petitioners identified these forward-looking costs with a cost study recognized by this Commission and other legal authorities, employing the HAI cost model. (Schoonmaker Direct, Ex. 1, p. 7) The average rate for Petitioners developed using the HAI cost model is considerably more than $0.035.

FCC rules recognize forward-looking costs as both "(1) the total element long-run incremental cost of the element [TELRIC]; and (2) a reasonable allocation of forward-looking common costs". *Verizon, et al. v. FCC*, et al., 535 U.S. 478, 495, 122 S. Ct. 1646 (2002)(citing 47 CFR Section 51.505(a)). TELRIC rates incorporate three components: the operating expenses, the depreciation cost, and the appropriate risk-

adjusted cost of capital. *Id*. 535 U.S. at 496. Common costs are those costs incurred in providing a group of elements that cannot be attributed to individual elements. *Id*. 535 U.S. at 495.

While the HAI model was initially employed to develop the forward-looking costs of large telecommunications companies, it is also an appropriate model for the small telephone companies such as the Petitioners. The HAI model is the best forward-looking model available for the Petitioners. (Schoonmaker Direct, Ex. 1, p. 9) Multiple jurisdictions have upheld the use of HAI cost results. *Qwest v. Koppendrayer*, (8th Cir. Case No. 04-3677)(filed Feb. 2, 2006); *GTE South v. Morrison*, 199 F.3d 733 (4th Cir. 1999); *Qwest v. Arizona Corp. Comm'n*, 349 F. Supp.2d 1228 (D. Ariz. 2004).

The HAI model has undergone continued development and modification over the years. (Schoonmaker Direct, Ex. 1, p. 11) Later versions were more sophisticated in cost development methods and techniques. Version 5.0a of the HAI model, used by Petitioners, was the latest version of the HAI model presented in formal comments to the FCC. *Id.* (citing the federal Universal Service Fund proceeding, CC Docket #96-45). It is also the most recent version available for use in Missouri. (Tr. 273)

The HAI model is preferred for identifying forward-looking costs for multiple reasons. First, it is an established, tested model, used in a number of states in developing forward-looking costs of service for incumbent local exchange carriers (ILECs). (Schoonmaker Direct, Ex. 1, p. 7) Thus, the model is widely available and has been examined extensively both by various state commissions and by the FCC. Through several different versions, many of the earlier problems that were recognized by those who reviewed it have been corrected, and the model has been used in

proceedings both for universal service purposes and for developing the cost of individual network elements. In examining alternatives available to it, the FCC used the HAI model as the basis for the switching and transport sections of its Synthesis Model. The Petitioners recognized that the model and its default inputs were developed under the sponsorship of AT&T and MCI, and those companies had a vested interest in seeing that the costs of network elements provided by ILECs were minimized. If anything, the HAI model might be considered to be biased against, rather than for, ILECs. (Schoonmaker Rebuttal, Ex. 2, p. 2-3). Second, the HAI model produces results that identify the cost of individual access cost elements (including switching and transport). Third, the model includes default input values to produce cost results. Accordingly, the expense of developing individual inputs is reduced, and the model is more affordable for the small Missouri telephone companies. Fourth, the HAI model allows the review and modification of a relatively small number of inputs in order to develop forward-looking costs meeting the requirements of the FCC rules. *Id.*

The integrated analysis of the HAI model includes a model design where several different modules interact and are interconnected to produce the result. (Schoonmaker Direct, Ex. 1, p. 11) The model design includes modules to develop the costs for various network elements and for the overall cost. Listed network element modules include: the cost of distribution and feeder plant, switching and interoffice plant, capital cost, and expense. Results of all these modules are then fed into a series of model output reports. *Id.* The HAI model has default values for costs which are national is scope. (Conwell, Tr. p. 364) Thus, the HAI cost model utilizes the interplay of multiple inputs to produce a comprehensive study of forward-looking costs.

In this arbitration proceeding, the Petitioners request approval of a rate of $0.035, which is lower than the average costs developed using the HAI model projecting the actual forward-looking costs of the companies. This $0.035 rate is established at the same level as rates approved by the Commission in more than ninety (90) traffic termination agreements between Missouri small rural Local Exchange Carriers ("LECs") and CMRS providers. The Commission has taken official notice of the approved interconnection agreements and specifically the parties, rate, case number, and the date approved, as listed on the Petitioners' exhibit marked Ex. 21 (Tr. 515-16)

Testifying for T-Mobile, Mr. Conwell admitted that he did not conduct his own stand-alone cost study for the Petitioners in this arbitration proceeding. (Conwell, Tr. p. 304) Mr. Conwell testified that he was unable to install and run the HAI 5.0a model on his computer. (Conwell Direct, Ex. 12, p. 23-24). But the record shows that the HAI model is compatible with current versions of Microsoft software. (Schoonmaker Rebuttal, Ex. 2, p. 4) Where not already available, Microsoft Access could be obtained at a cost of $125.00. *Id.* Ultimately, Mr. Conwell was able to obtain and utilize elements of the HAI model. (Conwell, Tr. pp. 305, 351)

Mr. Conwell focused on what he characterizes as "the most important" inputs that were most likely to lower the Petitioners' calculated rates. He testified, "I think that is what we've done in this case, which isn't to say that if we hadn't have gone in and made Data Requests about cable costs or trenching costs, that it might have further reduced the cost." (Conwell, Tr. 366) For seven of the small Missouri telephone companies, Respondents take the position that the Commission should adopt no compensation, or rather a bill-and-keep relationship. Respondents rationalize the position on the basis

that the companies have not produced sufficient information for Mr. Conwell to "compute" corrected costs. This position is taken in spite of the facts that: (1) Mr. Conwell is using no comprehensive methodology to develop such a computation; and (2) Respondents inundated the Petitioners with more than 100 data requests in this proceeding. (Conwell, Tr. p. 341-42).

Respondents' proposed rates ranged from a low of $.0025 to $.0147 per minute of use (MOU) with many of the twenty (20) recommended rates below one cent per MOU. These rates are simply not reasonable when compared with rates contained in interconnection agreements approved by this Commission. As previously noted, this Commission has approved over ninety (90) agreements between small Missouri companies (including many of Petitioners) and wireless carriers that have a rate of $.035 per MOU. In addition, Respondents' initial interconnection agreements with SBC (now AT&T) contained a rate of $.01 per MOU. While Respondents attempted to make much of the fact that their amended interconnection agreements with SBC now call for a transport and termination rate of $.0007 per MOU, it became clear on cross examination and in response to questions from the arbitration panel that this rate was not cost-based, but was a reflection of an FCC directive setting default rates for the exchange of Internet-bound traffic. (Pruitt, Tr. 472-73; Pue, Tr. 519-20)

In fact, Respondents continue to pay SBC a "transit" rate of between $.003 and $.004 per MOU which is designed to only recover SBC's cost of transiting traffic to Petitioners, not the cost of terminating that traffic. If SBC's forward-looking cost for transiting traffic is in the neighborhood of $.003 to $.004 per MOU, clearly the Petitioners' costs of <u>transporting and terminating</u> this traffic should be significantly

higher. In this regard, the Commission's conclusion in the recent *Alma Arbitration Order* is particularly appropriate:

> T-Mobile calculates a single cost of $0.0074, less than eight-tenths of a cent per minute. T-Mobile states individual Petitioner rates should not be allowed to exceed this figure, although T-Mobile offered to accept a $0.015 rate. The cost that T-Mobile calculates for Petitioners appears to be less than the rates T-Mobile pays for traffic exchanged with SBC. It is counterintuitive to conclude that the forward-looking costs of Alma, Chariton Valley, Mid-Missouri, and Northeast would be less than those of SBC. . . . The Petitioners' costs to serve those exchanges would be at least as high as the costs that a Regional Bell Operating Company, such as SBC, would have to serve its exchanges.[3]

Respondents' cost witness in this case was the same cost witness in the Alma case and his analysis in this case clearly is subject to the same criticism. [4] Mr. Conwell's results are counterintuitive when viewed in light of other relevant data.

In sum, the Petitioners' proposed transport and termination rate is based upon an appropriate forward-looking cost study using the HAI model, and the Commission should adopt Petitioners' proposed $0.035 rates.

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[3] *In the Matter of the Petition of Alma Telephone Company for Arbitration of Unresolved Issues Pertaining to a Section 251(b)(5) Agreement with T-Mobile USA*, Case No. IO-2005-0468, *Arbitration Report*, issued Oct. 6, 2005.

[4] Mr. Conwell's forward-looking economic cost recommendations for Petitioners range from a high of 1.47¢ per minute to a low of 0.25¢ per minute. (Conwell Direct, p. 11, Ex. WCC-1)

Issue 3. What is the Petitioners' forward-looking cost to purchase and install new switches?

The Petitioners use a cost component for switches in their forward-looking costs that reasonably reflects the size of the companies and the type of technology necessary for their transport and termination responsibilities. The Petitioners used a cost of $520.14 per line for switching instead of the HAI default value of $416.11 per line. (Schoonmaker Direct, Ex. 1, Schedule RCS-2) Even at this level, Petitioners' forward-looking costs are 28% less than current actual investment costs. *Id.* at 24.

The forward-looking technology for switching includes digital central office switches, both host and remote, that are generally equipped with currently required functions and features, including SS7 signaling capability. When one reviews the switching equipment actually in use by Petitioners, one finds digital central office switches, both host and remote, that are equipped with these features and functions. These switches include such recently required capabilities as interchangeable NXX codes, four digit CIC code capability, intraLATA presubscription, and in most cases, SS7 signaling and the features required by the Communications Assistance for Law Enforcement Act (CALEA). (Schoonmaker Direct, Ex. 1, p. 23).

Many of the Petitioners are using at least their second generation of digital switching equipment. The equipment is relatively new and has been upgraded since installation, as needed. While it is generally believed that the cost of switching equipment has been falling over time, the falling costs of hardware have been at least partially offset by increasing costs of switching software.

As background on the switching cost issue, the Petitioners developed their forward-looking costs in this arbitration using the HAI model, utilizing a comprehensive number of inputs in order to identify projected, or future-looking, costs of transport and termination. (Schoonmaker Direct, Ex. 1, p. 10) While the HAI model provides default inputs where necessary, Petitioners determined that the default input for switching costs would not provide an accurate result. *Id.* at 22.

The HAI default input for switching costs does not represent the forward-looking cost of end office switching equipment for small companies and their switches. *Id.* at 22. Several facts cause the default input switching costs to fail. In developing the HAI model, the default switching input value was based on switch costs for large companies like the Regional Bell Operating Companies (RBOCs) and large independent carriers such as GTE that were publicly available. (Schoonmaker Direct, Ex. 1, p. 22) The input value is used in a fairly straight line formula based on a number of lines. In reviewing the results of the default analysis, it is clear that the input does not correctly estimate the cost of switching for small offices. *Id.*

Mr. Schoonmaker performed an analysis comparing the default input model results with the actual investments incurred by the Petitioners for the central office equipment ("COE") switching in Missouri. The COE switching investments produced using the HAI default values were about 45% less than the actual COE switching investments of the Petitioners. *Id.* This is a strong indicator that the default indicator is generating inappropriate results for these companies. More appropriately, using the increased default input, Petitioners propose a forward-looking cost that is still considerably less (28%) than the current actual investments.

Overall, Mr. Schoonmaker believes that the model costs for forward-looking COE switching equipment should be relatively close to, though possibly somewhat less than, actual costs. The approximate 45% difference between the model and the actual costs for this equipment indicates that the model costs do not truly reflect the forward-looking costs of this equipment. (Schoonmaker Direct, Ex. 1, p. 23-24)

Petitioners' actual investment in COE is particularly relevant to a determination of their forward-looking costs as most of the Petitioners have replaced their switching equipment in the last five to ten years. (Schoonmaker Rebuttal, Ex. 2, p. 11) Accordingly, their actual investment in switching equipment as of 2003 is not significantly different from what they would have to pay today to replace that equipment. Nevertheless, the input value used by Mr. Schoonmaker in his analysis is 28% less than the 2003 actual switching investment for Petitioners. So, if there is any concern that actual investments are overstated, Mr. Schoonmaker's input value should more than compensate for that concern.

To put Mr. Schoonmaker's analysis in perspective, he explained that a comparison of default model inputs with the actual investments incurred by companies is not always an appropriate test of model results. *Id.* The comparison would be invalid where the network elements being developed are of a different design than that being used. (Schoonmaker Direct, Ex. 1, p. 22) However, a comparison of model input values for central office switching equipment to the actual costs for the small Missouri telephone companies is a valid comparison. *Id.* at 23. The attributes of both are practically the same. The forward-looking technology for switching includes digital central office switches, both host and remote, generally equipped with currently required

functions and features. The switching equipment actually in use by the small Missouri companies includes digital central office switches, both host and remote, which are equipped with these same functions and features.[5]

Mr. Conwell, testifying on behalf of Respondents, claims that the HAI default value for switching is not low enough. (Conwell Direct, Ex. 12, p. 31) Mr. Conwell relies on a 1999 FCC decision for his conclusion that the current cost to purchase switches is significantly lower than that identified by Petitioners. *Id.* In his calculations, he took the values from a 1999 FCC case and adjusted them further downward by 12% to arrive at his switch values. (Conwell, Tr. p. 308-309, 313) However, Mr. Conwell ignores the fact that the values adopted by the FCC for switch cost investment in 1999 are not representative of the Petitioners' costs. The information used by Mr. Conwell includes the cost of both rural and non-rural local exchange companies. (Schoonmaker Rebuttal, Ex. 2, p. 14; Conwell, Tr. p. 313) Large LECs are able to obtain much better prices than small LECs because of their ability to make bulk purchases. (Schoonmaker Rebuttal, Ex. 2, p. 14) Thus, switch cost values that include the costs for large LECs do not accurately represent the forward-looking switch costs for small LECs.

