

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

T-MOBILE USA, INC.,)	
)	
Complainant,)	
)	
vs.)	Case No. TC-2006-0486
)	
BPS TELEPHONE COMPANY, et al.,)	
)	
Respondents.)	

**T-MOBILE’S RESPONSE IN OPPOSITION TO
RESPONDENTS’ MOTION FOR SUMMARY DETERMINATION**

T-Mobile USA, Inc. (“T-Mobile”), pursuant to Commission Rule 240-2.117(C) and the Commission’s Scheduling Order issued on July 13, 2006, submits this response in opposition to the Motion for Summary Determination that the Rural LEC Respondents filed on July 12, 2006.

**I. T-MOBILE’S RESPONSE TO THE MATERIAL FACTS IDENTIFIED BY
THE RURAL LECS**

Commission Rule 240-2.117(C) provides that a response such as this “shall admit or deny each of movant’s factual statements in numbered paragraphs corresponding to the number paragraphs in the motion for summary determination.” The Rural LECs have identified 10 facts in their Motion (at 2-5) which they state are material. Their allegations, and T-Mobile’s responses, are as follows:

1. “T-Mobile f/k/a VoiceStream delivered wireless calls to Respondents’ exchanges during the time period at issue in this case.”

T-Mobile’s Response: T-Mobile admits that it sent wireless calls for termination to the Rural LECs during the period covered by their complaint. The complaint period began on various dates in 2001 (depending upon the effective date of each Rural LEC’s wireless termination tariffs) and closed on February 6, 2005, the

effective date of the Commission's Complaint Order (hereinafter, "Complaint Period").¹

2. "T-Mobile did not have a Commission-approved agreement with the Respondents during the time period at issue in this case."

T-Mobile Response: T-Mobile admits that the parties (T-Mobile and the Rural LECs) did not have Commission-approved interconnection agreements in effect during the Complaint Period.

3. "Each of the Respondents had wireless termination service and intrastate exchange access tariffs that were lawful and in effect at all times."

T-Mobile Response: T-Mobile admits that during the Complaint Period, each of the Rural LECs had wireless termination service and intrastate exchange access tariffs on file with the Commission, but it denies that those tariffs were lawful for the reasons explained below.

4. "Respondents' wireless termination service tariffs were lawful during the time period at issue here."

T-Mobile Response: T-Mobile denies that Respondents' wireless termination tariffs were lawful during the Complaint Period.² While T-Mobile acknowledges that the Commission in its *Complaint Order* summarily rejected T-Mobile's argument that the termination tariffs contravened federal substantive law,³ the

¹ *BPS Telephone v. VoiceStream*, TC-2002-1077, Report and Order, at 5, 17 and 32 (Jan. 27, 2005) ("*Complaint Order*").

² T-Mobile recognizes that the FCC in its *Wireless Termination Tariff Order*, 20 FCC Rcd 4855 (2005) held that the procedure of using tariffs was not unlawful *per se* prior to April 29, 2005.

³ See *Complaint Order* at 28.

Missouri Supreme Court has since confirmed that State tariffs must comply with federal substantive law:

This case is controlled by the Federal Telecommunications Act of 1996 (FTA). The FCC is charged with implementing and enforcing provisions of the FTA, and FCC regulations and decisions are binding on the industry and state commissions.⁴

In addition, the FCC has specifically held that LECs may not abrogate their federal substantive law obligations simply by preparing and filing incompatible State tariffs that purport to exempt themselves from their federal duties.⁵ Rural LECs' tariffs do not comply with federal substantive law in two respects: (1) they do not provide for reciprocal compensation as the Communications Act explicitly requires,⁶ and (2) the rates contained in the tariffs do not comply with the FCC's governing TELRIC rules, which the U.S. Supreme Court has affirmed.⁷

5. "Accordingly, this Commission sustained the complaint filed by BPS Telephone et al. against T-Mobile for uncompensated wireless calls and directed T-Mobile to make payment for these past due amounts, plus late charges and attorneys' fees."

