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January 27, 2000

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

FILED

JAN 27 2000

**Missouri Public
Service Commission**

Re: Case No. TC-2000-375

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and 14 copies of Southwestern Bell Telephone Company's Answer and Motion to Dismiss.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "Leo J. Bub".

Leo J. Bub

Enclosure

cc: Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

JAN 27 2000

Missouri Public
Service Commission

Modern Telecommunications, Co., Northeast
Missouri Rural Telephone Co., Mid-Missouri
Telephone Co., and MoKan Dial, Inc.

Complainants

vs.

Southwestern Bell Telephone Company,

Respondent.

Case No. TC-2000 - 375

**SOUTHWESTERN BELL TELEPHONE COMPANY'S
ANSWER AND MOTION TO DISMISS**

Southwestern Bell Telephone Company respectfully submits this Answer and Motion to Dismiss the Joint Complaint filed by Modern Telecommunications Company, Northeast Missouri Rural Telephone Company and MoKan Dial, Inc. (Complainants).

INTRODUCTION

This case is the second prong of Complainants' strategy to illegally impose their intrastate access charges on wireless traffic that terminates in their exchanges.

The first prong of their strategy was seen in Case No. TT-99-428. There, Complainants proposed to amend their intrastate access tariffs to apply to wireless originated traffic, despite clear prohibitions in federal law against imposing access charges on intraMTA wireless traffic (i.e., wireless traffic that both originates and terminates within a Major Trading Area or "MTA").¹ If successful in getting the Missouri Public Service Commission to issue an order approving their access tariff amendments, Complainants will use that order to illegally extract access charges not only from wireless carriers, but also from tandem companies like

¹ Missouri has been divided into two MTAs, one for the Kansas City side of the State and one for the St. Louis side.

Southwestern Bell on cellular traffic wireless carriers send through the tandem company's network for termination in Complainants' exchanges.

In this case, the second prong of Complainants' strategy, the Commission will see how Complainants intend to use those revised access tariffs, if approved. Here, Complainants attempt to portray themselves as victims of wireless carriers who "continue to terminate large quantities of traffic without compensating" Complainants. They claim the wireless carriers do not have reciprocal compensation agreements with them and that wireless carriers have refused to pay the bills Complainants sent them for terminating such traffic. Thus, they have sought a Commission order requiring the tandem company to pay for the wireless carriers' traffic, and at access rate levels.

Viewed together, this two-prong strategy demonstrates Complainants' deliberate efforts to frustrate federal law and prior Commission orders that contemplate the negotiation of terminating compensation arrangements for wireless traffic. In Case No. TT-99-428, uncontested evidence showed that as the Commission intended, wireless carriers repeatedly contacted Complainants seeking to negotiate appropriate termination arrangements for their traffic. But rather than negotiating in good faith as required by the Act and prior Commission orders, Complainants admittedly refused. Both in Case No. TT-99-428 and in this case, Complainants attempt to use these failed "negotiations" -- which they themselves undermined -- to portray themselves as victims of wireless carriers who seek to have their traffic terminated for free and transiting carriers like Southwestern Bell who let it happen.

But as the evidence in Case No. TT-99-428 showed, no wireless carrier was seeking to get anything for free. Rather, it showed that they made good faith efforts to make the necessary arrangements with Complainants for the termination of their wireless traffic. And in order to assist Complainants establish terminating arrangements with these wireless carriers, Southwestern Bell long ago provided each Complainant with the names and contact information of the wireless carriers transiting traffic to them through Southwestern Bell. Since February, 1998, Southwestern Bell has been providing Complainants with the number of minutes, by

wireless carrier, terminating to each of their exchanges on a monthly basis (the "Cellular Transiting Usage Summary Report" or "CTUSR"). But until very recently, Complainants have done absolutely nothing with this information. And when Complainants finally did use these CTUSRs to bill wireless carriers, that billing was at full intrastate access rates, in violation of Federal Communications Commission (FCC) rules.