There are other problems with Mr. Conwell's testimony. For example, the 12% deflater used by Mr. Conwell is based upon testimony of a witness in Tennessee concerning the C.A. Turner Price Index. (Conwell, Tr. p. 319-320) While Mr. Conwell testified that he has a general understanding of the Turner Price Index, he does not know the specific methodology. *Id.* at 321. He does not know if it is based upon vendor quotes or actual prices paid. *Id.* And Mr. Conwell never consulted switch vendors

[5] Respondents' witness Conwell does not disagree that digital switching is still forward-looking technology for the Petitioners. (Schoonmaker Rebuttal, Ex. 2, p. 11)

himself to obtain current switch prices for either small or large local exchange companies in Missouri. (Conwell, Tr. p. 314) In testimony directly at odds with his previous position on establishing cost of switch values, Mr. Conwell also testified that the FCC data does not ultimately affect the result and calculation of the corrected costs. (Conwell, Tr. p. 313)

Respondents fail to use available and sound evidence of baseline costs of switching equipment. Using the example chosen by Mr. Conwell, his assumed switch investment for Cass County is only 30% of its actual investment. In other words, Mr. Conwell's switch costs for Cass County are 70% less than its actual embedded costs. Since Cass County began business in 1996 and replaced all of its switches in the 1996 to 1999 timeframe, its actual investment in switching is less than six to eight years old. It is simply not reasonable to assume that Cass County's switches could be replaced at only 30% of their current investment. Nevertheless, that is what Mr. Cornwell's input value for Cass County assumes. (Schoonmaker Rebuttal, Ex. 2, p. 15)

On the other hand, Petitioners start with a baseline they actually experience by purchasing the forward-looking technology required to provide service. The Petitioners then adjusted the cost of switching equipment downward by approximately 28% to recognize the possibility of some price decreases after the switches were purchased to arrive at their appropriate forward-looking costs for digital switching equipment.

Issue 4. What is the appropriate value for the usage-sensitive portion of Petitioners' forward-looking end office switching costs?

Petitioners adopt the HAI 5.0a model input value which assigns 70% of switch costs to usage sensitive costs. (Schoonmaker Rebuttal, Ex. 2, p. 16) As background, end office switching costs are allocated between those costs which are classified as traffic sensitive and those costs which are non-traffic sensitive. The traffic sensitive costs are recovered on a usage basis (i.e., per minute of use) from carriers. The non-traffic sensitive costs are recovered on a non-usage basis (i.e., flat rate) from the Petitioners' end-users (Schoonmaker Rebuttal, Ex. 2, p. 16) Both Wireless Carriers and interexchange carriers (IXCs) use the same switching facilities of Petitioners. IXCs that originate and terminate long distance traffic in Petitioners' exchanges pay an intrastate local switching access rate ranging from 0.71 to 3.69 cents per minute of use. *Id.* Wireless Carriers, such as Respondents, create the same costs as IXCs. *Id.*

The 70% proportion of switch costs to traffic sensitive costs is consistent with the current and forward-looking digital switching technology and prices for the small Missouri telephone companies. (Schoonmaker Rebuttal, Ex. 2, p. 20-21) The allocation is also supported by previous FCC determinations including the FCC's Tenth Report and Order in CC Docket 96-45 which specifically established FCC inputs for use in the FCC's synthesis model and the FCC's order In the Matter of Multi-Association Group "MAG" Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, FCC 01-304 issued in 2001. *Id.* at 16-17. The FCC codified this 70% requirement in Section 69.306 of its rules, stating that "requiring cost studies for all rate-of-return carriers would be overly burdensome, costly

and time-consuming for small carriers…By adopting a proxy, we also respond to our obligations under the Regulatory Flexibility Act to minimize administrative burdens on smaller local telephone companies." *Id.* at 17-18.

Mr. Schoonmaker testified that he recognizes that more recent HAI models make a different value for end office switching available for input. (Schoonmaker Rebuttal, Ex. 2, p. 18) He examined the new input and the evidence and records of the cases cited to justify it. Mr. Schoonmaker concluded that the more recent input is not appropriate for the Petitioners. *Id.* at 21. The evidence and cases supporting this different value involved much larger telecommunications companies and their purchasing capabilities. *Id.* at 19-21. Most significantly, the FCC rule identifying 70% of switch costs as traffic sensitive has not changed. (Schoonmaker Rebuttal, Ex. 2, p.18) As noted above, the rule notes refer to smaller local telephone companies such as the Petitioners. Mr. Schoonmaker believes this is a reasonable allocation of switch costs to traffic sensitive costs based upon his knowledge and experience with small ILEC switches. (Schoonmaker Rebuttal, Ex. 2, p. 16)

Respondents argue that the end office switching value attributed to usage sensitive costs should be significantly reduced from 70% to approximately 10%. (Conwell, Tr. p. 325) Mr. Conwell testified that the reason he used the 10% was simply "that's based on other regulatory decisions that have been made, plus [his] understanding of the switch technology". *Id.* at 351.

Respondents claim that the sole portion of usage sensitive costs for end office switching can be attributed to interoffice trunk equipment. (Conwell Direct, Ex. 12, p.49) Mr. Conwell believes it is appropriate to treat this relatively small portion of end office

switching costs as usage-sensitive. *Id.* Mr. Conwell justified this small concession explaining that the quantity of equipment used to interface the switch with incoming and outgoing trunks carrying traffic between switches is affected by the volume of traffic among offices. *Id.* The Respondents' analysis reducing usage sensitive costs results in a corresponding significant increase in the non-traffic sensitive costs. The shifting of costs to non-traffic sensitive costs substantially reduces the obligation of the Wireless Carriers for reciprocal compensation. (Conwell, Tr. p. 322-23)

Respondents cite several state commission orders and an FCC decision in support of their argument that the 70% proportion of traffic sensitive costs should be reduced, but the Minnesota and Illinois cases they cite are clearly distinguishable because they involve RBOCs such as Ameritech (now SBC/AT&T) and Qwest. For example, in the Illinois case, the witness testified:

> By the terms of the [switch vendor] contracts, Ameritech buys switching equipment by paying a one-time price for each line that it demands. The line prices do not vary with the number of lines purchased, nor with the year of purchase, nor with the state in which the equipment is to be installed; the contracts are region wide.

(Schoonmaker Rebuttal, Ex. 2, p.19) Thus, these cases involved large RBOCs rather than small companies such as the Petitioners, and this makes a difference because those RBOCs had the ability to purchase switches on a flat price, per line basis.

The Petitioners do not have long-term purchase agreements with manufacturers addressing the purchase of large volumes of switches. They do not have contracts with fixed prices per line, regardless of the number of lines or other equipment in the

switches. Rather, Petitioners purchase switches on an individual switch basis, frequently obtaining bids from multiple manufacturers. Those bids continue to be developed on an individual switch basis, based on the component pricing that was used for all switches in earlier years. Thus, the reasoning in these Illinois and Minnesota cases is simply not applicable here. (Schoonmaker Rebuttal, Ex. 2, p. 20)

Despite the fact that Respondents ask this Commission to dramatically reduce the percentage of switch costs to usage sensitive costs from 70% to 10%, Respondents fail to provide a substantive record for the decision. Mr. Conwell came up with 10% based on his belief that there had been significant changes in switch pricing and technology. Yet, he has not seen (let alone been involved with obtaining) switch quotes for small rural ILECs like Petitioners. He has neither worked for nor consulted with small ILECs. He has no personal first hand knowledge of Petitioners or their switching equipment/facilities. In short, he has no basis on which to conclude that switch pricing and technology has changed for Petitioners. In fact, the evidence in this case demonstrates that switch equipment for small rural carriers is still viewed as largely traffic sensitive. Attached to Mr. Schoonmaker's rebuttal testimony is a letter from Nortel, a large manufacturer of switches, which reveals that switch pricing and technology for small ILECs has not changed, and a large portion of the switch remains traffic sensitive.

Issue 5. What is the appropriate amount of Petitioners' forward-looking land and building space attributable to switching?

Petitioners accept the HAI model input value for floor space which reflects an appropriate amount of building and land investment. In contrast, Respondents reject the HAI model input value propose to reduce the calculation of floor space attributable to switching based upon a flawed understanding of the current footprint of floor space where Petitioners locate switching equipment.

Respondents' proposed reductions of land and building space are flawed by the research they conducted. In order to obtain information on the Petitioners' floor space, Respondents forwarded Data Requests asking the Petitioners to "Provide an estimate of the square footage of floor space required for each of the Petitioner's end office switches (host and remote) identified in response to question 19. Show the space required for equipment bays versus aisles, hallways, etc., that may be included". (Schoonmaker Rebuttal, Ex. 2, p. 22) Petitioners responded, interpreting the request to mean the footprint of the equipment bays only, excluding aisles, hallways, etc. *Id.*

Mr. Conwell, testifying on behalf of Respondents, made assumptions which are simply not adequate to house the host and remote switches. (Schoonmaker Rebuttal, Ex. 2, p.22)

He allowed a minimum of 100 square feet of area, resulting in switch equipment floor spaces of 100 square feet of area for the remotes (i.e., 10' x 10') and 200 square feet for the host switch (i.e., 10' x 20'). (Conwell Direct, Ex. 12, p.52) This would fail to include the space necessary to access or maintain the equipment, including, aisles

between the equipment bays, entry facilities, restrooms, space for heating and air conditioning equipment, storage space, etc.(Schoonmaker Rebuttal, Ex. 2, p.22)

It also appears that Mr. Conwell inappropriately reduces the size of the land to 200 square feet for the size of the remote switches and 400 square feet for the size of the host switch. *Id.* For the remotes, this would be an area of 14 feet by 14 feet or a perimeter of only 4 feet around the building. For the host switch, this would be an area of 20 feet by 20 feet or a perimeter of 6 feet around the building. *Id.* This would leave an unacceptably small amount of space to accommodate utility and sidewalk easements, parking, and room for external generators for emergency power. *Id.* at 22-23.

Finally, Respondents' proposed reductions of proposed land and building space are flawed because they lack a transparent methodology. Mr. Conwell provided no evidence or workpapers to the Petitioners demonstrating how he obtained his results. (Schoonmaker Rebuttal, Ex. 2, p.23) By substituting the floor space sizes, he testified that he reduced the end-office switching costs for Cass County from $0.0048 to $0.0040 per minute. (Conwell Direct, Ex. 12, p.52)

Issue 6. What is the appropriate forward-looking end office switching cost per minute of use (MOU) for all Petitioners?

Petitioners provide their calculations of each Petitioners' end office switching costs in Schedules RCS-4 and RCS-5. (Schoonmaker Direct, Ex. 1, Schedules RCS-4 and RCS-5) Respondents, on the other hand, provide evidence which is both inconsistent and confusing. The multiple versions of evidence they provide to the

Commission on their proposed end office switching costs includes testimony and exhibits prepared by their expert witness, Mr. Conwell.

In the first version, Respondents maintain a position that end office switching costs vary among Petitioners in the approximate range of $0.00116 to $0.00120 per MOU. (Joint Issues Matrix; *See* Conwell Direct, Ex. WCC-1)

In the second version, Mr. Conwell uses only one small Missouri telephone company, Cass County Telephone Company, chosen as a surrogate for all Petitioners. (Conwell Direct, Ex. 12, p. 53) He testifies that by using: (1) FCC switch cost data (selected from 1999 and further adjusted downward by a factor of 12% through his chosen calculation to identify "current dollars"); and (2) restricting land and building space requirements, he can reduce the end office switching costs by more than half (from $0.0091 to $0.0040). *Id.* at 53; *See* Conwell Direct, Ex. WCC-8.

In the third version, Mr. Conwell calculates his final determination of end office switching costs by limiting the allocation of traffic sensitive costs to merely a switch trunk investment. Mr. Conwell then assigns the switch trunk investment with an assumption of $18.33. The resulting termination cost he attributes for his surrogate, Cass County Telephone Company, is $0.0012 per minute of use (Conwell Direct, Ex. 12, pp. 53, 31)

In all the versions developed by Mr. Conwell, the lowest number identified in the record is $0.0012 MOU for Cass County Telephone Company. *Id.*; Conwell Direct, Ex. 12, p. 53. It is no coincidence that Respondents propose this number as their corrected end office switching cost for all of the Petitioners. *Id.* Mr. Conwell's calculations stop here. It makes no difference that he admits "there would presumably be slight

differences in the Petitioner costs due to differences in annual cost factors and minutes of use per line". (Conwell Direct, Ex. 12, p.53)

Respondents' lack of a comprehensive methodology is clear. Ultimately, Mr. Conwell assumes that only the trunk equipment is traffic sensitive. He fails to apply the analysis comprehensively to all of the small Missouri telephone companies. He conducts a calculation on only one company and stops. This lack of a methodology (both in choosing the input and in applying it comprehensively) and the lack of effort to calculate end office switching cost for each of the small Missouri telephone companies leaves the record bare of support for Respondents' position.

Issue 7. What are Petitioners' forward-looking cable lengths?

Petitioners' interoffice cable lengths are based on the HAI's model establishing forward-looking costs. Petitioners' position is supported by the rational foundation for the model inputs, which is a forward-looking efficient network.

The HAI model includes assumptions that the RBOC would not build facilities to Petitioners' exchanges, as has been the case historically. In an era of increasing competition, the HAI model developers predict that instead of building to the Petitioners' exchanges, the large RBOCs and other larger independent companies will build network facilities to connect their own switches. They will require the Petitioners to be responsible for building Petitioners' own network facilities to connect with the RBOC facilities. (Schoonmaker Rebuttal, Ex. 2, p.24)

The HAI Model uses a cable length input establishing a forward-looking cost. Mr. Schoonmaker recognizes that if the interoffice network would be rebuilt today, it would

be surprising to see the RBOCs build networks out to Petitioners' locations in the future. *Id.* It would be difficult for the RBOCs to economically build such facilities to Petitioners' network. The responsibility will fall increasingly to the Petitioners. *Id.* As an illustration of this fact becoming reality for Petitioners, SBC has been unwilling to build a replacement fiber cable to the Ellington Telephone Company even though the existing copper cable requires replacement. *Id.* at 25.

The HAI modelers assumed a forward-looking network that was reconstructed to reflect on a statewide basis an efficient statewide network. The network that is designed by the HAI has different tandem concentration points than the current network in order to minimize interoffice transport requirements and to increase the efficiency of the designed network. As described earlier, the model assumes that the RBOC will build network nodes and rings to interconnect its exchanges. The network design contemplates sufficient capacity on the RBOC ring network to accommodate Petitioners' traffic, but assumes that the Petitioners will provide the facilities to reach the RBOC network. This reduces the forward-looking cost of the RBOC's network, but puts additional investment requirements on the Petitioners' network.

Forward-looking costs are estimates of network costs in the future using the most cost efficient forwarding-looking technology. While in some cases, the cost efficient forward-looking technology is less expensive than embedded costs and technologies, that is not always the case, particularly in rural areas and for small companies. The conventional wisdom that forward-looking switching and transport costs have been reducing is likely true on a national scale, but it is frequently not true in rural areas. The small companies in Missouri do not prefer using forward-looking costs; they prefer using

embedded cost data which reflect the actual investments and expenses. Nevertheless, the FCC has required the use of forward-looking costs, and the Petitioners have done their best to comply with that directive.

Finally, the Commission should recognize that Cass County is only one of many companies that have many different circumstances. The Commission should be careful not to draw conclusions about the rest of the Petitioners solely on Cass County data. For example, Cass County is one of several companies that are using ring architecture in their internal network. There are other companies, particularly those with smaller numbers of exchanges, that do not use that type of architecture and their network structures would be different.