T-Mobile Response: T-Mobile admits that the Commission "sustained" the Rural LECs' complaint and further admits that the Commission stated that the amount due may include "interest, late fees, and reasonable attorneys' fees,"⁸ but it denies the remaining allegations and specifically denies that the Commission "directed"

⁴ *Alma Telephone v. Missouri PSC*, 183 S.W.3d 575, 577 (2006)(supporting citations omitted).

⁵ *See TSR Wireless v. U S WEST*, 15 FCC Rcd 11166 (2000), *aff'd Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

⁶ *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.703(a).

⁷ *See Verizon v. Maryland Public Service Comm'n*, 535 U.S. 632, 642 (2002).

⁸ *See Complaint Order* at 31-32.

T-Mobile to make payment. As T-Mobile understands State law, if the Rural LECs want to enforce a Commission complaint order, they must file an action for damages with the appropriate court, as the Commission has no power to determine damages, award pecuniary relief or declare or enforce any principal of law or equity.⁹

6. “T-Mobile admits in its complaint that it has not paid its bills as ordered by the Commission in January of 2005.”

T-Mobile Response: T-Mobile denies this allegation because its complaint makes clear that the Rural LECs, not T-Mobile, made this allegation in their Notice of Disconnection. T-Mobile stated in paragraph 6 of its amended complaint:

By letter dated May 12, 2006, the Rural LECs notified T-Mobile that beginning June 21, 2006, they intend to block calls made by T-Mobile customers placed to customers served by the Rural LECs because T-Mobile has not paid for certain mobile-to-land traffic that the Rural LECs terminated before April 29, 2005.

Nevertheless, T-Mobile admits that it has not paid in full the tariffed rates that the Rural LECs claim is due for traffic exchanged prior to April 29, 2005. T-Mobile denies the remaining allegations of paragraph 6, and specifically, the allegation that the Commission in its *Complaint Order* “ordered” T-Mobile to pay anything.

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

T-Mobile’s Response: T-Mobile admits that on May 12, 2006, the Rural LECs advised it that they intended to block T-Mobile’s mobile-to-land traffic beginning on June 21, 2006.

⁹ See, e.g., *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

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

T-Mobile Response: At the outset, T-Mobile is perplexed by the Rural LECs’ reference to “LEC-to-LEC network” since the Commission has confirmed that all wireless traffic, including “interstate interMTA wireless traffic” can use this network.¹⁰ While T-Mobile is not familiar with the details of the trunking arrangements between two incumbent LECs, including the Rural LECs and transit carriers like AT&T-Missouri or Embarq-Missouri, in most circumstances, the only way to route mobile-to-land traffic to one of the Rural LECs is through a transit carrier’s network. Thus, it is not apparent that there are, in fact, “other ways to deliver wireless calls to Respondents’ rural exchanges.”

The Rural LECs want to block traffic that T-Mobile sends to them through the AT&T-Missouri’s network. Yet, they state they have no intent to block T-Mobile traffic destined to them so long as T-Mobile first sends the traffic to an “alternate” network – even though in the vast majority of cases, this “alternate” network must also use the transit carrier’s network in order to send T-Mobile traffic to the Rural LECs’ networks (because most “alternate” networks also do not connect directly to the Rural LECs’ networks).

¹⁰ See *ERE Rulemaking Order*, 30 Mo. Reg. 1373, 1377 (June 15, 2005).

T-Mobile denies that its traffic is subject to the ERE rules, for the reasons explained in its accompanying legal memorandum. Nevertheless, Rule 240-29.130(1) gives an originating carrier the right to use one of three “alternative methods of delivering the blocked traffic to terminating carriers.” One of the methods the Rule explicitly authorizes is for the originating carrier to commence “interconnection agreement negotiations with terminating carriers for transiting traffic.” Here, the parties have executed interconnection agreements for transit traffic, and the Rural LECs do not allege that T-Mobile is in violation of these agreements in any way. Thus, even if the ERE rules did apply to mobile-to-land traffic (and they do not), the Rural LECs cannot invoke those rules’ blocking provisions because T-Mobile has exercised the right provided in Rule 240-29.130(1) to deliver the blocked traffic to terminating carriers via interconnection agreements.

