

**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.)	

**REPLY IN OPPOSITION TO T-MOBILE'S MOTION
TO DISMISS ISSUES A AND B**

I. INTRODUCTION AND SUMMARY

On November 16, 2005, T-Mobile filed a motion to dismiss the issues related to T-Mobile's past due amounts for wireless calls that T-Mobile delivered to the Petitioners. T-Mobile offers a host of reasons why it should not have to pay for its use of Petitioners' network facilities and services between 1998 and 2005. Specifically, T-Mobile claims that: (1) Petitioners are barred from raising the issue of T-Mobile's past due bills in this proceeding, and (2) the Missouri Public Service Commission ("Commission" or "PSC") lacks authority to resolve the issue of T-Mobile's past due bills. Sections 251(d)(3) and 252(e)(3) of the Act dispel both of T-Mobile's claims. Amazingly, T-Mobile also argues that Petitioners' wireless tariffs were preempted by or in conflict with federal law and Federal Communications Commission ("FCC") rules, despite the fact that the FCC, the PSC, and every court that has examined Petitioners' tariffs has expressly ruled to the contrary.¹ In short, none of T-Mobile's claims have merit, so T-Mobile's motion to dismiss must be denied.

¹ See e.g. Attachment A, *T-Mobile's Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, rel. Feb. 24, 2005; Attachment B, *State ex rel. Sprint Spectrum v. Public Service Comm'n*, 112 S.W.3d 20

T-Mobile's past due billings include bills for: (1) calls delivered between 1998 and 2001 when the PSC had prohibited wireless carriers from delivering calls in the absence of an agreement² ("Issue A"); and (2) calls delivered between 2001 and 2005 in violation of Commission-approved wireless termination service tariffs³ ("Issue B"). At the outset, the PSC should recognize that T-Mobile is complaining about calls that it delivered in violation of PSC orders. It is also important to note that **T-Mobile is the only wireless carrier in Missouri that has failed to pay Petitioners for wireless traffic terminated between 2001 and 2005 pursuant to Commission-approved tariffs.**

The PSC has already sustained a complaint finding that T-Mobile sent traffic between 2001 and 2005 to small rural telephone companies without payment and concluding that T-Mobile was therefore responsible for paying the lawfully tariffed rate as well as interest and late fees.⁴ Petitioners' wireless tariffs have also been upheld as lawful by both the FCC and the Missouri Court of Appeals.⁵ Nevertheless, T-Mobile simply ignores all of these decisions and refuses to pay its past due bills. T-Mobile's latest pleading is simply another example of what the U.S. District Court for the Western District of Missouri recently described as T-Mobile's "**transparent litigation strategy.**"⁶

(Mo. App. WD 2003); Attachment C, *BPS Telephone Co. et al. v. T-Mobile*, Case No. TC-2002-1077, *Report and Order*, issued Jan. 27, 2005).

² *In the Matter of SWBT's Tariff Filing to Revise Its Wireless Interconnection Service Tariff*, Case No. TT-97-524, *Report and Order*, issued Dec. 23, 1997.

³ *In the Matter of Mark Twain Rural Telephone Company's Wireless Termination Tariff* TT-2001-139 et al., *Report and Order*, issued Feb. 8, 2001; *In the Matter of Mark Twain Communications Company's Wireless Termination Service Tariff*, Case No. TT-2001-646, *Report and Order*, issued Oct. 16, 2001.

⁴ See Attachment C.

⁵ See Attachments A and B.

⁶ *T-Mobile v. BPS Tel. Co.*, Case No. 05-cv-4037, *Order*, Nov. 11, 2005 (emphasis added).

II. BACKGROUND HISTORY

A. Case No TO-97-524 (1998-2001)

On February 4, 1998, the PSC approved the Southwestern Bell Telephone Company (SWBT) wireless carrier interconnection service tariff that included the following language as ordered by the PSC:

Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic.⁷

Thus, the PSC expressly prohibited wireless carriers such as T-Mobile from sending calls that terminate to the Petitioners' exchanges without an agreement to compensate the rural carriers.