This Commission should accept the HAI model input regarding cable lengths as proposed by the Petitioners.

Issue 8. What are Petitioners' appropriate forward-looking cable sizes?

Petitioners' cable sizes of 24 fibers constitute the appropriate cable size for a forward-looking network. It would not be cost effective to install smaller cables. The 24 fiber size is a minimum industry standard. In fact, some companies use 48 fibers as their minimum interoffice cable size. (Schoonmaker Rebuttal, Ex. 2, p. 31) The HAI model developers recognize the 24 fiber size to be state of the art by including this size as a basic part of the HAI methodology.

Respondents again look back instead of forward. The Respondents' position is that fiber cables sizes should be: (1) limited to their total demand for fibers; and (2) reduced to smaller cables as they deem the reduction to be appropriate. (Joint Issues

Matrix) Respondents propose the installation of smaller cables even where they recognize that the additional costs of larger cable sizes is not significant, due to the fact that a significant portion of fiber cable costs are for trenching, engineering and installation. (Conwell Direct, Ex. 12, p. 68; Schoonmaker Rebuttal, Ex. 2, p. 31) This position seems unfounded in light of a forward-looking analysis.

Future demand for current services must be considered for forward-looking costs. Demand projections for new services are even more difficult to do. (Schoonmaker Rebuttal, Ex. 2, p. 31-32) It is clear that there may be significant future increases in demand for telecommunication services. *Id.* at 32. Why would a rational telecommunications carrier pursue the significant present-day expense of installing a smaller cable in light of potential future needs when the additional cost of the 24 fiber size is not significant?

This Commission should reject the Respondents' proposal and thin evidentiary support. Petitioners' reliance on the integrated HAI model incorporating the standard 24 fiber sized cable is appropriate for the purposes of developing forward-looking costs.

Issue 9. What is the appropriate amount of sharing of Petitioners' interoffice cabling?

Petitioners agree that sharing of interoffice facilities is appropriate. Petitioners accept the HAI model input value for sharing interoffice facilities including cabling. The HAI model includes multiple inputs in order to identify the future-looking costs. (Schoonmaker Direct, Ex. 1, p. 10-11) These values plus the accompanying

methodology make up an integrated process of establishing a complicated economic projection. *Id.* at 12.

Respondents contend that the HAI model does not recognize any sharing of interoffice facilities. Respondents' witness Mr. Conwell argues that the reduction for sharing does not occur often enough. Respondents also complain that the Petitioners allocate the cost to the transport system, rather than sharing the cost among loops, leased fibers and others. (Joint Issues Matrix)

The shared cost of fiber cables is not assigned only to transport. Sharing of fibers is included in multiple areas of the HAI model calculations. The "Wire Center Investment" worksheet of the switching and transport module of the HAI model reveals that the cost of the fiber cable is assigned to nine different types of trunks. (Schoonmaker Rebuttal, Ex. 2, p. 32) While a significant portion of the trunks are tandem trunks assigned to the common transport cost element, another significant portion is assigned to the dedicated transport element, and smaller amounts are assigned to local tandem and local direct trunks. *Id.* at 32-33. The local direct trunks include host-remote links in those cases where host-remote networks are modeled. *Id.* at 33.

Sharing is contemplated by both the Petitioners and the HAI model in the development of forward-looking costs. The position of Petitioners is supported and appropriate.

Issue 10. What is the appropriate size of Petitioners' interoffice transmission equipment in a forward-looking network?

Petitioners accept the HAI model and the model input value, including OC-48 for transmission equipment. As noted previously, the HAI model provides an integrated method of identifying future-looking costs of the telephone network as required under the federal Telecommunications Act. (Schoonmaker Direct, Ex. 1, p. 10-12) The developers of the model established appropriate input values. *Id.* at 12. The HAI model assumes an interoffice network built using OC-48 transmission systems with OC-48 add/drop multiplexer equipment and with accompanying OC-3 ADM terminal multiplexers. (Schoonmaker Rebuttal, Ex. 2, p. 35)

Respondents criticize Petitioners' assumptions as being too high. Respondents state that the small Missouri telephone companies, by accepting the HAI model input value, "assume all employ an OC48 add/drop multiplexer and a digital cross connect system." Respondents mix additional factors, including their complaints that "optical regenerators are employed every 40 miles of interoffice cable routes" and that cable routes are overstated. Respondents imply that Petitioners must limit their forward-looking capacity for growth below the indications of the HAI model inputs using no other considerations. (Schoonmaker, Tr. p. 243)

This issue illustrates Respondent's position on picking apart a comprehensive model and all the assumptions it must include in order to formulate the most efficient, forward-looking network design. The model and the inputs it employs work together to develop an industry-wide standard. This standard is projected into the future, as required by the federal Telecommunications Act and FCC Rules promulgated under the

Act. It is not difficult for the Respondent to compare this standard with the incremental attributes of an individual company as it exists today and see differences.

Remarkably, Respondent makes selections which even reduce the size of the embedded network. In his calculations based on Respondents' surrogate, Cass County Telephone Company, Mr. Conwell demonstrates this fact. He removes the information based on Cass County present OC-48 equipment and "used only the OC-3 ADM/terminal multiplexer." (Conwell Direct, Ex. 12, p. 83; Schoonmaker, Tr. p.226) Mr. Conwell also removed the regenerator investment and changed the number of nodes. *Id.* Mr. Conwell uses this information as his "correction." By removing equipment such as the OC-48 already in place as an integral part of the network, Mr. Conwell's calculation could result in a network design and rate that cannot sustain even the embedded network.

Mr. Schoonmaker understands from his engineering staff while OC-3 equipment is still available from some manufacturers, it is becoming obsolete, and they would not consider using OC-3 in a new network design. At a minimum, they would recommend nothing smaller than an OC-12 system, but more typically they would recommend an OC-48 system, and in some cases even larger systems, up to OC-192. (Schoonmaker Rebuttal, Ex. 2, p. 36) Mr. Schoonmaker concludes that the equipment proposed by Mr. Conwell does not meet the FCC's criteria of being forward-looking current technology equipment. *Id.*

In designing networks, companies' engineers purchase equipment that will be cost effective over its project life, which in the case of transmission equipment is in the neighborhood of ten years. At the present time, there is a great deal of evidence that

suggests that demand for communication facilities and bandwidth will increase substantially over that ten year period, perhaps exponentially. As the engineer and management weigh the incremental costs of larger systems in comparison to smaller ones and consider the potential future demands, network planners most frequently migrate to OC-48 systems as an appropriate transmission system. (Schoonmaker Rebuttal, Ex. 2, p. 36-37)

Contrasting with the Petitioners' efforts to comply with all legal authorities, Respondents offer no design standard for the small Missouri telephone companies. The position they promote is not forward-looking, but rather status quo. The Commission should recognize Petitioners' input value of OC-48 as the forward-looking design standard it is.

Issue 11. What are the appropriate common transport costs for each small Missouri telephone company?

The appropriate, forward-looking common transport costs for the Petitioners are the sum of the Common Transport and Dedicated Transport elements as described in Mr. Schoonmaker's testimony (Schoonmaker Direct, Ex. 1, p. 33, Schedules RCS-4 and RCS-5).

Respondents attempt to establish common transport costs by using information on Petitioners' current embedded network as well as the HAI model results. (Conwell Direct, Ex. 12, p. 82) For 20 of the Petitioners, Respondents compute common transport costs in Conwell Direct, Ex. WCC-1. For seven (7) companies, who Respondents argue have not provided enough information to T-Mobile and Cingular,

Respondent recommends that the Commission adopt bill-and-keep as the method of compensation until the seven (7) Petitioners provide more information to compute corrected costs. (As discussed more fully in Issue 19, bill-and-keep is not an available option because the evidence of all parties demonstrates that the traffic between the Petitioners and the wireless carriers is not roughly balanced.) Alternatively, the Respondents submit that the Commission should establish a rate for the seven (7) Petitioners not higher than $0.0147 per MOU. (Joint Issues Matrix) Respondents' proposals must be rejected because they fail to adequately calculate the appropriate forward-looking costs for the Petitioners.

The Commission should accept the Petitioners' common transport elements as contained in Mr. Schoonmaker's testimony (Schoonmaker Direct, Ex. 1, Schedules RCS-4 and RCS-5).

Issue 12. Should any of the costs identified in HAI 5.0a as dedicated transport be included in Petitioners' transport and termination rates?

Petitioners include dedicated and common transport costs as they are included in the HAI model analysis. In general industry usage, dedicated and common transport are considered separate and distinct transport facilities and generally only one is used for any type of traffic. However, in the development of costs in the HAI model, a different analysis is used in deriving the costs of transport facilities.

First, the total cost of the facility is developed based on the mileages between offices and the cost of fiber and terminals for the facility. This total cost is then allocated to various types of transport facilities, such as special access, local interoffice, operator

service, common trunks, and dedicated trunks, based on the number of trunks for each service. In the studies for the Petitioners, the default assumptions are changed to assume that all the traffic will be transported via common trunks so one would expect there would be no dedicated trunks. (Schoonmaker Direct, Ex. 1, p. 33)

However, the model assumes that there will be one dedicated trunk for each common trunk, and thus allocates a substantial part of the cost of the facility to dedicated trunks which should be treated as common trunks. Mr. Schoonmaker corrected for this allocation of costs to dedicated transport by adding the dedicated cost element to the cost of transport. (Schoonmaker Direct, Ex. 1, p. 33) The dedicated transport costs in the HAI model should be included as part of the Petitioners' common transport costs.

Respondents take the position that Petitioners duplicate common transport costs by including dedicated transport costs. Respondents argue that their corrections for common transport would more accurately measure transport cost. Mr. Conwell defines dedicated transport as the transport facility "that would run from a tandem switch to the local exchange carrier." *Id.* Mr. Conwell's removal of this function is improper.

Petitioners' proposal including dedicated and common trunk transport costs as they are defined in the HAI model is the appropriate position. While the transport rates developed are considerably higher than those for large companies such as SBC Missouri, these differences reflect the different unit costs of operating in rural areas with long transport distance and relatively small amounts of traffic.

Issue 13. What is the appropriate value of Petitioners' forward-looking signaling link costs?

Petitioners accept the ISUP signaling costs, based on the HAI model's default input value and costing method (*See* Schoonmaker Direct, Ex. 1, Schedules RCS-4 and RCS-5) ISUP is an acronym meaning "Integrated Services Digital Network User Part. (Newton's Telecom Dictionary, 19th Ed. 2003) The HAI model predicts forward-looking costs including ISUP signaling costs for an efficient network.

Respondents find fault with Petitioners' reliance on the HAI model and default input value. They argue that the assumptions for signaling links should be corrected. (*See* Conwell Direct, Ex. WCC-21) In contrast to the HAI model, however, the wireless carriers' method is focused on present costs.

Mr. Conwell, testifying for the Respondents, explained that rather than using the HAI model, he established his independent default model for signaling. He used the Petitioners' "current payments that they make for SS7 connections, and then again used the Hatfield model message quantities to solve for signaling costs." (Conwell, Tr. p. 349) As with other calculations performed by Mr. Conwell, he "used either the Petitioners' data or the Hatfield model data…" *Id.* at 348-49.

Mr. Conwell does not understand the signaling calculations for small ICO's and the differences between those calculations for the RBOCs. For small ICOs, the HAI model uses a simplified investment input that is based on an amount per line per wire center. Thus, the calculation of signaling investment is totally unrelated to distance, cable sizes, cable sharing, etc. for small ICOs. (Schoonmaker Rebuttal, Ex. 2, p. 38)

The Respondents' result is inappropriate for a forward-looking and efficient network design. The Respondents' methodology lacks an integrated and reliable process. The Commission should reject the results as arbitrary.

B. COMPENSATION FOR 1998-2001 TRAFFIC

Issue 14. Upon what basis should Petitioners and Cingular and T-Mobile compensate each other for traffic exchanged between February of 1998 and the 2001 effective date of Petitioners' wireless termination service tariffs?

The Petitioners' position is that they should be compensated at the same $0.035 per minute of use rate for all intraMTA 1998-2001 traffic that Petitioners have proposed for intraMTA traffic under the new agreement or at the rate finally determined by the Commission as a result of this arbitration. The wireless carriers argue that issues of past compensation are "not relevant" and not a proper subject for this arbitration.

In 1998, the Commission allowed Southwestern Bell Telephone Company (SBC) to change its wireless interconnection service tariff so that wireless carriers, rather than SBC, would be responsible for compensating small rural LECs for the use of the LECs rural networks in completing wireless-to-wireline calls. At that time, the Commission directed wireless carriers to enter into agreements with Petitioners before they sent calls, and the Commission required SBC's tariff language to reflect this requirement.

> **Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carrier's network unless the wireless**

carrier has entered into an agreement to directly compensate that carrier for the termination of such traffic.[6]

SBC's tariff became effective on February 6, 1998.[7]

Cingular and T-Mobile never entered into the agreements as directed by the Commission and required by SBC's tariff, yet both of these wireless carriers continued to send wireless calls to Petitioners' exchanges in violation of the Commission's order and SBC's tariff. The small ILECs could not block or otherwise prevent wireless carriers from making this unauthorized and uncompensated use of their facilities and services. Years of litigation followed, and Respondents have still not paid for their use of the Petitioners' networks during the three year period between the February 6, 1998 effective date of SBC's tariff revisions and the 2001 effective dates of Petitioners' wireless termination service tariffs.

The wireless cellular transiting usage summary report (CTUSR) traffic records provided by SBC establish that T-Mobile sent a total of 2,207,943 minutes of wireless-originated calls to Petitioners' exchanges and Cingular/AT&T Wireless sent a total of 20,371,389 minutes of wireless-originated calls to Petitioners' exchanges between February of 1998 and the 2001 effective date of the wireless termination service tariffs approved by this Commission. (Schoonmaker Rebuttal, Ex. 2, p. 47) Petitioners seek compensation for this traffic.

First, it is important to note that the Respondents delivered this traffic in the absence of an agreement and therefore in violation of the Commission's prohibition

[6] *In the Matter of Southwestern Bell Telephone Company's Filing to Revise Its Wireless Carrier Interconnection Service Tariff*, Case No. TT-97-524, *Report and Order*, Dec. 23, 1997 (emphasis added).
[7] Case No. TT-97-524, *Order Approving Tariff*, Feb. 6, 1998.

against sending such traffic in Case No. TT-97-524. Second, Petitioners have consistently made resolution of outstanding pre-tariff traffic amounts an issue in their negotiations with wireless carriers. Petitioners did so in this case as well. (*Id.*) In fact, during the negotiations with both T-Mobile and Cingular prior to Petitioners' bona fide request on April 29, 2005, the issue of pre-tariff traffic has always been raised and discussed, though not resolved. Third, in all of the other agreements that Petitioners have negotiated with wireless carriers and filed with the Commission for approval, Petitioners and the wireless carriers have been able to resolve this issue and entered into confidential settlement agreements. Therefore, Petitioners believe this is an appropriate issue to be raised in this arbitration and one that the Commission should resolve, particularly when it involves companies such as Respondents that have willfully ignored the Commission's order in Case No. TT-97-524. Moreover, it would be bad public policy and send the wrong message to those wireless carriers that do not play by the rules.