In its Report and Order in Case No. TT-97-524, the Commission sought to resolve the intercompany compensation issue with respect to wireless traffic by providing "the maximum incentives on the part of all parties for negotiation of reciprocal compensation agreements." Thus, it made the originating wireless carrier whose customer placed the call "primarily" liable to the third-party LEC for terminating the call. The Commission required the third-party LEC "to bill the wireless carrier and make good faith efforts to collect." Clearly, it was the Commission's intent that the originating wireless carrier and the terminating LEC, through negotiations, work out appropriate arrangements between themselves for the termination of this traffic. As the Commission explained the structure of the incentives it put in place, "since the third-party LEC cannot simply continue with the status quo and collect access fees from SWBT, they too may have more of an incentive to negotiate with wireless carriers."² Southwestern Bell believes that it was only in the event a wireless carrier refused to negotiate a reciprocal compensation agreement with the third-party LEC and refused to pay a third-party LEC for such termination that Southwestern Bell would have any "secondary" liability on traffic that transited its network under its wireless interconnection tariff.³

Complainants have not met the conditions precedent to be entitled to invoke "secondary" liability against Southwestern Bell. The record in Case No. TT-99-428 made clear that Complainants have not negotiated with the wireless carriers in good faith to reach appropriate

² Report and Order, p. 21.

³ Here, most of the traffic at issue was sent to Southwestern Bell by the wireless carriers under their individual interconnection agreements, not the wireless interconnection tariff. But even if the Commission were to impose similar "secondary" liability on traffic flowing under individually negotiated interconnection agreements, Complainants have not met the conditions precedent to be entitled to invoke "secondary" liability against Southwestern Bell.

terminating arrangements. Rather, Complainants rebuffed them at every turn and deliberately prevented negotiations from even starting. All that Complainants have done is recently bill wireless carriers at rates that violate federal law.

Complainants' motive for pursuing this two-pronged strategy is obvious: Complainants would rather collect their full access rates on all wireless traffic from tandem companies like Southwestern Bell instead of much lower cost-based rates with wireless carriers as required by the Act for intraMTA traffic. The Commission should not tolerate such gamesmanship and should dismiss Complainants' complaint.

SOUTHWESTERN BELL'S ANSWER

1. Southwestern Bell admits the allegations contained in paragraph 1.
2. Southwestern Bell acknowledges and will comply with Complainants' request to direct all correspondence, pleadings and other communications to their counsel of record in this case.
3. Southwestern Bell admits the allegations contained in paragraph 3.
4. Southwestern Bell admits that the Commission, by Report and Order dated December 23, 1997 in Case No. TT-97-524 approved Southwestern Bell's revised Wireless Carrier Interconnection Service Tariff which provided a transiting service allowing wireless carriers to use Southwestern Bell's network facilities to reach the networks of other carriers. Southwestern Bell, however, denies that it, through this revised tariff, seeks to terminate wireless carriers' traffic to Complainants. Rather, as specifically found by the Commission in its December 23, 1997 Report and Order at p. 12, "the traffic in question is the traffic of the wireless carriers whose customers initiate the calls, and not SWBT." And the Cole County Circuit Court affirmed this specific factual finding.⁴ Southwestern Bell would note that while some wireless carriers continue to use this tariff, the majority of traffic wireless carriers send to

⁴ State of Missouri ex rel. Alma Telephone Company v. the Public Service Commission of Missouri, et al., Case Nos. CV198-178CC and CV198-261CC, Findings of Fact, Conclusions of Law and Judgment, issued February 23, 1999 at p. 9.

Southwestern Bell (both for termination within its own exchanges and for transiting to other LECs), is sent under individual interconnection agreements wireless carriers have with Southwestern Bell, all of which have been approved by the Commission.