The Commission should be apprised that the two other “alternative methods of delivering the blocked traffic to terminating carriers” make no sense in connection with the traffic at issue. One of the alternative methods specified in the rules is installing a “direct interconnection with terminating carriers.” A direct connection here would needless increase the costs of all parties without any corresponding public benefit.¹¹

The third alternative method referenced – “contract[] with interexchange carriers for traffic delivery” – also makes no sense as T-Mobile provides no

¹¹ The Commission has recognized that the Rural LECs would be responsible for the cost of the direct interconnection trunk to the extent they used the trunk for land-to-mobile traffic.

“interexchange services” to its one-rate customers. A one-rate customer call to a Rural LEC customer is a “local” call whether the T-Mobile customer is located within a Rural LEC’s exchange, Los Angeles or New York City.¹² In addition, even if T-Mobile were to use an “interexchange carrier,” as discussed above, in the vast majority of circumstances, that carrier would still have to route the T-Mobile traffic through an intermediary carrier’s network – generally, AT&T-Missouri’s or Embarq-Missouri’s network.

9. “T-Mobile’s traffic was previously blocked by the Respondents pursuant to their tariffs between December 15, 2004 and April 29, 2005. During this prior blocking on the LEC-to-LEC network, T-Mobile simply delivered its calls over the facilities of other interexchange or ‘long distance’ carriers, as documented in a newspaper article from the St. Louis Post-Dispatch:

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

See Exhibit B, Companies ask SBC to Block T-Mobile Calls, St. Louis Post-Dispatch, ¶ 2 (Dec. 15, 2004). This exactly what happened, and there was no disruption of service for anyone’s customers. It is misleading for T-Mobile to suggest that its calls will be disrupted, especially when it has already successfully rerouted its calls during the prior four-month period of blocking on the LEC-to-LEC network.”

T-Mobile Response: T-Mobile denies that it has misled anyone and further denies that during the four-month period specified, it sent traffic to carriers that were performing an “interexchange” function. In addition, upon information and

¹² Under the Communications Act, “telephone toll service” is limited to situations to calls “between stations in different exchanges” and for which there is “a separate charge not included in contracts with subscribers for exchange service.” 47 U.S.C. § 153(48). T-Mobile one-rate customers pay one rate to make a call on T-Mobile’s network regardless of the distance of the call. As a practical matter, for these customers, T-Mobile has only one “local exchange,” which is coextensive with the boundaries of the U.S. In other words, for these customers, T-Mobile does not provide any “interexchange” services. Even in the situation where T-Mobile does assess “long distance” charges, it is T-Mobile that provides the long-distance services, not a third-party intermediary carrier.

belief, it is T-Mobile's understanding that during this four-month period, the Rural LECs assessed access charges for terminating T-Mobile's intraMTA mobile-to-land traffic even though the FCC and the Missouri Supreme Court has held that access charges for such traffic are unlawful.¹³ Thus, it appears that the Rural LECs want the Commission to condone an arrangement that would result in the Rural LECs contravening their obligations under federal law.

T-Mobile further notes that it is generally more expensive to route its traffic destined to Rural LECs through two intermediary carriers (AT&T and AT&T-Missouri) than through one intermediary carrier (AT&T-Missouri). T-Mobile specifically denies that the Rural LECs or this Commission possess any legal authority to dictate how a commercial mobile service provider like T-Mobile must route its traffic, much less dictate that it use more expensive alternatives, as T-Mobile demonstrates in its accompanying legal memorandum.