1. The Act Authorizes the Commission to Resolve This Dispute.

Respondents argue that the Commission lacks authority to address compensation claims for traffic exchanged before the date on which the Petitioners requested negotiations, but Section 251(d)(3) and 252(e)(3) of the Telecommunications Act expressly grant the Commission the authority to approve and enforce "requirements of state law."

a. Section 251(d)(3) of the Act

The Telecommunications Act expressly grants the PSC authority to approve and enforce interconnection obligations of local exchange carriers such as the Petitioners in this case:

> **PRESERVATION OF STATE ACCESS REGULATIONS**.
>
> In prescribing and enforcing regulations to implement the requirements of this section, **the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that**—
>
> (A) **establishes access and interconnection obligations of local exchange carriers**;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part (47 U.S.C. §251 et seq.)

47 U.S.C. §251(d)(3)(emphasis added).

In Case No. TT-97-524, the Commission prohibited wireless carriers from sending wireless calls to small rural LECs in the absence of a compensation agreement.[8] Nevertheless, Respondents violated this Commission order and sent wireless calls to the Petitioners in the absence of an approved agreement:

> Despite the fact that no such agreements were ever obtained, the wireless companies continued to send, and SWBT continued to transmit, wireless

[8] *Sprint Spectrum*, 112 S.W.3d at 23 (The Commission "prohibited the wireless companies from sending calls through SWBT that terminated with the rural carriers, unless the wireless companies had an agreement to compensate the rural carriers.")

> calls to the networks of the rural carriers without compensation. . . . The inability of the rural carriers to refuse these calls left the wireless companies with no incentive to make compensation arrangements when they could continue to terminate their calls at no cost. [9]
>
> * * *
>
> [T]he wireless companies routinely circumvent payment to the rural carriers by calculated inaction. [10]

The Commission had express authority under Section 251(d)(3) of the Act to prohibit wireless calls from being sent to small rural LECs in the absence of an agreement. Indeed, federal courts recognize that the Act expressly preserves a state commission's right to enforce its own interconnection obligations on carriers.[11] Therefore, the Commission should reject Respondents' arguments and enforce its order in Case No. TT-97-524.

b. Section 252(e)(3)

Section 252(e)(3) of the Act expressly allows state commissions to establish and enforce other requirements of state law when it reviews interconnection agreements:

> **PRESERVATION OF AUTHORITY**. Notwithstanding paragraph (2), but subject to section 253, **nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of state law in its review of an agreement**, including requiring compliance

[9] *Id.*
[10] *Id.* at 26.
[11] *BellSouth Telecomms. Inc. v. Cinergy Communs. Co.*, 297 F. Supp. 2d 946 (ED Ky. 2003).

with intrastate telecommunications service quality standards or requirements.

47 U.S.C. §252(e)(3)(emphasis added); *see also Michigan Bell Tel. Co. v. Climax Tel. Co*., 121 F.Supp. 2d 1104, 1115 (W.D. Mich. 2000)(holding that §252(e)(3) "expressly allows state commissions to establish and enforce other requirements of state law in reviewing an agreement"). Thus, Respondents' claims that the Commission lacks authority to enforce its prior decisions fail in light of this clear authority to do so under the Act.

C. SCOPE OF INTRAMTA RECIPROCAL COMPENSATION OBLIGATION

15. Must Petitioners pay Cingular and T-Mobile reciprocal compensation for intraMTA, wireline to wireless traffic that they hand off to interexchange carriers?

This issue involves the question of whether Petitioners must pay reciprocal compensation for wireline-to-wireless calls that are the responsibility of an interexchange carrier ("IXC"). Only one of the wireless carrier Respondents has taken a position on this issue.

a. Cingular has failed to take a position or offer testimony.

As a threshold matter, this issue should be decided in Petitioners' favor as to Cingular because Cingular has taken "no position" in both its position statement and testimony before the Commission on Issue 15. Indeed, Cingular witness Pue's Direct Testimony specifically identifies the issue of whether the parties' compensation

obligations apply to intraMTA traffic that one Party hands off to an IXC for termination to the other party and states as follows:

> Question: What do you understand Petitioners' position to be on this issue?
>
> Answer: I understand Petitioners' position to be that they owe no compensation on land-to-mobile traffic that they hand off to an IXC.
>
> **Question: What is Cingular's position on this issue?**
>
> **Answer: <u>Cingular takes no position on this issue</u>.**

(Pue Direct, Ex. 19, p. 16); *see also* Issues Matrix ("**<u>Cingular takes no position on this issue</u>**.")(emphasis added) Cingular has offered no evidence or position on Issue 15, so Petitioners should be entitled to judgment on the pleadings and/or a directed verdict resolving the issue in favor of Petitioners as to Cingular.

<u>Indeed, it is likely that Cingular is prohibited from taking such a position in this case because Cingular's parent company SBC (now AT&T) does not pay reciprocal compensation to wireless carriers for IXC-carried traffic</u>:

> Q. And would you – having read that and hopefully refreshing your memory, would you agree with me that your testimony in the Alma arbitration case indicates that **<u>SBC does not pay reciprocal compensation to wireless carriers on IXC-carried traffic</u>**?
>
> A. **<u>Yes</u>**.

(Tr. 400)(emphasis added) Therefore, this issue must be resolved in Petitioners' favor as to Cingular. In the event that the Commission does not resolve the

matter based on Cingular's failure to take a position or offer testimony, then Petitioners' response below to T-Mobile should apply equally to Cingular.

b. Petitioners Are Not Responsible For IXC Traffic.

Although the FCC has determined that the MTA serves as the most appropriate definition of the wireless carriers' "local" service areas for purposes of reciprocal compensation agreements under the Act, the MTAs do not correspond with the local calling area of traditional landline ILECs such as the Petitioners. Rather, the "local" calling area of a rural landline carrier is typically much smaller, so intraMTA calls from a customer of a small rural landline company to a wireless customer located outside of the rural company's local exchange boundary would be "long distance" calls dialed on a "1+" basis and, pursuant to the FCC and this Commission's intraLATA dialing parity requirements, handed off to the landline end user customer's chosen IXC.[12] The IXC pays the LEC for the use of its facilities to originate its call, delivers the call, and receives payment from the end user customer that dialed the call. In the past, wireless carriers have either received or sought compensation from the IXCs for these calls.

T-Mobile now argues that the Act's reciprocal compensation obligations apply to all intraMTA traffic regardless of the carrier originating and responsible for the call and delivering the traffic for termination. The Commission recently found in T-Mobile's favor on this issue in the *Alma Arbitration Order*.[13] Nevertheless, T-Mobile's position is inconsistent with the FCC's current view on this issue, and Petitioners should not have

[12] *In the Matter of TSR Wireless, LLC, et al v. US West, et al*., 15 FCC Rcd 11166; 2000 FCC LEXIS 3219, FCC 00-194, *Memorandum Opinion and Order*, issued May 31, 2000, ¶31 (emphasis added).

[13] The *Alma Arbitration Order* is presently on appeal in the United States District Court for the Western District of Missouri in Case No. 05-4358-CV-C-NKL.

any obligation to pay reciprocal compensation for landline traffic that is carried to T-Mobile by IXCs. The Petitioners' position is consistent with the Act, FCC rules, industry practice, prior Missouri Commission decisions, and the terms of more than ninety (90) Commission-approved traffic termination agreements between small rural ILECs and wireless carriers.

For example, in 2001, this Commission clearly explained the issue in the context of Missouri's unique telecommunications network in its *Mark Twain Wireless Tariff* decision:

> At present, with the termination of the PTC [Primary Toll Carrier] Plan, it is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. The Filing Companies' expert witness, Robert Schoonmaker, explained that the CMRS carriers' switches are located outside of the local calling scopes of the small LECs and that such calls are necessarily toll calls, and thus carried by an IXC. The CMRS carriers' witnesses admitted that the traffic is being carried by IXCs, but contend that this is a business choice made by the small LECs in order to generate access charges. **In either case, if the traffic is carried by an IXC, the IXC must compensate the CMRS carrier for the termination of the call**.[14]

Thus, the issue for IXC-carried calls in Missouri is not whether the wireless carrier is entitled to reciprocal compensation, but rather, which carrier is financially responsible for compensating the wireless carrier for terminating the

[14] *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce its Wireless Termination Service Tariff*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001 (emphasis added).

call. In 2001, the Commission correctly recognized that IXCs were responsible for compensating the wireless carriers.

T-Mobile's argument misapplies the FCC rules, state and federal tariffs, and business practices that govern relationships between LECs, end user customers, and IXCs. And the *Alma Arbitration Order* erroneously relies on the mistaken assumption that IXC traffic is the same as traffic between LECs and wireless carriers. As demonstrated by the following examples, the *Alma Arbitration Order* directly contradicts the Commission's prior findings in numerous cases such as the *Mark Twain Wireless Tariff* case as well as current industry practice in Missouri.

EXAMPLE 1. Wireline-to-Wireless Call with a "Local" NPA/NXX Number

First, assume an intraMTA call from a Sprint local landline (*i.e*. ILEC) customer in Jefferson City, Missouri to a Cingular wireless customer with a Jefferson City telephone number (or "NPA-NXX" referring to the area code + prefix) such as "573-635-XXXX" to "573-619-XXXX". This call would be dialed as a local call (*i.e.* without dialing "1+") and would be switched and delivered to Cingular's facilities by Sprint. Under this scenario, the traffic is exchanged between Sprint and Cingular, and reciprocal compensation applies.

EXAMPLE 2. Wireline-to-Wireless Call with a "Non-Local" NPA/NXX Number

Next, assume an intraMTA call from the same Sprint local landline (*i.e.* ILEC) customer in Jefferson City, Missouri to a Cingular wireless customer with a Columbia, Missouri NPA-NXX. This call would be dialed as a long distance call (*i.e*. with a "1+") and would be directed in Jefferson City to the Sprint wireline customer's chosen (i.e. presubscribed) IXC (*e.g.* AT&T) and carried to Cingular's facilities by that IXC. Under this scenario, the traffic is carried by the IXC (*e.g.* AT&T) to Cingular, and those two parties are responsible for compensating each other. Under this second example, the wireline ILEC (Sprint) has no responsibility for compensating the wireless carrier for terminating the call.

It is this second scenario that is most prevalent in rural areas because wireless carriers seldom have "local" NPA-NXX numbers in rural exchanges. Thus, virtually all traffic from customers located in rural ILEC service areas to wireless carriers is dialed on a "1+" basis and carried by an IXC, and the IXC is responsible for compensation. The Commission properly recognized this fact in the *Mark Twain Wireless Tariff Order* quoted above.

c. "1+" calls from Rural Exchanges are IXC-CMRS Calls.

In this case, Petitioners' local tariffs, which are approved by the Commission, define the Petitioners' local calling areas. All calls outside of these Commission-defined

"local" areas are "toll" calls which must be carried by the customer's chosen IXC. The Petitioners' end users are not customers of the ILEC for toll services. Rather, these rural customers choose an IXC to be their "toll" carrier and carry all "1+" calls in accordance with the FCC's mandated presubscription rules. The Petitioners' customers purchase "toll services" from their IXC of choice and pay their toll carrier for those services under the IXC's toll tariffs or price schedules. IXCs purchase the use of the ILEC's facilities to "access" end users and provision their toll services to their customers in the ILEC's exchange.

The IXCs have the business relationship with the end user customer placing the long distance call. The IXC has the right to receive compensation (*i.e*. toll charges) from the calling party and the obligation to compensate other carriers whose facilities the IXC uses to originate and terminate the call. (Schoonmaker Direct, Ex. 1, pp. 36-39) If the customer has a complaint regarding the quality or price of the long distance call, then the customer calls the IXC, not the small rural ILEC. (Tr. 391) In fact, if the IXC has no billing and collection agreement with the ILEC, then the IXC bills the end user directly and the ILEC is not involved at all with the call. (Tr. 390)

Thus, as demonstrated in the examples above, a call dialed "1+" and carried by an IXC is a call from an IXC end user to the wireless carrier customer, and the responsibility for compensation is between the IXC and the wireless carrier. The call does not fall under the FCC's rules for reciprocal compensation between ILECs and wireless carriers.[15] Thus, the rural ILEC Petitioners' final arbitration offer was consistent with FCC rules and decisions, past Missouri Commission precedent, standard industry

[15] *See* Schoonmaker Testimony, pp. 33-35.

practice in Missouri, and more than ninety (90) agreements that have been approved by the Missouri Commission.

1. FCC Rules

Under FCC rules and industry practice, reciprocal compensation rules apply to agreements for intraMTA calls "exchanged" between an ILEC and a wireless carrier, and the Petitioners agree that reciprocal compensation provisions apply where the LEC is exchanging (*i.e.* carrying) the traffic.[16] (*See* Example 1 above.) However, the reciprocal compensation rules do not apply to IXC traffic. (*See* Example 2 above.) In other words, the FCC's reciprocal compensation rules apply to traffic that is "exchanged" between wireline and wireless carriers, but this rule only addresses the situation where a LEC is actually carrying the traffic to the wireless carrier. 47 C.F.R. §51.701(b)(2). Reciprocal compensation rules simply do not apply in this case because the small rural ILECs do not carry the traffic to the wireless carriers. Rather, under the FCC's presubsription rules these calls are dialed on a "1+" basis and handed off to the customer's IXC.

Numerous FCC decisions acknowledge that IXC traffic is not presently subject to the Act's reciprocal compensation provisions. For example, less than a year ago the FCC issued a *Notice of Proposed Rulemaking* ("*NPRM*") questioning whether it should

[16] In a few limited circumstances, some of the STCG member companies do exchange traffic with wireless carriers. For example, (a) Lathrop Telephone Company is included in the Kansas City "Metropolitan Calling Area" (MCA) Plan and exchanges traffic with wireless carriers under the terms of this Commission-ordered plans; and (b) a few of the small carriers have Extended Area Service (EAS) plans and exchange traffic with wireless carriers under the terms of those Commission-ordered plans. The STCG agrees that the FCC's reciprocal compensation rules do apply in these circumstances.

retain the intraMTA rule for wireless traffic.[17] **In its March 3, 2005 *NPRM*, the FCC observed that IXCs, and not small rural ILECs, remain financially responsible for IXC traffic**. The FCC specifically identified the same issues that are present in this case and recognized that its present rules require intraMTA calls dialed on a 1+ basis to be routed through IXCs and remain subject to the access compensation regime. The FCC invited comment on whether its existing rules and industry practices could be **changed** to allow traffic to be routed to wireless carriers and made subject to reciprocal compensation, but the FCC recognized that this is simply not the case today:

> 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."[18]

[17] *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, issued March 3, 2005.