5. Southwestern Bell admits that the Commission's December 23, 1997 Report and Order held wireless carriers "primarily" liable for the traffic they originated and terminated on other LEC networks using Southwestern Bell's transiting facilities obtained through Southwestern Bell's Wireless Carrier Interconnection Service Tariff. Southwestern Bell, however, denies that the Commission imposed "secondary" liability on Southwestern Bell when a wireless carrier simply "refuses to pay" Complainants for such transited traffic and does not have a reciprocal compensation agreement with them. Rather, Complainants were "required to bill the wireless carriers and make good faith efforts to collect."⁵ The Commission established these obligations and relationships for the purpose of providing "the maximum incentives on the part of all parties for the negotiation of reciprocal compensation agreements."⁶ Southwestern Bell admits that the Commission ruled that Southwestern Bell would "be entitled to indemnification from the wireless carrier upon payment of the loss" in the event it became secondarily liable for termination of wireless traffic to a third-party LEC. Southwestern Bell denies all other allegations contained in paragraph 5.

6. Southwestern Bell denies Complainants' allegations that the Cole County Circuit Court in Case No. CV198-178CC, et al. "did not foreclose Modern, Northeast, Mid-Missouri and MoKan from applying their intrastate access tariffs to this traffic." Rather, what the Court said was that it found that the Commission did not foreclose them from applying their existing access tariffs as appropriate on interMTA wireless traffic:

This Court thus finds that in approving SWBT's revised Wireless Carrier Interconnection Service Tariff, the PSC did not foreclose Relators or any other telecommunications carrier from other appropriate means of being compensated

⁵ In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise its Wireless Carrier Interconnections Service Tariff, PSC Mo-No. 40, Case No. TT-97-524, Report and Order, issued December 23, 1997, page 21.

⁶ Ibid.

by wireless carriers for terminating wireless originated traffic that transits SWBT's network under the tariff at issue here. The PSC did not foreclose Relators from applying their existing inter or intrastate tariffs as appropriate on interMTA wireless traffic; developing and filing their own tariff charges for terminating wireless originated traffic (similar to the Southwestern Bell tariff before the PSC and the Court in this case); or negotiating agreements with wireless carriers that would compensate Relators for intra and interMTA wireless-originated traffic as appropriate.

7. Southwestern Bell admits that the Commission approved Southwestern Bell's CTUSR and that it has been providing these reports to Modern, Northeast, Mid-Missouri and MoKan. Southwestern Bell, however, denies that this report reflects the volumes of traffic "terminated by SWBT" to these companies. Rather, these reports show the amount of traffic the originating cellular carriers terminated to LECs like Modern, Northeast, Mid-Missouri and MoKan, not Southwestern Bell. As the Commission found in its December 23, 1997 Report and Order, "the traffic in question is the traffic of the wireless carriers whose customer initiate the calls, and not SWBT."⁸ Southwestern Bell is without sufficient information to admit or deny whether Complainants relied upon the CTUSRs or whether Complainants billed the originating wireless carrier for the volumes of traffic designated in the CTUSRs and therefore denies these allegations. Southwestern Bell understands, however, that some of the Complainants have billed some wireless carriers but that whatever bills Complainants sent were sent late and that those bills rated the traffic at intrastate access charge levels which, for intraMTA traffic is unlawful.

8. Southwestern Bell is without sufficient information to admit or deny whether the wireless carriers either have received bills from Complainants or whether they refused to pay those bills and therefore denies the allegations in paragraph 8. Southwestern Bell, however, understands that several wireless carriers have attempted to negotiate terminating compensation arrangements with various members of Complainants for the termination of their wireless traffic. Rather than negotiate in good faith as required by Section 251(c)(1) of the Telecommunications Act of 1996, Complainants unlawfully refused to negotiate.