Despite the fact that T-Mobile had not obtained agreements to compensate the Petitioners, T-Mobile continued to send wireless calls in the absence of an agreement. Petitioners could not prevent T-Mobile from making unauthorized and uncompensated use of Petitioners' facilities and services. As a result, T-Mobile was unjustly rewarded for its "calculated inaction" with free use of the Petitioners' networks.⁸ At all times relevant, T-Mobile was prohibited from sending the calls by the PSC's final order in Case No. TT-97-524. Years of litigation followed, and the case was recently submitted to the Missouri Supreme Court in Case No. SC86529 on September 28, 2005.

⁷ *In the Matter of SWBT's Tariff Filing to Revise Its Wireless Interconnection Service Tariff*, Case No. TT-97-524, *Report and Order*, issued Dec. 23, 1997.

⁸ *Sprint Spectrum*, 112 S.W.3d at 26 (discussing the wireless carriers' "calculated inaction").

It is likely that the question of whether Petitioners' access tariffs are appropriate for T-Mobile's use of the Petitioners' facilities and services between 1998 and 2001 will be conclusively resolved by the Missouri Supreme Court before the end of this arbitration period. Petitioners have styled their Petition for Arbitration accordingly. If the Missouri Supreme Court upholds the use of Petitioners' access tariffs between 1998 and 2001, then Petitioners expect to be compensated according to these rates. Otherwise, the Petitioners will accept the same \$0.035 per minute of use that they have proposed for traffic on a going-forward basis. T-Mobile cannot get a free pass for its unlawful use of Petitioners' networks between 1998 and 2001 because this would: (1) violate the Commission's Order in Case No. TT-97-524; and (2) discriminate against Missouri's other wireless carriers that played by the rules and paid their bills or entered settlement agreements. Given T-Mobile's history of ignoring PSC orders and violating state court decisions, the PSC should not hesitate to resolve the matter of past due compensation in this case.

B. Wireless Tariffs (2001-2005)⁹

In 2001, after notice and hearing, the PSC approved Petitioners' wireless termination service tariffs that set the rates, terms, and conditions for wireless calls that are delivered to their exchanges in the absence of a negotiated agreement. The Cole County Circuit Court upheld the PSC's decision on November 26, 2001. All of the major wireless carriers in Missouri except T-Mobile participated in the Circuit Court appeal.

⁹ See Attachment C – *State ex rel. Sprint Spectrum v. Mo. Pub. Serv. Comm'n*, 112 S.W.3d 20, 23 (Mo. App. WD 2003).

On April 29, 2003, the Missouri Court of Appeals – Western District issued a decision rejecting the same challenges that T-Mobile seeks to raise in its motion. Specifically, the Court of Appeals rejected arguments that the tariffs were preempted by the Act:

We disagree that federal laws preempted the Commission's authority to approve tariffs in the instant case. The Commission determined that the Act's "reciprocal compensation arrangements" were inapplicable because no agreements were ever entered into by the wireless companies and rural carriers. The Act requires "local exchange carriers" – such as the rural carriers – to negotiate in good faith and establish compensation arrangements for the termination of traffic, but it does not impose the same obligation on wireless carriers. . . . The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers. ***In the absence of a comprehensive scheme to address the wireless companies' conduct, the Commission did not use its tariff-approval authority to supplant federal law.***

Sprint, 112 S.W.3d at 25 (emphasis added). See Attachment B. Thus, the *Sprint* court addressed and rejected the same preemption arguments against the tariffs that T-Mobile seeks to revive in this case.

The *Sprint* court also rejected T-Mobile's claim that the tariffs conflict with federal law. The *Sprint* court observed, "**Federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Act.**" *Id.* (emphasis added). The *Sprint* court explained:

The tariffs approved by the Commission expressly state that they are subordinate to any negotiated agreements under the Act. Thus, the Commission's action does not prevent the negotiation of reciprocal compensation arrangements or otherwise conflict with the Act's procedural requirements. . . . **The wireless companies have failed to follow prior Commission orders to establish agreements with the rural carriers before sending wireless calls to their exchanges.** The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. **The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.**

Sprint, 112 S.W.3d at 25-26 (emphasis added and internal citations omitted).

Therefore, T-Mobile's conflict claim was also addressed and rejected in *Sprint*.