[18] *Id*. at ¶138.

Here, the FCC clearly states that it would require a future ***change*** to its access and reciprocal compensation regimes to make IXC traffic subject to reciprocal compensation. This language confirms that IXC traffic is currently not subject to reciprocal compensation.

Additional language in Paragraph 17 of the *NPRM* the FCC also clarifies that IXCs, not LECs, are responsible for IXC-carried calls:

> ***[U]nder the existing regimes, the calling party's carrier, whether LEC, IXC, or CMRS provider, compensates the called party's carrier for terminating the call.***[19]

Thus, the IXC is the calling party's carrier for IXC-carried traffic, and it is the IXC that is responsible for compensating "the called party's carrier" (i.e. the wireless carrier) for the call. The *Alma Arbitration Order* erred by placing this burden on small rural ILECs and thereby contradicts the FCC's existing compensation regimes.

T-Mobile's analysis misreads and misapplies FCC Rule 51.701. Subpart (2) of the rule defines telecommunications traffic as traffic ***exchanged between a LEC and a CMRS provider*** that, at the beginning of the call, originates and terminates within the same Major Trading Area. T-Mobile incorrectly argues that IXC traffic is the same as traffic "exchanged" between a LEC and a wireless carrier, but the term "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 either the LEC or the CMRS provider, and that each reciprocally delivers to the other to

[19] *Id*. at ¶17.

terminate. This rule does not apply to situations involving IXCs. In this arbitration issue, all of the calls at issue are being carried by an IXC to a wireless carrier, not "exchanged" between an ILEC and a wireless carrier.

2. The FCC's 2000 *TSR Wireless* Decision

The FCC has issued numerous other decisions confirming that reciprocal compensation is not appropriate for traffic carried by IXCs. For example, in its TSR Wireless decision, the FCC explained:

> Section 51.703 (b) concerns how carriers must compensate each other for the transport and termination of calls. It does not address the charges that carriers may impose upon their end users....MTAs typically are large areas that may encompass multiple LATAs, and often cross state boundaries. Pursuant to section 51.703 (b), a LEC may not charge CMRS providers for facilities use 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 reciprocal compensation if carried by the incumbent LEC, and under our access charge rules if carried by an interexchange carrier**.[20]

Again, the FCC recognizes a distinction for traffic that is carried by IXCs as opposed to traffic that is carried by small rural LECs.

3. *AT&T vs. Sprint PCS* Declaratory Ruling

In the past, wireless carriers have sought compensation for IXC-carried traffic from the IXCs. For example, in a 2002 case involving a wireless carrier (Sprint PCS)

[20] *In the Matter of TSR Wireless, LLC, et al v. US West, et al*., FCC 00-194, *Memorandum Opinion and Order*, issued May 31, 2000, ¶31 (emphasis added).

and an IXC (AT&T), the FCC held that wireless carriers could seek access compensation from IXCs:

> [N]either the Communications Act nor any Commission rule prohibits a CMRS carrier from attempting to collect access charges from an interexchange carrier. [21]

Thus, T-Mobile is already entitled to pursue access compensation from the IXCs, but T-Mobile has been unable to negotiate such contracts. (Tr. 404, 410) Instead, T-Mobile has decided to seek reciprocal compensation from the Petitioners.

4. T-Mobile Cannot Have It Both Ways

It is telling that T-Mobile refuses to pay reciprocal compensation for traffic that it sends to the small ILEC Petitioners via an IXC because "that just doesn't seem fair." (Tr. 481) The inconsistency of T-Mobile's position becomes obvious when the call path of an IXC-carried call is reversed, as evidenced by this response to questions from Mr. Voight by T-Mobile witness Billy Pruitt:

> When T-Mobile hands off traffic to an interexchange carrier, that interexchange carrier is going to carry the traffic to – and we're going to assume here – a terminating LEC. That terminating LEC is going to bill the interexchange carrier terminating access pursuant to its access tariffs. The question is, does T-Mobile have a responsibility to pay terminating reciprocal compensation to the LEC? The answer is yes. However, in

[21] *In the Matter of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-36, 2002 FCC LEXIS 3262, *Declaratory Ruling*, rel. July 3, 2002, ¶7. This FCC case was a referral from the United States District Court for the Western District of Missouri.

today's environment, that would mean that the rural LEC was getting paid twice for terminating this traffic.

* * *

The argument being made – my understanding of the argument being made by Petitioners was related to this whole concept of double billing and – and if, in fact, as I just acknowledged, T-Mobile believes they have a reciprocal compensation obligation to the LEC. But they are already receiving terminating access, so that just doesn't seem fair.

(Tr. 480-81)

The fallacy of T-Mobile's position was highlighted by Mr. Pruitt's response to questions from Ms. Dietrich:

Q. Okay. Then in reverse, if a Petitioner customer is calling the wireless customer, if I'm understanding your position, T-Mobile's position, the Petitioners should pay you reciprocal compensation because you're not receiving reciprocal compensation from the IXCs; is that correct?

A. That's one of the reasons, yes.

Q. Can you explain to me why it would be the Petitioners' responsibility to pay you if the IXCs are not paying, as opposed to somehow going after the IXCs? Why should Petitioners be penalized if you're not being paid?

A. I respectfully would say I'm not sure they're being penalized. . . .

(Tr. 486) Thus, T-Mobile appears to have a vastly different view of the situation depending on the direction of the call flow. Specifically, if an intraMTA call from one of Petitioners' customers is carried by an IXC to one of T-Mobile's customers, then T-Mobile expects payment from the Petitioners. However, if the call path is reversed, and a call from one of T-Mobile's customers is carried to one of Petitioners' customers by an IXC, then it is "just not fair" for Petitioners to expect compensation from T-Mobile.

5. Industry Practice

To the best of the STCG's information and belief, the *Alma Arbitration Order* is the first time in Missouri where it has been suggested that ILECs must pay reciprocal compensation for traffic that is carried by IXCs to wireless carriers. Indeed, during both the Alma arbitration hearing and this arbitration proceeding, T-Mobile has admitted that **SBC (now AT&T), the largest ILEC in Missouri, does not pay reciprocal compensation for landline-to-mobile traffic that is carried by an IXC**:

a. T-Mobile Witness Pruitt's Testimony in the Alma case

Q. Do you know if Southwestern Bell is paying T-Mobile for landline to wireless IXC traffic?

A. **They are not**.[22]

[22] *In The Matter of the Arbitration Petition of Alma Telephone Company*, Case No. IO-2005-0468, Tr. 263 (emphasis added).

b. T-Mobile Witness Pruitt's Testimony in this case

Q. And would you – having read that and hopefully refreshing your memory, would you agree with me that your testimony in the Alma arbitration case indicates that **SBC does not pay reciprocal compensation to wireless carriers on IXC-carried traffic**?

A. **Yes**.[23]

Nevertheless, T-Mobile expects small rural carriers to pay T-Mobile for traffic even though Missouri's largest ILEC does not pay for the same traffic. T-Mobile's position is inconsistent with statewide industry practice and should be rejected.

6. Missouri's Approved Interconnection Agreements

T-Mobile's position contradicts the terms and conditions of over ninety (90) approved agreements between small rural ILECs and wireless carriers. In all of these agreements, traffic carried by IXCs is expressly excluded for purposes of reciprocal compensation. For example, the Traffic Termination Agreement between Kingdom Telephone Company and Verizon Wireless, which was approved by the Commission in Case No. IO-2003-0201, expressly excludes traffic carried by an IXC:

> This Agreement shall cover traffic originated by, and under the responsibility of, one of the Parties . . . "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**

[23] Tr. 33 (emphasis added).

originating party has contracted with an Interexchange Carrier ("IXC") to assume the responsibility for terminating the traffic.[24]

T-Mobile's proposal departs from longstanding Missouri practice and precedent by subjecting IXC traffic to reciprocal compensation rules.

7. Precedent

The *Alma Arbitration Order* erroneously concludes "it is well settled" that landline-to-wireless IXC traffic is reciprocal compensation traffic. But this is not the case, and all of the federal cases cited in the *Arbitration Order* arose from foreign jurisdictions with very different telecommunications networks. The Act requires that state commissions examine state-specific networks and grants state commissions the discretion, in the first instance, to review the facts, interpret FCC rules, and reach their own decisions on the issues presented. In Missouri, the situation is unique in that the traffic at issue is being exchanged on a telecommunications network operating after the termination of a Primary Toll Carrier (PTC) Plan. This is vastly different from the situation in Iowa, for example, because in Iowa the small rural ILECs all participate in their own centralized interexchange network called Iowa Network Services ("INS"). There is no such centralized toll network among all small rural ILECs in Missouri.

The *Alma Arbitration Order* relies almost exclusively upon the conclusion from the Tenth Circuit's "*Atlas*" decision,[25] but the *Altas* case bases its analysis on an erroneous and outdated interpretation of paragraphs 1034-36 of the FCC's 1996 *First Report and Order*. ***Altas* fails to address the legal questions surrounding the**

[24] Case No. IO-2003-0201, Traffic Termination Agreement between Kingdom Telephone Company and Verizon Wireless, §1.1 – Scope of Agreement (emphasis added).
[25] *Atlas Tel. v. Oklahoma Corporation Comm'n*, 400 F. 3d 1256 (10th Cir. 2005).

FCC's more recent March 2005 *NPRM* discussed above. The FCC's more recent 2005 *NPRM* makes clear that wireline-to-wireless calls that are carried by IXCs are not subject to the Act's reciprocal compensation provisions. *Atlas* is also distinguishable on the facts because it did not address: (1) Missouri's unique telecommunications network; (2) the fact that Missouri's largest ILEC (SBC/AT&T) does not pay reciprocal compensation on wireline-to-wireless calls; or (3) prior Missouri Commission rulings holding that IXCs, not small rural ILECs, are responsible for paying the wireless carriers.

More accurate (and more binding) precedent is found in the Eighth Circuit's "*Comptel*" decision. In *Comptel v. FCC*, 117 F.3d 1068 (1997), the Eighth Circuit specifically held that the FCC's refusal to subject IXC traffic to the reciprocal compensation regime was lawful:

> The Act plainly preserves certain rate regimes already in place. . . . 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.

The *Comptel* case confirms that the FCC's *Local Competition Order* intended to preserve the traditional access compensation regime for IXC traffic, and IXC-carried traffic remains separate and distinct from reciprocal compensation traffic.

All three of the district court cases cited in the *Alma Arbitration Order's* description of "every federal court" are presently on appeal to the United States Circuit Courts of Appeal, and two of those cases (*Rural Iowa* and *Three Rivers*) have already been reversed and remanded once during the course of their first trip to the Eighth and Ninth Circuits, respectively. Thus, the district court decisions cited in the *Alma Arbitration Order* are neither final nor the solid precedent that the *Alma Arbitration Order* makes them out to be.

Finally, the *Alma Arbitration Order's* quotation at page 23 from an FCC brief in the D.C. Circuit Court of Appeals comes from a case that has since been remanded to the FCC and stayed as it applies to small rural carriers. *USTA v. FCC*, 400 F.3d 29 (D.C. Cir. 2005). Setting aside the question of whether a quote from an FCC brief can be considered "precedent" to begin with, the fact that the case has been remanded to the FCC and stayed by the D.C. Circuit confirms that it currently has absolutely no value as precedent and should be disregarded by the Commission.

D. IntraMTA Ratios

Issue 16. Should the Commission establish an IntraMTA Traffic Ratio for use by the parties in billing the termination of traffic?

No IntraMTA Traffic Ratio is appropriate because virtually all of the land-to-mobile traffic from Petitioners to Respondents is carried by IXCs. (*See* Issue 15 above.) Furthermore, an intraMTA traffic factor is completely inappropriate for Cingular because Cingular has taken no position on the issue of IXC-carried traffic (Issue 15). In other words, the traffic factor for Cingular is 100/0 since virtually all land-to-mobile traffic coming from Petitioners' exchanges is IXC-carried traffic.

Issue 17. What is the appropriate IntraMTA traffic balance ratio/percentage?

Should the Commission obligate the Petitioners to pay reciprocal compensation and establish intraMTA traffic ratios, those ratios should be based on an average of the actual Missouri traffic studies performed by Petitioners on T-Mobile and Cingular traffic. The results of those studies are contained in Mr. Schoonmaker's Direct Testimony, Schedules RCS-6. To conduct the traffic studies, eight of the Petitioners measured traffic to and from T-Mobile and eleven of the Petitioners measured traffic to and from Cingular. The traffic measured included traffic to and from NXX's in the entire MTA that are assigned to the Respondents. The wireless-originated traffic from the Respondents' NXXs included traffic terminated to the participating Petitioners, whether via transiting arrangements with SBC or carried by an IXC. For landline-originated traffic terminating to the Respondents, only calls carried by IXCs were included because all calls from

customers in the Petitioners' service areas are carried by IXCs. (Schoonmaker Direct, Ex. 1, p. 52)

The Petitioners propose that the mobile-to-land factor for each Petitioner be 84/16 for T-Mobile and 83/17 for Cingular because those are the averages from the traffic studies as shown in Schedule RCS-6. Petitioners' proposal is based on actual traffic studies that contained apples-to-apples comparison of traffic between the Parties. An average number is appropriate, as opposed to the use of a different factor for each Petitioner, because: (1) the number of Petitioners that performed the studies comprise a large enough sample; (2) the sample is geographically diverse as it contains rural LECs in each region of the state; (3) the sample is relevant by size of carrier because the Petitioners that participated in the study included companies that adequately represent the sizes (as measured by access lines and MOU) of all of the Petitioners; and (4) the results are relatively constant around the 80%-85% mobile-to-land range. (Schoonmaker Direct, Ex. 1, p. 53) The Commission has previously found Petitioners' traffic studies based on NPA-NXX to be credible. *See e.g. BPS Complaint Case*, Case No. TC-2002-1077, *Report and Order*, issued Jan. 27, 1005. The Commission also adopted the NPA-NXX methodology in the recent *Alma Arbitration Order*, Case No. IO-2005-0468, *Report and Order*, issued Oct. 6, 2005.

