

**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))	Case No. TO-2006-0147
Agreement with T-Mobile USA, Inc.)	

**PETITIONERS' RESPONSE TO T-MOBILE'S REPLY
REGARDING ISSUES A AND B**

I. INTRODUCTION AND SUMMARY

T-Mobile raises a number of shopworn arguments as to why T-Mobile should not have to pay its past due bills before establishing a new agreement with Petitioners. The majority of T-Mobile's arguments have already been addressed by Petitioners' November 28 Response and the Federal Communications Commission (FCC), Missouri Public Service Commission (Commission or PSC), and Missouri Court of Appeals decisions that were attached thereto. Those arguments and the decisions that support them need not be repeated here, and this response will focus on the arguments raised in T-Mobile's December 7, 2005 Reply.

II. DISCUSSION

A. The Commission Has Authority To Enforce Its Orders.

T-Mobile claims that the Commission "does not have independent authority here."¹ T-Mobile is mistaken. The Commission is authorized by state law to prohibit wireless calls from traversing the intrastate telecommunications network between local exchange telecommunications networks (LECs) in the absence of approved

¹ *T-Mobile Reply in Support of Motion*, Dec. 7, p. 6.

interconnection agreements.² In other words, the PSC continues to have authority to regulate the use of Petitioners' intrastate telecommunications networks even though it does not regulate wireless carriers. If T-Mobile did not want to pay to use the intrastate "LEC-to-LEC" network to deliver calls to Petitioners' exchanges, then T-Mobile had various other options available to deliver its traffic. Indeed, when T-Mobile's traffic was temporarily blocked pursuant to the wireless tariffs earlier this year, T-Mobile simply shifted its traffic to the interexchange (IXC) network. The point here is that the Commission is not regulating wireless carriers; rather, it is regulating the Petitioners and their networks.

T-Mobile argues that the Commission lacked authority to establish or enforce Petitioners' wireless termination tariff rates.³ But Petitioners' wireless tariffs were found to be lawful by both the Missouri Court of Appeals and the FCC.⁴ Rates that have been reviewed by the Commission in accordance with Chapter 386 and 392 have the same force and effect as if directly prescribed by the Missouri legislature. *Midland Realty v. Kansas City Power and Light Co.* (1937) 57 S.Ct. 345, 200 U.S. 109, 81 L.Ed. 540; *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 670 (Mo. App. 1997).

In this case, T-Mobile is simply another customer of the LECs for termination service, and the fact that T-Mobile is not regulated by the Commission has no bearing. The Commission does not regulate Petitioners' residential or business customers either,

² See Generally Chapters 386 and 392 RSMo.; *State ex rel. Sprint Spectrum L.P. v. PSC*, 112 S.W.3d 20, 25-26 (Mo. App. 2003); *In the Matter of SWBT's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff*, P.S.C. Mo. No. 40, 7 Mo.P.S.C.3d 38 (Dec. 23 1997).

³ T-Mobile cites little or no legal authority for its claims, choosing instead to either quote or cite its own prior pleadings disguised as authority. See *T-Mobile's Reply*, footnotes 7, 11, 12, 23, 29, 32, and 36.

⁴ T-Mobile argues that the FCC did not "expressly" uphold Petitioners' tariffs, yet the FCC's Feb. 17, 2005 *Declaratory Ruling* repeatedly cited Petitioner's tariffs when it held that wireless tariffs were not preempted by or in conflict with the Act. See e.g. *Declaratory Ruling*, ¶18, footnote 33 "the wireless termination tariffs at issue in Missouri apply only in the absence of an agreement and are expressly subordinate to approved agreements under the Act." See also footnotes 38, 53, and 54.

yet that does not excuse those customers from paying for service. “It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.” *State ex rel. Sprint Spectrum L.P. v. PSC.*, 112 S.W.3d 20, 26 (Mo. App. 2003); see also *Allstates Transworld Van Lines v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314 (Mo. App. 1996). Similarly, the PSC should require T-Mobile to pay for its past due amounts before allowing T-Mobile to take service from Petitioners under a new arbitrated agreement. As discussed above, the Commission has authority to enforce its orders. Likewise, federal law recognizes PSC authority to enforce its own rules, and Sections 251(d)(3) and 252(e)(3) of the Act expressly allow state commissions to establish and enforce other requirements of state law.

