

**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 IN OPPOSITION TO
T-MOBILE'S MOTION FOR SUMMARY DETERMINATION OF ISSUE E**

Come now the Petitioners pursuant to Missouri Public Service Commission (Commission) Rule 4 CSR 240-2.117(1)(C) and offer the following response in opposition to T-Mobile's Petition for Summary Determination of Issue E.

I. INTRODUCTION AND SUMMARY

T-Mobile is not entitled to summary disposition. The Commission's rule only authorizes summary disposition in those circumstances where: (1) there is no genuine issue as to any material fact, (2) the moving parties are entitled to relief as a matter of law, and (3) the Commission determines that it is in the public interest to give summary relief. 4 CSR 240-2.117(1)(E). T-Mobile has failed to establish these elements. This case is the first opportunity that Petitioners have had to present evidence related to Issue E and to test T-Mobile's evidence. Petitioners have identified genuine issues of fact involving this contested issue, and Petitioners' discovery on matters related to Issue E is ongoing. Petitioners have also identified contested issues of law. Due process requires that Petitioners must have the opportunity to present their case, and it is not in the public interest to grant summary determination. Therefore, T-Mobile's motion must be denied.

T-Mobile's motion focuses almost entirely on the Commission's recent decision in the *Alma Arbitration Report*,¹ but Petitioners were not parties to the *Alma Arbitration* case and cannot be bound by the factual record established in another case.² In this case, Petitioners will introduce evidence and establish other factual matters that were either not addressed or not fully developed in the *Alma Arbitration* case. Moreover, the *Alma Arbitration* case was a 3-2 decision by the Commission, and this shows that two Commissioners were unconvinced by T-Mobile's factual and legal arguments. It is both inappropriate and unlawful for T-Mobile to seek to graft the factual record from another case upon the companies participating in this arbitration. Petitioners have the right to present their case at hearing. Under both state and federal law, due process requires that Petitioners be allowed an opportunity to try this issue. Summary judgment cannot be used to deprive Petitioners of a full hearing on genuine fact issues, and any doubt as to the existence of a genuine issue of material fact must be resolved against T-Mobile. In addition, important questions of fairness and public policy will be circumvented if the motion is granted, so the public interest will not be served by granting the motion.

T-Mobile's motion should also be denied because Commission's summary determination rule does not apply to cases involving rate increases or cases that are subject to operation of law dates. 4 CSR 240-2.117(1)(A). This case involves rates and is subject to statutory operation of law deadlines, so summary judgment is not available in this case. See 47 U.S.C. §252(d)(rates) and §252(b)&(e)(statutory deadlines). Therefore, T-Mobile's motion for summary judgment must be dismissed.

¹ *In the Matter of the Petition of Alma Telephone Company for Arbitration with T-Mobile*, Case No. TK-2006-0165, *Arbitration Report*, issued Oct. 6, 2005.

² T-Mobile's request for summary determination on an issue that Petitioners have never had the opportunity to try is particularly ironic in light of the fact that T-Mobile seeks to relitigate (in numerous forums) issues related to past due bills that the Commission has already decided against T-Mobile.

II. SUMMARY DISPOSITION

A. Summary Disposition Is Not Available In This Case.

The Commission's summary determination rule does not apply to cases involving rate increases or cases subject to operation of law dates. 4 CSR 240-2.117(1)(A). This case involves rates and is subject to statutory operation of law deadlines for Commission action, so summary judgment is not available here. See 47 U.S.C. §252(d)(rates) and §252(b)&(e)(statutory deadlines). Therefore, T-Mobile's motion for summary judgment must be denied.

B. T-Mobile's Motion Does Not Meet the Standard For Summary Disposition.

Commission Rule 4 CSR 240-2.117 "Summary Disposition" provides for disposition of a contested case "in the nature of summary judgment or judgment on the pleadings." The rule requires T-Mobile to prove: (1) there is no issue of genuine material fact; (2) T-Mobile is entitled to relief as a matter of law; and (3) it is in the public interest to give T-Mobile summary relief. 4 CSR 240-2.117(1)(E); see e.g. *In the Matter of the Application of Aquila*, Case No. EF-2003-0465, *Order Denying Motion for Summary Disposition*, issued Oct. 9, 2003.

Summary judgment is "an extreme and drastic remedy." *Miller v. United Sec. Ins. Co.*, 496 S.W.2d 871, 875 (Mo. App. 1973):

Such a judgment borders on the denial of due process and trial courts have been warned to use it cautiously. Care should be used in utilizing the procedure. And the moving party has the burden to show by "unassailable evidence . . . that he is entitled to summary judgment as a matter of law."

Id. at 875-76 (emphasis added and internal citations omitted).

A motion for summary judgment lies only when there is no genuine issue of material fact; a summary judgment is not a substitute for the trial of disputed issues. *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 184-85 (8th Cir. 1976). Accordingly, the Commission cannot try issues of fact on a summary judgment motion, and summary judgment cannot be used to deprive a litigant of a full trial of genuine fact issues. *Giordano v. Lee*, 434 F.2d 1227, 1230 (8th Cir. 1970). Thus, **“a surmise that a party is unlikely to prevail at trial is not a sufficient basis for refusing him his day in court with respect to those issues that are not shown to be sham, frivolous, or so unsubstantial that it would be futile to try them.”** *Union Transfer Co. v. Riss & Co.*, 218 F.2d 553, 554 (8th Cir. 1955); *Perry v. Kunz*, 878 F.2d 1056, 1062 (8th Cir. 1989)(emphasis added for both).