10. "On June 20, 2006, the Eighth Circuit reviewed most of the arguments now raised by T-Mobile before the Commission and denied T-Mobile's request for an injunction to prevent Respondents from blocking T-Mobile's traffic over the LEC-to-LEC network. See Exhibit C. Respondents expressly deny that the question of the lawfulness of their state tariffs is currently pending before the Court of Appeals for the eighth Circuit in Case No. 05-4377. Rather, the only points raised by T-Mobile on appeal are whether the U.S. District Court for the Western District of Missouri erred in granting Respondents' motion to dismiss for lack of jurisdiction and denying T-Mobile's request for transfer. The only other matter currently pending before the Eight Circuit is Respondents' motion to dismiss for lack of subject matter jurisdiction. Respondents do not agree that the Eighth Circuit has jurisdiction. Respondents further state that on March 17, 2006 the Eighth Circuit Court of Appeals denied T-Mobile's motion to stay the proceedings, and on June 20, 2006 the Eighth Circuit denied T-Mobile's request for an injunction to prevent the Respondents from blocking T-Mobile's calls on

¹³ See, e.g., T-Mobile First Amended Complaint at ¶ 28 (FCC citations); *Alma Telephone v. Missouri PSC*, 183 S.W.3d 575 (2006).

the LEC-to-LEC network. Thus, the Eighth Circuit has already rejected most of the arguments T-Mobile now seeks to revive before the Commission.”

T-Mobile Response: The federal court orders and pleadings to which the Rural LECs reference speak for themselves and, consequently, no admission or denial is required. The remaining allegations constitute legal assertions and conclusions and, as such, no admission or denial is required. However, T-Mobile specifically denies the assertion that the Eighth Circuit has already decided “most of the arguments” that T-Mobile makes in this proceeding.

II. ADDITIONAL MATERIAL FACTS

Commission Rule 240-2.117(C) provides that a response in opposition may include “each additional material fact that remains in dispute.” T-Mobile below identifies additional facts that are material to this proceeding. If the Rural LECs dispute any of these material facts, then the Commission would be required to deny their motion for summary determination.¹⁴

11. T-Mobile and each of Rural LECs have executed Traffic Termination Agreements that have been filed recently with the Commission.¹⁵

12. These Agreements were negotiated and arbitrated pursuant to the procedures established in Section 252 of the Communications Act.¹⁶

¹⁴ See, e.g., *T-Mobile/Rural LEC Arbitration*, TO-2006-0147, Order Denying Motion for Summary Determination, at 2 (Dec. 29, 2005)(The Commission denies T-Mobile’s motion because based on the pleadings, it is “not clear” there are “no genuine issues of material fact.”).

¹⁵ See, e.g., *Traffic Termination Agreement between Mark Twain Rural Telephone Company and T-Mobile*, filed June 22, 2006 in docket TO-2006-0147.

¹⁶ See, e.g., *BPS/T-Mobile Traffic Termination Agreement*, Opening Paragraph (“This Agreement has been executed pursuant to Section 251(b)(5) of the Telecommunications Act of 1996.”).

13. Each of these Agreements encompasses all traffic that the parties have exchanged since April 29, 2005 and will exchange until the Agreements expire or are terminated.¹⁷

14. The rates contained in Appendix 1 of each Agreement apply to all intraMTA traffic, including traffic either party sends to an “interexchange carrier.”¹⁸

15. The Rural LECs are planning to assess access charges, rather than the rates contained in Appendix 1 of each Agreement, for any intraMTA mobile-to-land traffic that T-Mobile may send to a carrier that the Rural LECs deem to be an “interexchange carrier” as a result of any call blocking.