⁷ State of Missouri, ex rel. Alma Telephone Company, et al. v. the Public Service Commission of Missouri, Sheila Lumpe, Diane M. Drainer, Connie Murray, and Harold Crumpton, Commissioners, Case Nos. CV198-178CC, et al., Findings of Fact, Conclusions of Law and Judgment, pages 8-9, entered February 23, 1999 (emphasis added).

⁸ Report and Order, p. 12.

9. Southwestern Bell is without sufficient information to admit or deny whether any wireless carriers have compensation arrangements with Complainants and therefore denies the allegations in paragraph 9. But given Complainants' unlawful refusal to negotiate with wireless carriers, Southwestern Bell would not expect Complainants to have concluded any such agreements, except, perhaps with their own cellular affiliates.

10. Southwestern Bell admits that Modern, Northeast, Mid-Missouri and MoKan have directly contacted it requesting that it pay for the termination of calls placed by wireless carriers' customers that the wireless carrier sent over Southwestern Bell's facilities for termination to Complainants. Southwestern Bell, however, denies that it has any "secondary liability" for this traffic.

11. In this paragraph of the Joint Complaint, Modern incorporates by reference the allegations of paragraphs 1-10 from the Joint Complaint. Southwestern Bell, therefore, answers these allegations by incorporating by reference its previous answers contained in paragraphs 1-10 of this Answer.

12. Southwestern Bell denies the allegations contained in paragraph 12.

13. Southwestern Bell admits that wireless carriers have, since the filing of the Joint Complaint, continued to send calls through Southwestern Bell's facilities to Complainants' exchanges. Southwestern Bell, however, is without sufficient information to admit or deny the remaining allegations in paragraph 13 and therefore denies them.

14. In this paragraph of the Joint Complaint, Northeast incorporates by reference the allegations of paragraphs 1-10 from the Joint Complaint. Southwestern Bell, therefore, answers these allegations by incorporating by reference its previous answers contained in paragraphs 1-10 of this Answer.

15. Southwestern Bell denies the allegations contained in paragraph 15.

16. Southwestern Bell admits that wireless carriers have, since the filing of the Joint Complaint, continued to send calls through Southwestern Bell's facilities to Complainants'

exchanges. Southwestern Bell, however, is without sufficient information to admit or deny the remaining allegations in paragraph 16 and therefore denies them.

17. In this paragraph of the Joint Complaint, Mid-Missouri incorporates by reference the allegations of paragraphs 1-10 from the Joint Complaint. Southwestern Bell, therefore, answers these allegations by incorporating by reference its previous answers contained in paragraphs 1-10 of this Answer.

18. Southwestern Bell denies the allegations contained in paragraph 18.

19. Southwestern Bell admits that wireless carriers have, since the filing of the Joint Complaint, continued to send calls through Southwestern Bell's facilities to Complainants' exchanges. Southwestern Bell, however, is without sufficient information to admit or deny the remaining allegations in paragraph 19 and therefore denies them.

20. In this paragraph of the Joint Complaint, MoKan incorporates by reference the allegations of paragraphs 1-10 from the Joint Complaint. Southwestern Bell, therefore, answers these allegations by incorporating by reference its previous answers contained in paragraphs 1-10 of this Answer.

21. Southwestern Bell denies the allegations contained paragraph 21.

22. Southwestern Bell admits that wireless carriers have, since the filing of the Joint Complaint, continued to send calls through Southwestern Bell's facilities to Complainants' exchanges. Southwestern Bell, however, is without sufficient information to admit or deny the remaining allegations in paragraph 22 and therefore denies them.

23. To the extent that Southwestern Bell has neither specifically admitted nor denied any allegation contained in the Joint Complaint, Southwestern Bell specifically denies it.