After the Petitioners' wireless tariffs were approved by the PSC and upheld by the courts, all of Missouri's other wireless carriers began compensating the Petitioners under either the tariffs or approved agreements under the Act. For example, ALLTEL Wireless, Cingular, Sprint PCS, and Verizon Wireless all negotiated compensation agreements with various Petitioners, and these agreements were all approved by the PSC.¹⁰ T-Mobile is the only major wireless carrier in Missouri that has failed to compensate the Petitioners for the use of their networks, and T-Mobile's refusal to pay the tariff rates caused a group of the Petitioners to file Complaint Case No. TC-2002-1077 against T-Mobile with the PSC on May 15, 2002.

C. The *BPS Complaint Case* (TC-2002-1077)

The PSC held an evidentiary hearing in Case No. TC-2002-1077 on November 6-7, 2003, and the PSC reviewed numerous rounds of written testimony and legal briefs. T-Mobile participated fully in this PSC proceeding. On January 27, 2005, the PSC issued a *Report and Order* finding that each of the complainants had a Commission-approved wireless service tariff that was in effect at all times beginning on February 19, 2001. See Attachment C, pp. 16-17. The PSC found that T-Mobile did not have a Commission-approved interconnection agreement in effect with any of the complainants. *Id.* at 18. The PSC also found that: (a) T-Mobile had delivered both local and long distance

¹⁰ See e.g. the negotiated compensation agreements approved in PSC Case Nos. IO-2003-0207 (Verizon Wireless); TK-2003-0533 (Sprint PCS); TO-2004-0445 (Cingular); and TO-2002-0147 (ALLTEL Wireless). In fact, even T-Mobile has negotiated agreements with some small ILECs, but not the Petitioners. See e.g. PSC Case No. TK-2004-0165 (Goodman Telephone Company).

traffic to the complainants after the wireless tariffs were approved in February 19, 2001; and (b) the complainants had sent timely invoices to T-Mobile.

The Commission explained that the “Filed Tariff Doctrine”¹¹ or “Filed Rate Doctrine” governed Petitioners’ relationship with its customers:

The United States Supreme Court first announced this rule, that the rate of a utility contained in tariffs filed with the appropriate agency is the only lawful charge from which no deviation is permitted, in 1915. The utility has no choice and can only collect the proper, tariffed rate for the service rendered. “Pursuant to the filed rate doctrine, carriers have a right, as well as a duty, to recover the proper charges for services performed.”

Id. at 27-28 (citing *Louisville and Nashville R.R. v. Maxwell*, 237 U.S. 94, 97, 59 L.Ed. 853, 855, 35 S.Ct. 494, 495 (1915)). The PSC also observed that the wireless tariffs had been reviewed and upheld by the Missouri Court of Appeals in *Sprint*. *Id.* at 28. Therefore, the PSC rejected T-Mobile’s arguments and sustained the complaint.

D. The Federal District Court Case

Although the exclusive and jurisdictional procedure for appeal of the PSC’s decision is set forth in §386.510 RSMo., T-Mobile did not pursue such an

¹¹ The filed tariff doctrine forbids a regulated entity from charging a rate other than the one on file with the appropriate regulatory authority. See *Qwest v. Scott*, 380 F.3d 367, 374-75 (8th Cir. 2004). A tariff that has been approved by the PSC “becomes Missouri law and has the same force and effect as a statute enacted by the legislature.” *Bauer v. Southwestern Bell*, 958 S.W.2d 568, 570 (Mo. App. 1997). “The filed tariff, or filed rate, doctrine governs a utility’s relationship with its customers and provides that any rate filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action.” *Id.*

appeal¹² Instead, T-Mobile filed a case in the U.S. District Court for the Western District of Missouri in an effort to make an end run around Missouri courts, the PSC, and the FCC. T-Mobile's appeal was dismissed for lack of jurisdiction because the FCC had already resolved the issue. In that case, Judge Laughrey stated:

In this Court's opinion, it would not be in the interest of justice to have this matter litigated in yet another court. . . . [T]here has already been an unreasonable delay in the resolution of this matter because of T-Mobile's transparent litigation strategy.¹³

In *dicta*, the District Court commented, "One would think that the doctrines of issue preclusion and claim preclusion would bar T-Mobile's current complaint given that this is the fourth adjudicatory entity in which T-Mobile's issues either have been raised or could have been raised."¹⁴

III. DISCUSSION

A. Federal Law

T-Mobile claims that federal law: (1) prohibits Petitioners from raising the issue of T-Mobile's past due bills in this arbitration; and (2) prohibits the PSC from considering T-Mobile's past due bills.¹⁵ T-Mobile is flat wrong.