16. Section 19 of each Agreement is titled, “Termination of Service to Either Party.”¹⁹

17. Section 19.1 of each Agreement specifies that traffic subject to the Agreement may be blocked only under one circumstance – namely, when “either Party fails to pay when due any undisputed charges billed to them under this Agreement (“Undisputed Unpaid Charges”), and any portion of such charges remain unpaid more than (30) days after the due date of such Undisputed Unpaid Charges.”²⁰

¹⁷ *Id.* (“This Agreement for the termination of traffic . . . [shall be] effective April 29, 2005); *id.* at § 1.1 (“This Agreement shall cover traffic originated by one of the Party’s networks and delivered to the other Party for termination without the direct interconnection of the Parties’ networks. ‘Traffic originated by’ a Party means traffic that is originated on one Party’s network, irrespective of the identity of any intermediary carrier for which the originating Part has contracted with, including but not limited to an Interexchange Carrier or transiting LEC.”).

¹⁸ *See id.*, Appendix 1.

¹⁹ *See id.* at § 19.

²⁰ *Id.* at § 19.1.

18. With respect to each Rural LEC, there are no Undisputed Unpaid Charges for any of the traffic exchanged with T-Mobile for any of the traffic covered by the Agreements (e.g., April 30, 2005 to present).²¹

19. The Rural LECs propose to block T-Mobile's existing traffic because of non-payment of tariffed rates for traffic T-Mobile sent to them prior to the effective date of each Traffic Termination Agreement.²²

20. T-Mobile disputes the validity of the rates the Rural LECs want to charge for traffic it sent to them prior to April 29, 2005.

21. The tariffs that the Rural LECs want to apply to traffic exchanged prior to April 29, 2005 are not reciprocal – that is, the tariffs purport to require T-Mobile to pay them to terminate mobile-to-land traffic, but the Rural LECs would not be required to pay T-Mobile to terminate intraMTA land-to-mobile traffic.

22. The rates contained in the tariffs that the Rural LECs want to apply to traffic exchanged prior to April 29, 2005 are higher than the rates this Commission approved in its recent arbitration order between the parties.

23. The Commission, in its January 27, 2005 *Complaint Order*, summarily rejected T-Mobile's federal law arguments pertaining to the Rural LECs' wireless termination tariffs.²³

²¹ See T-Mobile's First Amended Complaint at ¶ 5. Remarkably the Rural LECs state in response that they are "without specific information or belief" to know whether any undisputed charges are outstanding. See Rural LEC Answer at ¶ 5.

²² See T-Mobile's First Amended Complaint, Exhibit A.

²³ See *Complaint Order*, TC-2002-1077, at 28.

24. In response, T-Mobile filed a complaint with the U.S. District Court for the Western District of Missouri alleging that the Rural LECs' wireless termination tariffs were unlawful and unenforceable because they were incompatible with federal substantive law.²⁴

25. That federal court dismissed T-Mobile's complaint not because federal courts could not entertain T-Mobile's federal law claims, but because it believed that T-Mobile had filed its claims in the wrong federal court.²⁵

26. T-Mobile has appealed that order to the Eighth Circuit Court of Appeals, and that appeal remains pending.²⁶

27. T-Mobile and the Rural LECs have conducted several discussions in an attempt to resolve their dispute over traffic exchanged prior to April 29, 2005.

28. These discussions have been unsuccessful to date.

29. During those discussions, the Rural LECs refused to make any concessions to T-Mobile or to depart in any way from their opening positions.

30. The Rural LECs have reached agreements with other wireless carriers for traffic exchanged prior to April 29, 2005, and T-Mobile believes that those agreements depart from the terms of their wireless termination agreements.

31. The Rural LECs have refused to produce to T-Mobile their agreements with other wireless carriers pertaining to pre-April 29, 2005 traffic.

²⁴ See *VoiceStream d/b/a T-Mobile v. BPS Telephone, et al.*, No. 05-04037-CV-C-NKL (W.D. Mo.).

²⁵ See *id.*, Order of August 24, 2005.

²⁶ See *VoiceStream d/b/a T-Mobile v. BPS Telephone, et al.*, No. 05-4377 (8th Cir.).