B. There Was No Bill-And-Keep Arrangement.

T-Mobile suggests that a bill-and-keep arrangement can exist even though T-Mobile has not taken the appropriate steps to establish such an agreement. T-Mobile’s argument was expressly rejected by the U.S. District Court for the Western District of Missouri earlier this year:

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

establishes that termination tariffs are lawful in the absence of an actual, negotiated agreement, not a *de facto* arrangement that exists solely because T-Mobile sends its calls through to the LECs and the Defendants send their calls through to T-Mobile. Again, the FCC states that by sending the calls to the LECs, T-Mobile “accept[s] the [alternative] terms of otherwise applicable state tariffs.” *Id.*

VoiceStream PCS v. BPS Telephone Co., Case No. 05-04037-CV-C-NKL, Order, issued August 24, 2005, p. 11 (emphasis added)(see attached copy of order).

C. T-Mobile’s “Everybody Else Did It” Argument

T-Mobile claims that every wireless carrier in Missouri has ‘violated’ the Commission’s order in Case No. TT-97-524, and T-Mobile suggests that this should somehow excuse T-Mobile’s unlawful actions.⁵ The difference is that each and every one of those other wireless carriers has subsequently stepped up to the plate and paid for their use of small rural LEC network facilities and services under the wireless tariff rates and/or negotiated settlement agreements. T-Mobile is the only outlier in this regard. All of Missouri’s other wireless carriers played by the rules and paid their bills or established agreements after the wireless tariffs were approved. Over seventy (70) agreements between Missouri’s small rural ILECs and wireless carriers such as Cingular, Sprint PSC, and Verizon Wireless have been approved by the Commission. Over twenty (20) more agreements with U.S. Cellular have recently been filed with the Commission. Each one of these agreements with other wireless carriers settled all past due amounts, so T-Mobile’s “everybody else did it” argument just doesn’t fly.

⁵ See *T-Mobile’s Reply*, p. 10.

D. *Res Judicata* and Collateral Estoppel

“In all collateral actions or proceedings, the orders and decisions of the Commission which have become final shall be conclusive.” §386.550 RSMo. 2000; *State ex rel. Licata Inc. v. Missouri PSC*, 829 S.W.2d 515 (Mo. App. 1992). Petitioners’ wireless tariffs were affirmed by the Missouri Court of Appeals, and the Commission has already found that T-Mobile is liable for past due amounts under Petitioners’ wireless termination service tariffs. Therefore, the Commission need not revisit the matter of Petitioners’ wireless tariffs or past due amounts (no matter how often T-Mobile tries to relitigate this question) because these matters have been resolved in final orders by the Commission.⁶ See *Mid-Missouri Tel. Co v. Missouri PSC*, 867 S.W.2d 561 (Mo. App. 1993). Thus, the narrow question that remains in this arbitration is whether or not T-Mobile must pay its past due bills before taking service under a new agreement.

IV. CONCLUSION

It is standard practice in Missouri for utilities to require customers to settle past due amounts before entering into new service agreements. Every other wireless carrier in the state has made arrangements to pay or settle past due amounts. The position taken by T-Mobile in this case is both unlawful and unreasonable. The Commission should find and conclude that T-Mobile must pay its past due amounts before taking advantage of a new agreement. Until it does so, the Commission should expressly prohibit T-Mobile from sending traffic over the intrastate LEC-to-LEC network and

⁶ The lawfulness of the wireless tariffs was upheld by the Missouri Court of Appeals, Western District in *State ex rel Sprint Spectrum L.P. v. Missouri PSC*, 112 S.W.3d 20 (Mo. App. 2003). And T-Mobile failed to timely file an application for rehearing of the *BPS Complaint* Case No. TC-2002-1077, so it is now final. See *Mid Missouri Tel. Co.*, 867 S.W.2d at 565.

require T-Mobile to send its traffic over IXC trunks that ensure Petitioners are compensated for terminating T-Mobile's wireless traffic.

WHEREFORE, Petitioners respectfully request that the Commission DENY T-Mobile's motion to dismiss Issues A and B and grant such other relief as may be appropriate in the circumstances, including: (1) issuing a finding that T-Mobile is barred by the principles of *res judicata* and collateral estoppel from contesting the wireless tariffs and T-Mobile's past due amounts; and (2) prohibiting T-Mobile from using the LEC-to-LEC intrastate network until it has settled its past due amounts.

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 19th day of December, 2005, to the following parties:

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