¹² *T-Mobile v. BPS Telephone Co.*, Case No. 05-cv-4037, *Order*, issued Aug. 24, 2005, p. 6 ("Under Missouri law, T-Mobile had a right to appeal the decision of the PSC within thirty days. Mo. Rev. Stat. §386.510 (2000). **T-Mobile did not pursue an appeal**; instead, T-Mobile brought this case in federal court . . .")(emphasis added).

¹³ *T-Mobile v. BPS Telephone Co.*, Case No. 05-cv-4037, *Order*, issued Nov. 11, 2005 (emphasis added).

¹⁴ *T-Mobile v. BPS Telephone Co.*, Case No. 05-cv-4037, *Order*, issued Aug. 24, 2005, p. 12.

¹⁵ T-Mobile Motion, pp. 4-5.

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

T-Mobile argues 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 with authority to approve and enforce access and 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). Thus, the Commission had express statutory authority under the Act to: (1) prohibit wireless carriers from sending

traffic in the absence of an agreement in Case No. TT-97-524; and (2) approve Petitioners' wireless termination service tariffs in Case Nos. TT-2001-139 and TT-2001-646.

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.¹⁶ Nevertheless, T-Mobile 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 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.¹⁷

* * *

[T]he wireless companies routinely circumvent payment to the rural carriers by calculated inaction.¹⁸

The PSC has express authority under Section 251(d)(3) of the Act to enforce its order in Case No. TT-97-524 that prohibited wireless calls from being sent to small rural LECs in the absence of an agreement.

¹⁶ *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.").

¹⁷ *Id.*

¹⁸ *Id.* at 26.

Federal courts recognize that the Act expressly preserves a state commission's right to enforce its own interconnection obligations on carriers:

When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell*, 323 F.3d at 358. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* Specifically, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. §251(d)(3).¹⁹

Therefore, the Commission should reject T-Mobile's claim that the Commission lacks authority to enforce its prior orders and arbitrate issues involving T-Mobile's past due bills.

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,**

¹⁹ *BellSouth Telecomms. Inc. v. Cinergy Communs. Co.*, 297 F. Supp. 2d 946 (ED Ky. 2003).

including requiring compliance 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, T-Mobile’s claims that the Commission lacks authority to enforce its prior decisions fail in light of this clear authority to do so under the Act.

2. The FCC’s *Interconnection Order*

The only legal authority that T-Mobile cites for its argument that Petitioners cannot raise the issue of T-Mobile’s past due bills is one sentence lifted from paragraph 153 in the FCC’s *Interconnection Order*.²⁰ T-Mobile takes the sentence entirely out of context. For example, in the first sentence of the same paragraph, the FCC declines to find that a request to resolve issues concurrently violates the duty to negotiate in good faith.²¹ And in the last sentence of paragraph 153, the FCC states:

²⁰ *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.”

²¹ *Id.* **“We decline to find that other practices identified by the parties constitute per se violations of the duty to negotiate in good faith.”**

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 multinational conglomerate such as T-Mobile and small rural telephone companies such as the Petitioners.

This proceeding is also factually distinguishable from 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 of the facts and circumstances.²² After looking at the facts and circumstances in this case, it should be clear that T-Mobile has acted in bad faith, not the Petitioners. In fact, T-Mobile has consistently demonstrated that it would

²² “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*.

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.**”²³ 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.

3. FCC Cases

T-Mobile claims that the Petitioners have been “arrogant” and refuse to comply with FCC orders,²⁴ but **T-Mobile fails to mention the most recent FCC decision on the issue which is directly on point.** See Attachment A. Specifically, T-Mobile filed Petition for Declaratory Ruling requesting the FCC to find that Petitioners’ wireless termination service tariffs were preempted by or otherwise in conflict with federal law. On February 24, 2005, the FCC released a

²³ *Interconnection Order*, ¶154.