T-Mobile's study produced an average ratio of 75/25, but by its own admission this is unreliable because T-Mobile's study failed to capture all of the intraMTA traffic exchanged between the parties. (Pruitt Direct, Ex. 15, p. 18) T-Mobile then arbitrarily increases the land-to-mobile traffic by 10% to arrive at a 65/35 factor. T-Mobile lacks any empirical or factual basis for this 10% adjustment. (Schoonmaker Rebuttal, Ex. 2,

pp.41-42) T-Mobile's studies are also questionable because it appears that they have captured large amounts of interMTA traffic in addition to or instead of intraMTA traffic. (Tr. 423-24) Thus, T-Mobile's studies are flawed and lacking in credibility. Therefore, for T-Mobile, the Commission should adopt the 84/16 traffic ratio as proposed by Petitioners. T-Mobile admits to concerns about the validity of its study and has not offered reasonable evidence to support a different ratio.

Cingular has failed to take a position or offer any testimony on Issue 15, so this issue has become moot for Cingular. If the Commission does choose to address the issue, then this issue should be resolved in Petitioners' favor.

First, Cingular's traffic study produced ratios of 79/21 that are not too different from the 83/17 ratios produced by Petitioners' study. Second, Cingular has provided no evidence on the derivation of these studies, the data techniques used, or how the studies were performed. (Schoonmaker Rebuttal, Ex. 2, p. 43) Third, Cingular has an 80/20 factor in its agreement with SBC, and it is only reasonable to expect that land-to-mobile calling from small rural exchanges would be lower because these calls are all toll calls. The vast majority of SBC customers, on the other hand, are located in metropolitan areas that enjoy much larger calling scopes as well as expanded calling options such as the Metropolitan Calling Area (MCA) Plan. As a result, customers in SBC exchanges are likely to make more calls and longer calls because the land-to-mobile calls are toll-free. For these reasons, if the Commission should decide to establish an intraMTA traffic ratio between Cingular and Petitioners, then the Commission should accept Petitioners' traffic ratio. If the factors become materially different, then either party has the right to adjust them. (*See* Issue 18 below.)

Issue 18. Should the contract allow for modification of the intraMTA traffic ratio?

Cingular proposes that if a party can demonstrate through a proper traffic study that the intraMTA traffic ratio has changed, then the contract should allow for modification of the ratio. Petitioners do not believe that an intraMTA traffic factor is appropriate in this case. (*See* Issue 15 above.) Also, Cingular has failed to take a position on Issue No. 15 above, so this issue is moot. Finally, if the Commission does chooses to require such a ratio for Cingular, then Petitioners do not object to periodically modifying the intraMTA traffic ratio. Thus, if Issue 15 is resolved in Petitioners' favor, then this issue is no longer necessary, and if Issue 15 is resolved in Respondents' favor, then this issue does not appear to be contested.

Issue 19. Should the parties employ bill-and-keep for compensation purposes if the traffic exchanged between Cingular and any Petitioner does not exceed a specific de minimis level (5,000 MOUs)?

Cingular proposes that the parties should exchange traffic on a bill-and-keep basis for traffic amounts less than 5,000 minutes of use (MOU) per month. In other words, Cingular would not pay for any traffic if the traffic volumes are less than 5,000 MOU that month.

As both a legal and a policy matter, Petitioners must be compensated for all of the traffic that they transport and terminate for wireless carriers. Cingular's

proposal is inappropriate and unlawful because it would allow Cingular to terminate calls for free. This is clearly prohibited by both state and federal law:

> **The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory**.

State ex rel. Sprint v. Public Service Commission, 112 S.W.3d 20, 26 (Mo. App. 2003)(emphasis added)(*citing Smith v. Illinois Bell Tel. Co*., 270 U.S. 587, 591-92, 46 S.Ct. 408, 70 L.Ed 747 (1926).

All of Petitioners' other customers pay for all of the service they use. Although 5000 minutes may not be a large amount of traffic for a large, national carrier like Cingular, it can be a material amount for small rural ILECs. Also, because Petitioners remain rate base, rate-of-return regulated, any amount of their cost of service that is not recovered from Cingular would have to be recovered from other customers. It is neither fair nor reasonable to expect other customers to pay for costs caused by Cingular. (Schoonmaker Direct, Ex. 1, p. 65); *Ashcroft v. Public Service Comm'n*, 674 S.W.2d 660, 663 (Mo. App. 1984)(Costs associated with late payment 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.")

Cingular's proposal is also prohibited under the FCC's rules because state commissions may only impose bill-and-keep if the traffic between two carriers is roughly equal. 47 C.F.R. §51.713(c). Both Petitioners' and Respondents' traffic studies demonstrate that this is clearly not the case here. (Schoonmaker Direct, Ex. 1, p. 65) In fact, not even Cingular has argued that the traffic is "roughly equal" between the carriers, and there is no rule that would allow state commissions to impose bill-and-keep

for low traffic volumes. Rather, if the traffic is out of balance, as it is, then Cingular is required to pay for the traffic that it terminates to the Petitioners.

Cingular's position appears to be premised, at least in part, on the belief that it costs more to generate and pay bills than the bill is worth. (Pue Direct, Ex. 19, p. 20) However, Petitioners and Cingular have agreed to a net billing provision, so Cingular's concerns about the costs of preparing bills are unfounded since the Petitioners would be the only parties preparing and issuing bills. (Tr. 525-26)

Finally, none of the agreements that Cingular has with other small Missouri ILECs such as Fidelity Telephone Company, Alma Telephone Company, or Chariton Valley Telephone Company contain such a provision. (Tr. 527) Therefore, the Commission should decide this issue in favor of the Petitioners.

Issue 20. Should Petitioners be required to provide local dialing for calls to a Cingular NPA/NXX rate centered in Petitioners' EAS calling scopes?

Cingular argues that Petitioners should be required to provide "local dialing" for calls to a Cingular NPA/NXX that is rate centered in Petitioners' Extended Area Service (EAS) calling scopes. For example, Kingdom Telephone Company's customers in Tebbetts, Missouri have an EAS route to Jefferson City that allows them to call Jefferson City customers on a locally dialed basis. If Cingular obtains telephone numbers for its customers that are rated in the Jefferson City wire center or exchange, then Cingular wants those Tebbetts customers to be able to dial Cingular's customers on a locally dialed basis as well. (Schoonmaker Direct, Ex. 1, p. 60; Tr. 536-541)

Petitioners are willing to implement local dialing for their customers to call Cingular customers with telephone numbers rated in the wire center or exchange with which Petitioners have EAS **provided that Cingular is also locally interconnected in the wire center or exchange to which Petitioners have EAS**. Petitioners' position is consistent with the Commission's prior decision in the arbitration case involving SBC and Mid-Missouri Cellular:

> The Commission agrees with SWBT that a call from a SWBT landline customer to a MMC Cellular customer is **properly rated as a local call only where: (1) the landline and cellular exchanges are locally interconnected; and (2) the V&H [vertical and horizontal] coordinates of the cellular exchange lie within the local calling area of the landline exchange**.[26]

Cingular's position would require Petitioners to incur additional costs and haul calls farther than they would under the traditional landline-to-landline EAS arrangements. (Tr. 539-41) Cingular's witness testified that Petitioners should not be able to recover these additional costs from either Cingular or Petitioners' own customers.

In a series of cases involving similar issues related to local number portability (LNP), the Commission held that small rural LECs (including all of the Petitioners) should not be forced to bear the costs for transporting wireless calls outside of their local service areas. The Commission explained:

[26] *In the Matter of Missouri RSA No. 7's Petition for Arbitration with Soutwestern Bell*, Case No. TO-99-279, *Arbitration Order*, April 8, 1998 (emphasis added).

> The FCC has yet to determine which carrier should bear the burden of transporting calls to ported numbers. In light of this uncertainty and the costs of securing facilities, arrangements and regulatory approval to transport calls to ported numbers, **the Commission finds that there would be an undue economic burden if Cass County must transport calls outside of its service area**.
>
> * * *
>
> First, it is uncertain whether Western Wireless or Cass County will ultimately be required to bear the costs of transporting calls to ported numbers. In order to transport calls outside of its service area, Cass County will have to bear the costs of third-party arrangements and regulatory processes. Lastly, Cass County stands to gain no benefit from these costs. **These factors combine to create an undue economic burden**.

In the Matter of the Petition of Cass County Telephone Company for Suspension of the FCC's LNP Requirements, Case No. TO-2004-0405, *Report and Order*, issued Sept. 23, 2004. Cingular's proposal must be denied for the same reasons.

Issue 21. Should Petitioners be required to accept and recognize as local all calls from/to Cingular subscribers who have been assigned numbers that are locally rated in Petitioners' switches, if Cingular does not have direct interconnection to those switches?

Cingular argues that Petitioners must recognize local numbers in their switches even if a direct interconnection trunk has not been established. This issue is also referred to as the "Virtual NXX" issue, and it is currently being reviewed by the FCC. In fact, the FCC described the Virtual NXX issue as one of the more contentious issues to come before it in the intercarrier compensation docket:

> [I]ssues related to the location of the POI [point of interconnection] and the allocation of transport costs are some of the most contentious issues in interconnection proceedings. In particular, the record suggests that there are a substantial number of disputes related to how carriers should allocate interconnection costs, particularly when the physical POI is located outside the local calling area where the call originates or when carriers are indirectly interconnected. These disputes arise in part because of a lack of clarity among the various rules governing the costs of interconnection facilities and the relationship of those rules to the single POI rule.[27]

Petitioners oppose Cingular's proposed language because it would require Petitioners to transport calls outside of their service areas – an outcome that would be unduly economically burdensome. (Schoonmaker Direct, Ex. 1, pp. 62-63) Calls from Petitioners' service areas to Cingular are currently carried by IXCs, and Petitioners do not have facilities outside of their service areas nor do they have the certificate or tariff authority to carry traffic beyond their exchanges.

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[27] *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, issued March 3, 2005, ¶91.

This issue is currently an "open" issue before the FCC in CC Docket No. 01-92, and it has been addressed recently by the Missouri Commission in a number of cases involving local number portability (LNP). For example, when faced by a similar proposal by Western Wireless in the wireline-to-wireless LNP waiver proceedings, the Commission determined that it would be economically burdensome for rural LECs to transport calls outside of their service areas in consideration of the costs for them to secure facilities, arrangements, and regulatory approval:

> **[T]he Commission finds that there would be an undue economic burden if Cass County must transport calls outside of its service area**.
>
> * * *
>
> First, it is uncertain whether Western Wireless or Cass County will ultimately be required to bear the costs of transporting calls to ported numbers. In order to transport calls outside of its service area, Cass County will have to bear the costs of third-party arrangements and regulatory processes. Lastly, Cass County stands to gain no benefit from these costs. **These factors combine to create an undue economic burden**.[28]

It would be just as economically burdensome for the Petitioners to transport calls to NXXs for which Cingular does not have facilities because the Petitioners expect they would incur the same level of costs assumed by the rural LECs in those LNP

[28] *In the Matter of the Petition of Cass County Telephone Company for Suspension of the FCC's LNP Requirements*, Case No. TO-2004-0405, *Report and Order*, issued Sept. 23, 2004

proceedings to transport calls outside of Petitioners' service areas. (Schoonmaker Direct, Ex. 1, p. 63)

In addition, the Virtual NXX issue has been pending before the FCC for a number of years, and the FCC has yet to issue any ruling. As noted above, the FCC has specifically identified the cost issues associated with Cingular's Virtual NXX proposal, so it is reasonable to assume that the FCC has concerns about the burden of this proposal upon small LECs.

Finally, Cingular's position on Virtual NXX has been previously rejected by the Missouri Commission in the *Mid-Missouri Cellular* case:

> The Commission agrees with SWBT that **local call 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. MMC has not addressed the compensation issues necessarily raised by its proposal**.

In the Matter of Missouri RSA No. 7's Petition for Arbitration with Soutwestern Bell, Case No. TO-99-279, *Arbitration Order*, issued April 8, 1998. Cingular's position in this case suffers from the same deficiencies that the Commission identified in the Mid-Missouri Cellular arbitration case because Cingular has failed to address the compensation issues raised by its proposal.[29] (*See* Tr. 539-41; 561-62)

[29] This appears to be yet another example where Cingular expects Missouri's small rural ILECs to provide a service and take on responsibilities that not even its large parent company SBC (now AT&T) is willing to do.

Issue 22. Should the contract contain provisions for both direct and indirect interconnection?

Cingular proposes that the agreement should contain provisions related to direct interconnection, but neither Cingular nor the Petitioners have requested a direct connection.

Q. Would you agree with me to date Cingular has made no specific requests to any of the Petitioners for a direct interconnection?

A. I would say that's correct, we have not issued a BFR for direct interconnection.

(Tr. 554) Thus, the issue is not ripe for a Commission decision, and there is no reason for the Commission to address direct connection at this time.

The ripeness doctrine is grounded in both the jurisdictional limits of Article III of the Constitution and policy considerations of effective court administration. *Public Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930 (8th Cir. 2005). Article III limits courts to deciding actual "Cases" and "Controversies," U.S. Const. art. III, §2, thereby prohibiting them from issuing advisory opinions, *Bender v. Education Credit Mgmt. Corp.,* 368 F.3d 846, 847-48 (8th Cir. 2004). One kind of advisory opinion is an opinion "'advising what the law would be upon a hypothetical state of facts.'" *Preiser v. Newkirk,* 422 U.S. 395, 401, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975). As for policy, courts avoid resolving disputes based on hypothetical facts because to do so would be a poor use of scarce judicial resources. *Bender,* 368 F.3d at 848. Whether a case is ripe depends on the state of the case at the time of review, not at the time of filing. *Nebraska Public Power Dist. v. MidAmerican Energy Co.,* 234 F.3d 1032, 1039-40 (8th Cir. 2000). In this

case, neither Cingular nor the Petitioners have requested a direct interconnection. Therefore, the issue of direct interconnection is not ripe, and the Commission should decline to "advise what the law would be on a hypothetical state of facts."

Furthermore, as a legal matter, direct interconnection is covered by Section 251(c) of the Act, and Petitioners currently have a rural exemption from this obligation under Section 251(f) of the Act. Thus, Cingular is required to issue a bona fide request for termination of Petitioners' rural exemption pursuant to Section 251(f) of the Act, and the Commission must hear evidence and make findings that the request is: (1) not unduly economically burdensome; (2) technically feasible; and (3) consistent with universal service principles. 47 U.S.C. §251(f). None of these conditions have been met. Moreover, the Commission's own rules require it to issue any such order terminating Petitioners' rural exemptions before a Petition for Arbitration is filed. *See* 4 CSR 240-36.040(2). This requirement has not been met either.