32. T-Mobile needs access to these agreements to determine whether it such exercise its federal statutory right to opt-into such agreements.²⁷

33. The Rural LECs have refused to mediate the dispute involving pre-April 29, 2005 traffic.

34. T-Mobile and other Missouri rural LECs – including Alma Telephone Company, Northeast Missouri Rural Telephone Company, Mid-Missouri Telephone Company, and Chariton Valley Telephone Company – have successfully negotiated resolution of disputes concerning the traffic they exchanged prior to April 29, 2005.

35. As a general rule, most carriers that the Rural LECs consider to be “interexchange carriers” do not interconnect directly with the Rural LECs.

36. As a general rule, most carriers that the Rural LECs consider to be “interexchange carriers” route traffic destined to one of the Rural LEC’s networks through the networks of AT&T-Missouri or Embark-Missouri.

37. The Rural LECs have no means to identify and segregate, at the time a mobile-to-land call is made, whether the call is an intraMTA or an interMTA call.

38. Neither AT&T-Missouri nor Embark-Missouri have the means to identify and segregate, at the time a mobile-to-land call is made, whether the call is an intraMTA or an interMTA call.

39. The Rural LECs have no means to identify, at the time a mobile-to-land call is made, whether the calling wireless customer is physically located in Missouri or some other State.

²⁷ See 47 U.S.C. § 252(i).

40. Neither AT&T-Missouri nor Embark-Missouri have the means to identify and segregate, at the time a mobile-to-land call is made, whether the calling wireless customer is physically located in Missouri or some other State.

III. THE RURAL LECS' HAVE FAILED TO MEET THEIR BURDEN OF DEMONSTRATING THAT THE SUMMARY DETERMINATION THEY SEEK IS APPROPRIATE

A motion for summary determination may be granted only if (1) there is no genuine issue of fact, (2) the movant demonstrates that it is entitled to the requested relief as a matter of law, and (3) the Commission determines that summary determination is in the public interest.²⁸ Here, the Rural LECs, as the movants, have the burden of proof on all three elements.²⁹ T-Mobile demonstrates in its accompanying legal memorandum that the Rural LECs have not met this burden with regard to any of these three elements. Accordingly, the Commission should deny their motion for summary determination

IV. CONCLUSION

For the foregoing reasons and those set forth in the accompanying legal memorandum, T-Mobile respectfully asks the Commission to deny the Rural LECs' Motion for Summary Determination.

²⁸ See 4 CSR 240-2.117(E).

²⁹ See, e.g., *Aquila*, EF-2003-0465 (Oct. 9, 2003).

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

/s/ Roger W. Steiner

Mark P. Johnson MO Bar #30740

Roger W. Steiner MO Bar #39586

4520 Main Street, Suite 1100

Kansas City, Missouri 64111

Telephone: (816) 460-2400

Facsimile: (816) 531-7545

ATTORNEYS FOR T-MOBILE USA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been mailed electronically this 1st day of August, 2006, to:

W. R. England, III
Brydon, Swearengen & England P.C.
312 East Capitol Avenue, P.O. Box 456
Jefferson City, MO 65102-0456

Mr. Leo Bub
Attorneys for Southwestern Bell Telephone, L.P.
d/b/a/ AT&T Missouri
One SBC Center, Suite 3520
St. Louis, MO 63101

Mr. Gary Manderfeld
Embarq
6450 Sprint Parkway
Overland Park, KS 66251

Ms. Linda Gardner
Embarq - KSOPHN0204-2B503
6450 Sprint Parkway
Overland Park, KS 66251

Mr. John Van Eschen
Missouri Public Service Commission
200 Madison Street
Jefferson City, MO 65102-2230

Office of the Public Counsel
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230

General Counsel
Missouri Public Service Commission
200 Madison Street
P.O. Box 360
Jefferson City, MO 65102-2230

/s/ Roger W. Steiner
ATTORNEYS FOR T-MOBILE USA, INC.