²⁴ T-Mobile Motion, p. 7.

Declaratory Ruling and Report and Order which denied T-Mobile's petition. The FCC's decision held, "Because the existing rules do not explicitly preclude tariffed compensation arrangements, **we find that incumbent LECs were not prohibited from filing state termination tariffs and [wireless] providers were obligated to accept the terms of applicable state tariffs.**"²⁵ Attachment A, ¶9.

The FCC explained:

Our finding that tariffed arrangements were permitted under the existing rules is based on the fact that neither the Commission's reciprocal compensation rules, nor the section 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the types of arrangements that trigger a compensation obligation. Because the existing compensation rules are silent as to the type of arrangement necessary to trigger payment obligations, we find that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff.

Id. at ¶10 (internal citations omitted). The FCC concluded, "By routing traffic to LECs in the absence of a request to establish reciprocal mutual compensation, **[wireless] providers accept the terms of otherwise applicable state tariffs.**"

Id. at ¶12 (emphasis added). Thus, Petitioners' tariffs have been expressly upheld by the FCC, and it is both misleading and "bad faith" for T-Mobile to claim otherwise.

²⁵ *T-Mobile's Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, rel. Feb. 24, 2005, ¶9 (emphasis added).

4. The *BPS Complaint Case*

T-Mobile claims that the Commission's decision in the *BPS Complaint Case* (TC-2002-1077) is currently on appeal before the U.S. District Court for the Western District of Missouri. T-Mobile is wrong again. The BPS complaint case was a state law claim brought pursuant to §386.390 RSMo. 2000. After the Commission issued its *Report and Order*, the proper procedure for appeal would have been for T-Mobile to file an application for rehearing with the PSC followed by a writ of review in the appropriate circuit court. See §§386.500 and .510 RSMo. Because T-Mobile failed to follow this procedure, the *BPS* case is now final, and T-Mobile is barred by collateral estoppel and *res judicata* from contesting the same issues before the Commission in this arbitration.

In light of the Cole County Circuit Court and Court of Appeals – Western District's consistent decisions upholding Petitioners' access tariffs and wireless tariffs, it should come as no surprise that T-Mobile sought to make an end run around Missouri state courts altogether by filing a case with the U.S. District Court for the Western District of Missouri. As noted above, that court dismissed T-Mobile's complaint and recognized T-Mobile's "transparent litigation strategy." It is T-Mobile that acts in bad faith by refusing to pay its bills even though its position has been rejected by the PSC (twice), the Circuit Court (twice), the Missouri Court of Appeals (twice), the FCC, and now the U.S. District Court for the Western District of Missouri. The Commission should reject T-Mobile's federal law claims.

5. The Nebraska and Oklahoma Decisions Are Not On Point.

T-Mobile cites decisions arising from the Nebraska and Oklahoma Commissions, but those cases are not on point. Specifically, those cases did not involve tariffs that had been approved by the state commission and upheld by the courts. Rather, they involved attempts to make the FCC's rules for "interim compensation" and negotiated rates relate back to a prior period. The facts in the case at hand are entirely different. Here, each Petitioner had a wireless termination service tariff that was approved by the Commission and upheld by the courts. At no point during the time period at issue were Petitioners' tariffs stayed or otherwise held in abeyance.

The Act expressly preserves a state commission's right to enforce its own interconnection regulations such as the wireless tariffs:

When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell*, 323 F.3d at 358. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* Specifically, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. §251(d)(3).²⁶

²⁶ *BellSouth Telecomms. Inc. v. Cinergy Communs. Co.*, 297 F. Supp. 2d 946 (ED Ky. 2003).

Therefore, the Commission should reject T-Mobile's claim that the Commission lacks authority to enforce the wireless tariffs in this proceeding.

B. The PSC Has Approved Language For Past Due Amounts.

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 70 agreements between small rural LECs and various wireless carriers. In fact, T-Mobile has itself agreed to such language with three small rural companies in Missouri.²⁷

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.**²⁸

²⁷ See e.g. Case No. TK-2004-0165 (Goodman Telephone Company).