This arbitration is the result of a request by Petitioners for negotiations with Cingular to establish compensation for existing indirect interconnection arrangements. The Petitioners did not request and do not need direct interconnection with Cingular. (Schoonmaker Direct, Ex. 1, p. 59) Apparently, Cingular does not really need or want direct interconnection with any of the Petitioners at this time. (Tr. 554)

Direct interconnection is a very complicated process. Several of the Petitioners have established direct interconnection with wireless carriers and, as a result of those negotiations, they know that the provisions proposed by Cingular do not adequately cover all of the issues associated with direct interconnection that would need to be addressed between the parties in the event that one of the Parties chose to directly

interconnect. In other words, if the Parties choose to directly interconnect in the future, the generic language proposed by Cingular would need to either be amended or replaced anyway, especially in light of the voluminous interconnection agreements that the non-rural carriers have with CMRS carriers. The record shows that Cingular's direct connection agreement with its own parent company is over 70 pages long, yet in this case it proposes to resolve the same issues with Petitioners in only four paragraphs. (Tr. 554-55)

Rather than expending resources attempting to address hypothetical issues associated with direct interconnection which may never occur, the Petitioners believe it is a better use of everyone's resources to defer those issues until such time as a specific request for direct connection is made and all of the issues can be addressed in reality rather than in the abstract. (Schoonmaker Direct, Ex. 1, p. 60)

Issue 23. Should Petitioners be entitled to claim the Rural Exemption?

If Issue 22 is resolved in Petitioners' favor, as it must be, then this issue becomes moot. If the Commission chooses to address the merits, then Petitioners currently have a rural exemption under Section 251(f) of the Act. If Cingular wants a direct connection, then it is required to issue a bona fide request for termination of Petitioners' rural exemption pursuant to Section 251(f) of the Act. Then, the Commission is required to conduct an inquiry for the purpose of determining whether to terminate the exemption.

47 U.S.C. § 251(f)

(B) State termination of Exemption and Implementation of Schedule – The party making the bona fide request of a rural telephone company for interconnection, services, or network elements **shall submit a notice of its request to the State commission**. The state commission **shall conduct an inquiry for the purpose of determining whether to terminate the exemption** under subparagraph (A). . . .

None of these specific requirements under the Act have occurred, so the Commission need not go any further before deciding this issue in Petitioners' favor.

Cingular argues that the Petitioners' rural exemption is "irrelevant" to this proceeding, and Cingular argues that Petitioners' obligations arising under section 251(a) and (b) of the Act are sufficient to require direct interconnection. Cingular is mistaken. The compensation-related issues that need to be addressed by the Commission for the traffic currently exchanged between the parties are covered by the provisions of Section 251(b)(5) of the Act, whereas ILEC Section 251(c) service requirements are for unbundled elements, resale, collocation, and direct interconnection. (Schoonmaker Direct, Ex. 1, p. 66) Cingular is not asking for direct interconnection (or unbundled network elements, resale, or collocation). So, the agreement is clearly not a Section 251(c) agreement for any of those services.

Also, as explained above Cingular has not followed the requirements of the Act and issued a bona fide request that is necessary to terminate the Petitioners' rural exemptions. Indeed, the Commission's own rules also require that Cingular is required

to issue a bona fide request (BFR) for direct connection and termination of Petitioners' rural exemption before a Petition for Arbitration is filed. 4 CSR 240-36.040(2).

> If the incumbent local exchange carrier is a "rural carrier" subject to the rural exemption contained in 47 U.S.C. section 251(f), then a commission order terminating the rural exemption must precede any petition for arbitration.

Again, Cingular has not made any request for direct interconnection, bona fide or otherwise. (Tr. 554) Therefore, this issue must be resolved in Petitioners' favor.

This Commission has previously explained that indirect interconnection agreements with wireless carriers do not terminate the Petitioners' rural exemptions. For example, in a case involving Kingdom Telephone Company and Verizon Wireless, the Commission stated:

> The exemption at Section 251(f) does not terminate, by its express terms, until this Commission makes certain findings. The order herein at issue does not make those findings, and **the Commission finds that Kingdom has not waived its rural exemption**.[30]

Thus, the Commission has held that small rural ILECs such as Petitioners do not waive their rural exemptions by entering into indirect traffic exchange agreements with wireless carriers.

Finally, even if a bona fide request had been made and the Commission had conducted an inquiry, the Commission would have to make a finding that Cingular's

[30] *Application of Kingdom Telephone Company for Approval of a Traffic Termination Agreement under the Telecommunications Act of 1996*, Case No. IO-2003-0201, *Nunc Pro Tunc Order and Order Denying Motion for Correction*, issued Sept. 16, 2003 (emphasis added).

request is not unduly economically burdensome and is technically feasible. Again, Cingular has offered no evidence that would support these findings, so Cingular's position cannot be adopted.

For all of the reasons discussed above, this issue should be resolved in favor of the Petitioners.

Issue 24. Can CLECs seek arbitration of interconnection agreements with Cingular?

Although the Petitioners believe it is appropriate for competitive LECs (CLECs) to have the same rights as ILECs regarding negotiation and arbitration with wireless carriers, the Commission has indicated it lacks authority under the federal Act to arbitrate a dispute between CLECs and wireless carriers, and Cingular his indicated its refusal to arbitrate with CLECs under the Commission's state law authority. This issue was decided by the Arbitrator during the hearing. (Tr. 291)

E. COMPENSATION FOR 2001 – APRIL 2005 TRAFFIC

Issue 25. Upon what basis should Petitioners and T-Mobile compensate each other for traffic exchanged between 2001 and the BFR date?

In February of 2001, after notice and hearing, the Commission approved Petitioners' wireless termination service tariffs that set the rates, terms, and conditions for wireless traffic that was delivered to their exchanges in the absence of a negotiated

agreement.[31] Petitioners' wireless tariffs became effective on February 19, 2001.[32] All of Missouri's major wireless carriers (except T-Mobile) participated in the case and appealed the Commission's decision. On April 29, 2003, the Missouri Court of Appeals rejected the wireless carriers' claims that the tariffs were preempted by or in conflict with the Act.[33]

On January 27, 2005, this Commission sustained a Complaint against T-Mobile finding that T-Mobile failed to pay for its post-tariff wireless traffic and ordering T-Mobile to do so, including interest, late fees, and reasonable attorney's fees.[34] T-Mobile did not appeal the Commission's decision to the circuit court, yet T-Mobile has failed to comply with the Commission's decision.

On February 24, 2005, the FCC released a *Declaratory Ruling* which held that incumbent LECs were not prohibited from filing state wireless termination tariffs.[35] The FCC expressly stated that tariff arrangements were permitted under its existing rules, and by routing traffic to LECs in the absence of a request to establish reciprocal mutual compensation, wireless providers accepted the terms of otherwise applicable state tariffs. On a going-forward basis, the FCC prohibited the use of wireless tariffs after April of 2005 and expressly granted rural ILECs the right to compel negotiations with wireless carriers.

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[31] *In the Matter of Mark Twain Rural Telephone Company's Wireless Termination Service Tariff*, Case No. TT-2001-139, *Report and Order*.
[32] Grand River Mutual Telephone Company's wireless tariff was filed separately and became effective on Sept. 20, 2001. *See* Case No. TT-2002-127.
[33] *Sprint Spectrum v. PSC*, 112 S.W.3d 20 (Mo. App. 2003).
[34] *BPS Telephone Co. et al. Complaint*, Case No TC-2002-1077, *Report and Order*.
[35] *T-Mobile Petition for Declaratory Ruling*, CC Docket No. 01-92.

SBC's cellular transiting usage summary report (CTUSR) wireless traffic records establish that Respondent T-Mobile sent a total of 26,843,075 minutes of wireless calls to Petitioners' exchanges after the 2001 effective date of the Petitioners' wireless termination service tariffs. T-Mobile has failed to compensate the Petitioners for this traffic, and T-Mobile currently owes Petitioners nearly $1,750,000.00 for this traffic as detailed in Attachment E (Proprietary) of the Verified Petition for Arbitration.[36] (Schoonmaker Rebuttal, p. 50) This past due balance is a significant amount for small rural carriers such as Petitioners. Although Petitioners' tariffs have been upheld by both the Missouri Court of Appeals and the FCC as lawful for the time period at issue here, T-Mobile has failed to compensate the Petitioners for this traffic. T-Mobile argues that issues of past compensation are "not relevant" in this arbitration case.

T-Mobile is the only wireless carrier in Missouri that has refused to pay for wireless traffic delivered between 2001 and April of 2005. After the Missouri Court of Appeals issued its decision, all of Missouri's other major wireless carriers paid for the wireless calls they sent to Petitioners' exchanges between 2001 and 2005. The only outlier in this regard is T-Mobile.

Petitioners' position is that T-Mobile must compensate Petitioners for all past due traffic in accordance with Petitioners' wireless termination service tariffs, including interest, late fees, and reasonable attorney's fees as authorized by the tariffs. Until these past due amounts are paid in full, T-Mobile should not get the benefit of any agreement. Rather, Petitioners and any transit carriers (such as SBC) should be

[36] This amount does not include late fees or attorneys' fees, both of which are authorized by the tariffs.

authorized to take the necessary steps to block Respondent's traffic from terminating to Petitioners' exchanges over the LEC-to-LEC network.

T-Mobile argues that the matter is currently on appeal in the federal courts,[37] but none of the various federal courts where T-Mobile has filed appeals have stayed the Petitioners' tariffs. Rather, the only federal court to issue a decision in one of T-Mobile's appeals thus far is the U.S. District Court for the Western District of Missouri, Central Division (Jefferson City). In that case, the Judge dismissed T-Mobile's complaint and commented on T-Mobile's "transparent litigation strategy." In short, at no point has any federal court stayed the Petitioners' tariffs.

Respondent T-Mobile has cited one sentence from paragraph 153 in the FCC's *Interconnection Order* to prop up its argument that it is "bad faith" for Petitioners to raise the issue of T-Mobile's past due bills.[38] But T-Mobile takes the sentence entirely out of context. For example, in the first sentence of the same paragraph, the FCC declines to

[37] Tr. 462.

[38] *Local Competition Order*, 11 FCC Rcd 15499, ¶153 (1996) "We decline to find that other practices identified by the parties constitute per se violations of the duty to negotiate in good faith. Time Warner contends that we should find that a party is not negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. On its face, the hypothetical practice raises concerns. However, Time Warner did not present specific examples of how linking two independent negotiation proceedings would undermine good faith negotiations. We believe that requesting carriers have certain rights under sections 251 and 252, and those rights may not be derogated by an incumbent LEC demanding quid pro quo concessions in another proceeding. Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive."

find that a request to resolve issues concurrently violates the duty to negotiate in good faith.[39] And in the last sentence of paragraph 153, the FCC states:

> **In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive**.

Thus, T-Mobile is mistaken in suggesting that the FCC has prohibited concurrent resolution of issues, and T-Mobile is completely wrong when it claims that it is "bad faith" or unlawful for Petitioners to seek resolution of T-Mobile's past due bills in this case. On the contrary, the FCC has encouraged such consolidated resolution of issues, especially when it may equalize the bargaining power between a large multinational corporation such as T-Mobile and small rural telephone companies such as the Petitioners.

This proceeding is also factually distinguishable from the facts underlying the sentence cited by T-Mobile. First, in this case it is the small LECs that are petitioning for resolution of issues, not the wireless carrier, so the Petitioners may include those issues that remain unresolved after negotiations. Second, there is no other "independent negotiation proceeding" here; rather, there is simply an unbroken line of cases finding that T-Mobile owes Petitioners for these past due amounts.

Finally, the FCC has also held that the question of "bad faith" and "good faith" must be examined on a case-by-case basis by state commissions after considering all

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[39] *Id*. "**We decline to find that other practices identified by the parties constitute per se violations of the duty to negotiate in good faith**."

of the facts and circumstances.[40] After looking at the facts and circumstances in this case, it should be clear that the wireless carriers have acted in bad faith, not the Petitioners. In fact, T-Mobile has consistently demonstrated that it would rather seek to prolong its free ride on the rural LEC networks through "calculated inaction" and litigation than to exercise the right to compel negotiations that it has had since 1996. Petitioners, on the other hand, requested negotiation on the first possible date after the FCC granted them this right. If anything, it is T-Mobile that has proven its "bad faith" by delaying the resolution of this matter and refusing to pay its bills.

The FCC stated, "**[A]ctions that are intended to delay negotiations or resolution of disputes are inconsistent with the statutory duty to negotiate in good faith**."[41] The Missouri Court of Appeals criticized the "calculated inaction" of wireless carriers that use Petitioners' facilities in the absence of an agreement, and the U.S. District Court for the Western District of Missouri has recognized T-Mobile's "transparent litigation strategy" in refusing to pay its bills. In light of the fact that Petitioners' tariffs have been upheld by both the FCC and the Missouri courts for the time period in question, it is T-Mobile that has acted in "bad faith" by refusing to pay its bills for well over five years.

T-Mobile claims that the Commission lacks authority to require the payment of past due amounts before approving an agreement, but the Commission has done exactly that in over ninety (90) agreements between small rural LECs and various

[40] "We believe that determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances the FCC, in light of all the facts and circumstances underlying the negotiations." ¶150, *Interconnection Order.*

[41] *Interconnection Order*, ¶154.

wireless carriers. In fact, T-Mobile has itself agreed to such language with three small rural companies in Missouri.[42]

Similar language has also been approved in agreements for other companies. For example, in an *Order Approving Interconnection Agreement* issued September 21, 2005, the Commission approved the following language in an agreement between Sprint Missouri, Inc. and a competitive local exchange carrier (CLEC):

> **§5 TERM AND TERMINATION**
>
> This Agreement shall be deemed effective upon the Effective Date first stated above, and continue for a period of two years until July 18, 2007 ("End Date"), unless earlier terminated in accordance with Section 5, **provided however that if CLEC has any outstanding past due obligations to Sprint, this Agreement will not be effective until such time as any past due obligations with Sprint are paid in full**.[43]

Thus, it is standard practice in Missouri for agreements to address the payment of past due obligations, and the PSC should expressly rule that the arbitrated agreements resulting from this case are not effective until T-Mobile's past due bills have been paid. *See* 47 U.S.C. §252(c)(3)(authorizing the Commission to impose conditions and "provide a schedule for the implementation of terms and conditions by the parties to the agreement.").

[42] *See e.g.* Case No. TK-2004-0165 (Goodman Telephone Company).
[43] *In Re: The Interconnection Agreement by and between Sprint Missouri, Inc. and Missouri Network Alliance, LLC pursuant to Sections 251 and 252 of the Telecommunications Act of 1996,* Case No. IK-2006-0054, *Order Approving Interconnection Agreement*, issued Sept. 21, 2005.

Issue 26. Should the Arbitrator authorize the Petitioners and all transit providers to block T-Mobile's traffic until the past compensation issues are resolved?