MOTION TO DISMISS

For its Motion to Dismiss, Southwestern Bell states:

1. Complainants' Joint Complaint should be dismissed because they fail to state a claim upon which relief can be granted. In making their claim, Complainants rely on the

Commission's December 23, 1997 Report and Order in Case No. TT-97-524 in which the Commission permitted Southwestern Bell to revise its Wireless Carrier Interconnection Service Tariff, PSC Mo-No. 40 to offer a transiting service to wireless carriers. There, the Commission indicated that Southwestern Bell would be "secondarily liable" on wireless traffic transited under its Wireless Carrier Interconnection Service Tariff only under certain conditions. Complainants have failed to demonstrate or even allege that all of those conditions have been met.

Under the Report and Order, the Commission contemplated that Complainants would, in good faith, negotiate arrangements with wireless carriers for the termination of their traffic. Complainants were "required to bill the wireless carriers and make good faith efforts to collect."⁹ Complainants, however, have merely alleged that they have billed the wireless carriers for the traffic in question and that they simply "refused to pay" Complainants. Complainants have failed to allege that they have made good faith efforts to secure appropriate compensation arrangements with the wireless carriers or that they have made good faith efforts to collect appropriate compensation from the wireless carriers. Complainant's allegations are therefore insufficient to trigger any claimed "secondary" liability on the part of Southwestern Bell and the Commission should dismiss Complainants' Joint Complaint.

2. Complainants have failed to state a claim upon which relief can be granted in that they have failed to allege that all of the traffic for which they seek payment from Southwestern Bell under the "secondary" liability provision of the Commission's December 23, 1997 Report and Order approving Southwestern Bell's revised Wireless Carrier Interconnection Service Tariff was terminated to them by the originating wireless carriers using the transiting service of that tariff. And Complainants have cited no other authority for imposing such "secondary" liability. Accordingly, the Commission should dismiss Complainants' Joint Complaint.

3. Complainants' Joint Complaint should be dismissed because Complainants unlawfully seek to apply their intrastate access rates to the wireless traffic at issue. The FCC's

⁹ Report and Order, p. 21 (emphasis added).

Interconnection Order¹⁰ does not permit LECs to impose access charges for wireless traffic that originates and terminates within an MTA. Rather, under paragraph 1036, such traffic is subject to reciprocal compensation rates for transport and termination under Section 251(b)(5) of the Act:

. . . traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5) rather than interstate and intrastate access charges.

The FCC has long held that access charges should generally not be applied to wireless carrier traffic. The FCC, in its "Policy Statement on Interconnection of Cellular Systems," which was released in 1986,¹¹ required LECs' interconnection rates for terminating cellular calls to be negotiated in good faith between the cellular operators and telephone companies, and it specifically prohibited LECs from applying access charges:

The terms and conditions of interconnection depend, of course on innumerable factors peculiar to the cellular system, the local telephone network, and local regulatory policies; accordingly, we must leave the terms and conditions to be negotiated in good faith between the cellular operator and the telephone company.

. . .
Compensation Arrangements - In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal concern. We therefore express no view as to the desirability or permissibility of particular compensation arrangements, such as calling-party billing, responsibility for the cost of interconnection, and establishments of rate centers. Such matters are properly the subject of negotiations between the carriers as well as state regulatory jurisdiction. Compensation may, however, be paid under contract or tariff provided that the tariff is not an "access tariff" treating cellular carriers as interexchange carriers, except as noted in footnote 3.¹²

¹⁰ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98 (Released August 8, 1996) (the Interconnection Order).

¹¹ In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 1996 FCC LEXIS 3878, Appendix B, Paragraph 5, released March 5, 1986.

¹² The exception noted by the FCC in footnote 3 pertain to roaming cellular traffic, which is not at issue here.

Complainants' attempt to impose intrastate access charges on intraMTA wireless traffic is in clear violation of these FCC rules and requires dismissal of the Joint Complaint.

WHEREFORE, having fully answered, Southwestern Bell requests the Commission to enter an Order dismissing Complainants' Joint Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY

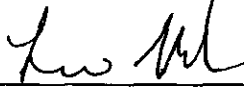


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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by first-class postage prepaid, U.S. Mail on January 27, 2000.



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