²⁸ *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.

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.").

C. The *Alma Arbitration* case

T-Mobile cites the *Alma Arbitration* case in which the Commission found that Alma Telephone Company's claims for past due traffic should be resolved in a separate complaint proceeding. The facts in this case are entirely different than the *Alma Arbitration* case. In the *Alma Arbitration* case, Alma Telephone still had a complaint case pending before the Commission. Here, the Commission has already completed the complaint case and issued a *Report and Order* sustaining Petitioners' complaint against T-Mobile. See Attachment C. In the *BPS Complaint Case*, the Commission found that T-Mobile was liable for past due traffic terminated under a group of the Petitioners' wireless termination service tariffs. The PSC explained that Petitioners have "a right, as well as a duty, to recover the proper charges for services performed."²⁹

²⁹ Attachment C, Case No. TC-2002-1077, p. 28 citing *Orscheln Bros. Truck Lines v. Ferguson Mfg., Inc.*, 793 S.W.2d 525, 530-31 (Mo. App. WD 1990).

D. Discriminatory Effect

The Telecommunications Act prohibits the Commission from approving agreements that discriminate against another telecommunications carrier not a party to the agreement. Specifically, Section 252(e)(2)(i) states that it is grounds for rejection if an “agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement.”

All of Missouri’s other major wireless providers, including ALLTEL Wireless, Cingular, Sprint PCS, Verizon Wireless, and U.S. Cellular played by the rules and paid for their service under the tariff or negotiated agreements. Moreover, all of the agreements that have been filed by the Petitioners and approved by this Commission with these other wireless carriers include language addressing the resolution of past due bills. Indeed, the Missouri Commission has approved over 70 agreements with this language. Therefore, it would be discriminatory to require all of Missouri’s other wireless carriers to pay their bills and resolve past due amounts while allowing T-Mobile to get a free pass.

E. *Res Judicata* and Collateral Estoppel

T-Mobile is barred from contesting the lawfulness of Petitioners’ wireless termination service tariffs by the Missouri Court of Appeals’ decision in *Sprint Spectrum* and the PSC’s prior decision in the *BPS Complaint Case*. See Attachments B and C. Nevertheless, T-Mobile seeks to resurrect the same claims that have been litigated and lost before the PSC, the Missouri Court of Appeals, and the FCC. T-Mobile’s motion is nothing more than an attempt to upset these prior decisions by the PSC and Missouri courts.

Under §386.550 RSMo., final orders of the Commission are conclusive and collateral attacks are barred: “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” Thus, a final order from the PSC “cannot be attacked in a collateral proceeding.” *State ex rel. Mid-Missouri Tel. v. PSC*, 867 S.W.2d 561, 565 (Mo. App. W.D. 1993).

Under *res judicata*, a final judgment on the merits of an action precludes T-Mobile from relitigating this issue before the Commission. *Allen v. McCurry*, 101 S.Ct. 411, 449 U.S. 90, 66 L.Ed.2d 308 (U.S. 1980); *Lay v. Lay*, 912 S.W.2d 466 (Mo. banc 1995). Here, the Commission has already found that the wireless tariffs are lawful and that T-Mobile is liable for past due traffic under the tariffs. Therefore, T-Mobile is barred from relitigating the issue in this case. The Commission should simply take notice of these prior decisions and find T-Mobile liable. At this point, T-Mobile is barred from relitigating this matter and required to pay its bills.

IV. CONCLUSION

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 issuing a finding that T-Mobile is barred by the principles of *res judicata* and collateral estoppel from contesting the wireless tariffs and its past due amounts.

RESPECTFULLY SUBMITTED,

/s/ Brian T. McCartney

W.R. England, III Mo. #23975
Brian T. McCartney Mo. #47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456
trip@brydonlaw.com
bmccartney@brydonlaw.com
(573) 635-7166
(573) 634-7431 (FAX)

Attorneys for Petitioners

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 28th day of November, 2005, to the following parties:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Michael F. Dandino
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Mark P. Johnson
Roger Steiner
Sonnenschein, Nath, and Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
mjohnson@sonnenschein.com
rsteiner@sonnenschein.com