T-Mobile has violated three Commission orders in Case Nos. TO-97-524, TT-2001-139, and TC-2002-1077, as well as a Missouri Court of Appeals decision by sending traffic in the absence of an agreement and in violation of Petitioners' wireless tariffs. The Commission has the authority to require T-Mobile to pay its past due bills before taking advantage of a new agreement, and similar requirements have been approved by the Commission in numerous other agreements. [44]

Such blocking is also authorized by the Commission's Enhanced Records Exchange (ERE) Rule, which provides that "A terminating carrier may request the originating tandem carrier to block, and upon such request the originating carrier shall block, the originating carrier's Local Exchange Carrier-to-Local Exchange (LEC-to-LEC) traffic, if the originating carrier has failed to fully compensate the terminating carrier for terminating compensable traffic, or if the originating carrier has failed to deliver originating caller identification to the transiting and/or terminating carriers."[45]

Petitioners' tariffs have never been stayed by either the FCC or any court. Therefore, Petitioners' position is that T-Mobile must compensate Petitioners for all past due traffic in accordance with Petitioners' wireless termination service tariffs, including

[44] See e.g. *In Re: The Interconnection Agreement by and between Sprint Missouri, Inc. and Missouri Network Alliance, LLC pursuant to Sections 251 and 252 of the Telecommunications Act of 1996,* Case No. IK-2006-0054, *Order Approving Interconnection Agreement*, issued Sept. 21, 2005 ("**[I]f CLEC has any outstanding past due obligations to Sprint, this Agreement will not be effective until such time as any past due obligations with Sprint are paid in full**.")

[45] 4 CSR 240-29.130.

interest, late fees, and reasonable attorney's fees as authorized by the tariffs and the Commission's order in Case No. TC-2002-1077. The Commission should require T-Mobile to pay its past due bills before allowing T-Mobile to take advantage of a new agreement. To this end, Petitioners and any transit carriers (such as SBC) should be authorized by the Commission to take the necessary steps to block T-Mobile's traffic from terminating to Petitioners' exchanges over the LEC-to-LEC network until it pays its past due bills.

T-Mobile argues that blocking provisions are "unnecessary and inappropriate given the availability of other legal remedies." *See* Joint Issues Matrix. The Commission should consider that this is coming from the only wireless carrier in Missouri that has failed to pay its bills under the wireless tariffs. Conversely, all of Missouri's other major wireless carriers have paid their bills for post-tariff traffic, and more than ninety (90) agreements already approved by the Commission for small LECs contain a similar blocking mechanism.

T-Mobile also argues that "consumers should not be penalized because of legal disputes between two carriers." But the evidence shows that blocking has absolutely no impact on consumers. In fact, when T-Mobile's traffic was temporarily blocked for non-payment last year, T-Mobile simply routed the calls to an IXC. (*See* Ex. 18) Thus, the customers saw no disruption of service, and the only difference was that T-Mobile had to actually pay (for the first time) for its use of the Petitioners' facilities.

F. INTERMTA TRAFFIC FACTORS

Issue 27. What InterMTA factors should be established by interconnection agreement?

The parties have reached an agreement on InterMTA factors. (See Joint Issues Matrix, Attachment A)

Issue 28. Within the traffic deemed InterMTA by applying the InterMTA factor, how should intra-state and inter-state InterMTA traffic be addressed?

The Parties agree that compensation for InterMTA traffic should be access rate based. (Schoonmaker Rebuttal, Ex. 2, p. 44). This issue addresses the proportion of the InterMTA traffic that terminates to the Petitioners' network from the Respondents. Petitioners propose an allocation of intra/interstate of the InterMTA traffic of 80% intrastate and 20% interstate that is both appropriate and reasonable. Respondent Cingular agrees. (Pue, Tr. p. 536)

Petitioners propose the same ratio of InterMTA traffic that Petitioners and other small, rural ILECs in Missouri have agreed to with Cingular and other wireless carriers. Because interstate calls are usually routed to IXCs for termination to ILECs, the preponderance of calls routed over the transit facilities of SBC would be intrastate. Rather than do detailed studies to develop this factor, the Petitioners base their ratio of 80% intrastate and 20% interstate on the agreements and underlying assumptions made between the Petitioners and wireless carriers.

Most wireless carriers have represented to the Petitioners that they routinely deliver interstate traffic to IXCs to terminate across the country along with their

intrastate interLATA traffic, much of which is also interMTA. However, in the case of three Petitioners, their exchanges are in the same LATA as the RBOC tandem, but in a different MTA. Therefore, these three Petitioners may receive a substantial percentage of interMTA traffic because of these MTA and LATA boundary situations. Most wireless carriers have recognized that this traffic is primarily intrastate in nature. T-Mobile has not. (Schoonmaker Rebuttal, Ex. 2, p. 45-46)

Respondent T-Mobile proposes a different allocation which is 20% intrastate and 80% interstate. (Pruitt, Tr. p. 416) One Petitioner, Mark Twain Rural Telephone Company, reviewed the detailed work papers provided by T-Mobile to support their study of the Mobile-to-Land/Land-to-Mobile traffic and found that the data did not support the factor. By T-Mobile's own study, the vast majority of the traffic terminating to Mark Twain is InterMTA. After reviewing the T-Mobile data call-by-call, and identifying any interMTA calls that had an interstate phone number, Mark Twain calculated the percent of interstate interMTA calls was 3%. In other words, T-Mobile's own study demonstrates that 97% of the interMTA traffic it terminates to Mark Twain is intrastate. (Schoonmaker Rebuttal, Ex. 2, p. 45; Schedule RCS-10(HC); *See* Pruitt, Tr. 424-25). T-Mobile's own data supports a ratio even larger than the Petitioner's proposal of 80% intrastate and 20% interstate.

This Commission should adopt the allocation of intra/interstate of the InterMTA traffic of 80% intrastate and 20% interstate as proposed by Petitioners.

G. SCOPE OF INTRAMTA RECIPROCAL COMPENSATION OBLIGATION

Issue 29. The interconnection agreement should include an explicit statement that reciprocal compensation for intraMTA traffic is reciprocal and symmetrical.

T-Mobile proposes that the agreement include a statement that intraMTA compensation is reciprocal and symmetrical. Petitioners do not object to such language, and the parties have reached agreement on this issue.

Issue 30. Should the interconnection agreement clarify which carrier pays for the trunks and associated costs of connecting each party's network with the third-party transit network?

T-Mobile proposes that the agreement should include language which clarifies that each originating carrier is responsible for paying for any trunks and associated costs it may incur in connecting its network with a third party transit network. Petitioners do not object to such language, and the parties have reached agreement on this issue.

Issue 31. Should the interconnection agreement require the parties to send all traffic via a third-party LEC when the parties are indirectly interconnected?

T-Mobile proposes that the agreement should not require the parties to send all traffic they exchange via a third party LEC when the parties are indirectly interconnected. Petitioners do not object to such language, and the parties have reached agreement on this issue.

H. BILLING

Issue 32. What billing mechanism should be used to reflect the IntraMTA traffic balance percentage?

This issue has two parts. The first part is the question of the appropriate method of calculating the intraMTA traffic balance percentage. The second part is the question of which records are used with the formulas.

a. Net Billing Is Not Appropriate for InterMTA Traffic.

Petitioners believe that if the Commission adopts a traffic factor for intraMTA traffic (Issues 16 & 17 above), then a net billing arrangement is appropriate. **A net billing arrangement is only appropriate, however, for intraMTA traffic**. InterMTA traffic, if any, should be identified and removed from total terminating usage before performing a net billing calculation on the remaining intraMTA minutes of use. *See* Issues Matrix. During the hearing, T-Mobile's witness agreed with this position:

Q. Well, isn't it intuitive that if you're only applying a traffic factor to intraMTA traffic, you've got to perform an interMTA allocation first to get to that intraMTA traffic?

A. Yes, if you have a – and I'll just make up some numbers. If you have 1,000 minutes, you know, and ten percent of those are interMTA, you would use – commonly could use the 90 percent number.

Q. Use the remaining 900 minutes –

A. Yes.

Q. To perform your net billing calculation, right?

A. I believe that's correct.

(T-Mobile witness Pruitt testimony, Tr. 445-46) Cingular's witness Mr. Pue also agreed that this is typically the way the billing mechanism works for interMTA traffic. (*See* Pue, Tr. 528) Accordingly, this issue should be resolved in Petitioners' favor.

b. Use of the Tandem Company's Transiting Usage Records.

T-Mobile proposes that formulas used in the development of the net bill be based on traffic terminated to the Petitioners from T-Mobile , as determined from the tandem company's transiting usage records (e.g. SBC's reports), as well as traffic for which T-Mobile has contracted with an IXC to carry the traffic but that is not identified on the transiting usage records. The Petitioners propose that the formulas apply simply to the traffic that is contained in the transiting usage reports because there is no economically feasible way for the Petitioners to determine what traffic from IXCs is associated with T-Mobile's customers. Although some of the Petitioners were able to make such a calculation on an isolated basis, this was done at significant time and expense. (Schoonmaker Direct, Ex. 1, p. 57) To perform such a study every month would be extremely burdensome, especially for the level of revenue at issue as a result of this proceeding.

Petitioners' proposal to issue net bills based solely on traffic contained in the transit usage records is being made in spite of the fact that the expected net bills under T-Mobile's proposal could theoretically result in more revenue to the Petitioners. Nevertheless, it is simply not practical for small rural LECs to incur the expenses necessary to determine which IXC-terminated minutes of use were originated by T-Mobile customers even when accounting for the additional revenue that could be

received from issuing net bills based on such calculations. In order to reduce these billing administration costs, the Petitioners request that the Commission order that net bills be issued by ILECs based solely on the tandem company's transiting usage reports. (Schoonmaker Direct, Ex. 1, p. 58)

Issue 33. Should billing be deferred until the amount owing equals at least $250?

Petitioners do not object to a deferred billing arrangement whereby they would not render a bill totaling less than $250, but rather accumulate billing information and render one bill for multiple billing periods when the total amount due exceeds $250; provided, however, that the billing party shall render a bill at least once per quarter, even if the bill is for less than $250. This quarterly billing provision is similar to the deferred billing arrangement that many Petitioners have with US Cellular, and it has recently been approved in numerous agreements with US Cellular. *See e.g. Application for Approval of a Traffic Termination Agreement between Mark Twain Rural Telephone Company and U.S. Cellular*, Case No. TO-2006-0259, *Order Approving Agreement*, issued Jan. 18, 2005.

The parties have reached agreement on this issue.

I. REMEDIES

Issue 34. Should the interconnection agreement include call-blocking as a remedy for a dispute between the parties?

Again, T-Mobile is the only wireless carrier to object to call blocking provisions in an agreement, and T-Mobile is also the only wireless carrier that has failed to pay for its use of Petitioners' services for the four years between February 2001 and April of 2005. Unsurprisingly, T-Mobile also objects to late fees and recovery of costs associated with blocked traffic.

This issue should be resolved in Petitioners' favor. It is standard industry practice for a party to be able to terminate service to the other party for failing to comply with the terms of an agreement, including failure to pay undisputed amounts. In fact, **the Missouri Commission's rules expressly allow for call blocking**:

> A terminating carrier may request the originating tandem carrier to block, and upon such request the originating carrier shall block, the originating carrier's Local Exchange Carrier-to-Local Exchange (LEC-to-LEC) traffic, if the originating carrier has failed to fully compensate the terminating carrier for terminating compensable traffic, or if the originating carrier has failed to deliver originating caller identification to the transiting and/or terminating carriers.

Commission Rule 4 CSR 240-29.130(2).

Blocking and disconnection provisions have been upheld by the Missouri Court of Appeals. Indeed, it is well established that telephone companies may block or discontinue service to a customer in default, as long as proper notice is given. *State ex rel. Sprint Spectrum L.P. v. PSC*., 112 S.W.3d 20, 26 (Mo. App. 2003); *Allstates Transworld Van Lines v. Southwestern Bell Tel. Co*., 937 S.W.2d 314 (Mo. App. 1996). Therefore, this issue should be resolved in Petitioners' favor.

J. EFFECTIVE DATE

Issue 35. What date should be selected as the effective date for the arbitrated agreement with T-Mobile?

The parties appear to agree that the effective date of the agreements should be April 29th, 2005, the date negotiations were requested. However, the Commission should clarify that this effective date does not prohibit Petitioners from being compensated for pre- and post-tariff traffic sent to Petitioners by T-Mobile (see Issues 14 & 25 above), nor does it relieve T-Mobile from complying with prior Commission orders and tariffs.

K. CITIZENS TRANSIT ISSUE

Issue 36. Is the transit rate issue raised by Citizens a proper subject of this arbitration?

Citizens Telephone Company of Higginsville, Missouri performs a transiting function for another small rural carrier – Alma Telephone Company. Thus, it is necessary for wireless carriers such as T-Mobile to use the transiting services of both Southwestern Bell and Citizens in order to deliver traffic to Alma Telephone Company. In other words, without the Citizens transit service, T-Mobile's calls could not be delivered to Alma Telephone Company under the present indirect connection.

T-Mobile argues that this issue was not raised in the arbitration petition, but this is simply another technical objection designed to prolong T-Mobile's free ride on another company's network. It is both appropriate and required by law for Citizens to receive compensation for the transiting functions that it performs on T-Mobile's behalf for calls

from T-Mobile to Alma. The $0.01 per minute rate proposed by Citizens has been agreed to by a number of other wireless carriers, including most recently Cingular and U.S. Cellular. Thus, this rate is consistent with the prevailing rate. Here again, all of Missouri's other major wireless carriers (except T-Mobile) have agreed to pay for their use of Citizens Telephone Company's network transiting service.

Alternatively, if the Commission does not allow Citizens to be compensated for the use of its transiting functions, then it must allow Citizens to block the transit traffic that T-Mobile sends for delivery to Alma Telephone Company. **Otherwise, the Commission will have prevented Citizens from being compensated for providing transit service and effectively approved a rate of $0.00 that is clearly confiscatory and unlawful**. *See State ex rel. Sprint v. Public Service Commission*, 112 S.W.3d 20, 26 (Mo. App. 2003); *Smith v. Illinois Bell Tel. Co*., 270 U.S. 587, 591-92, 46 S.Ct. 408, 70 L.Ed 747 (1926). As explained above in Issue 34, blocking T-Mobile's traffic until an appropriate rate is established will result in no disruption to customers because T-Mobile will simply re-route the traffic through long distance companies. (*See* Ex. 18)

III. CONCLUSION

Petitioners have provided appropriate cost studies and reasonable positions on all of the issues identified for this arbitration, and this Commission has already approved Petitioners' proposed rates in dozens of traffic termination agreements that are currently on file. Accordingly, the Commission should adopt the Petitioners' position on these important cost and traffic termination provisions, including the rate for transport and termination and the issues related to IXC-carried traffic.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or via electronic mail, or hand-delivered on this 8th day of February, 2006, to the following parties:

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