Any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. *U.S. v. Farmers Mut. Ins. Ass’n*, 288 F.2d 560, 562 (8th Cir. 1961). Because the burden is on the movant, the evidence presented to the court is always construed in favor of the party opposing the motion. *Nix v. Sweeney*, 573 F.2d 998, 1001 (8th Cir. 1978). The party opposing the motion is given the benefit of any and all favorable inferences. *McSpadden v. Mullins*, 456 F.2d 428, 430 (8th Cir. 1972). “The burden on the nonmoving party is not a heavy one; the nonmoving party simply is required to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.” Wright, Miller, Kane, FEDERAL PRACTICE AND PROCEDURE, Civil 3d §2727.

III. MATERIAL FACTUAL AND LEGAL ISSUES

A. ADMISSIONS OF SPECIFIC FACTUAL ALLEGATIONS

T-Mobile lists only two material facts in support of its motion and offers no “specific reference to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts” in this case as required by 4 CSR 240-2.117(B). Instead, T-Mobile simply cites comments filed by the Small Telephone Company Group (which includes different companies in addition to the Petitioners here) in a separate case.

1. Petitioners admit the facts alleged in paragraph one (1) of the motion. Petitioners further state that virtually all of these calls are dialed on a 1+ basis and carried by interexchange carriers (IXCs) that deliver them to T-Mobile’s wireless customers. Thus, these calls are “exchanged” between IXCs and T-Mobile, not between Petitioners and T-Mobile.

2. Petitioners admit the facts alleged in paragraph two (2) of the motion. Petitioners further state that they are required to route these calls to their customers’ presubscribed IXCs by federal and state law. See e.g. 47 U.S.C. §251(b)(3) (dialing parity). Petitioners further state that wireless carriers are already being compensated by IXCs and/or their own customers for these calls.

B. ADDITIONAL MATERIAL FACTS THAT REMAIN IN DISPUTE

Prior PSC cases, prior FCC cases, a U.S. District Court case (W.D. Mo.), and current industry practice all provide factual and legal support for Petitioners’ position on this contested issue. None of the following factual and legal matters were addressed or discussed in the *Alma Arbitration Report*, and Petitioners intend to present factual

evidence and legal argument about these matters at hearing on the question of whether or not IXC-carried calls are subject to the FCC's rules on reciprocal compensation for "local" traffic.

1. **Case No. TT-2001-139.** Prior Commission rulings state that when an interexchange carrier (IXC) carries a call to a commercial mobile radio service ("CMRS" or "wireless") carrier, then "the IXC must compensate the CMRS carrier for the termination of the call."³

2. **Wireless Carriers Are Compensated by IXCs and/or Wireless Customers.** At hearing, Petitioners intend to address the fact that T-Mobile is already being compensated for these calls by IXCs and/or their own customers, a fact that has been recognized in prior cases before the FCC and this Commission:

a. **Wireless Carriers Are Being Paid by IXCs.** Prior cross-examination of Respondent T-Mobile's own expert witnesses, Mr. Billy Pruitt, indicates that wireless carriers are already being paid for this traffic by IXCs.⁴

b. **Wireless Carriers Are Already Being Paid By Their Customers.** In *Sprint PCS v. AT&T*, the FCC reviewed a referral from the United States District Court for the Western District of Missouri involving a wireless carrier (Sprint PCS) seeking compensation from an IXC (AT&T). In that case, the FCC recognized that wireless carriers were already being compensated for this traffic by their own end users.⁵

³ *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce its Wireless Termination Service Tariff*, Case No. TT-2001-139, *Report and Order*, issued Feb. 8, 2001.

⁴ *Mark Twain Wireless Tariff* case, Tr. 342-43.

⁵ *In the Matter of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 2002 FCC LEXIS 3262, *Declaratory Ruling*, rel. July 3, 2002, ¶14.

3. **SBC Does Not Pay Reciprocal Compensation.** Missouri's largest local exchange carrier (LEC), Southwestern Bell Telephone d/b/a SBC Missouri, does not pay reciprocal compensation for land-to-mobile traffic that is carried by an IXC.⁶

4. **The FCC's Notice of Proposed Rulemaking.** Earlier this year the FCC issued a *Notice of Proposed Rulemaking* ("NPRM") questioning whether it should retain the intraMTA rule for wireless traffic.⁷ In its March 3, 2005 *NPRM*, the FCC observed that IXCs, and not small rural LECs, remain financially responsible for IXC traffic. The FCC specifically identified the same issues related "transit" traffic and wireless carriers that are present in this case and recognized that its present rules require intraMTA calls dialed on a 1+ basis to be routed through IXCs and remain subject to the access compensation regime. The FCC invited comment on whether its existing rules and industry practices could be changed to allow traffic to be routed to wireless carriers and made subject to reciprocal compensation, but the FCC recognized that this is simply not the case today.⁸ Thus, the FCC clearly stated that it would require a future change to its access and reciprocal compensation regimes to make IXC traffic subject to reciprocal compensation. This language confirms that IXC traffic is currently not subject to reciprocal compensation.

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

⁶ See *Alma Arbitration*, Tr. 263.

⁷ *Further Notice of Proposed Rulemaking in the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, issued March 3, 2005.

⁸ *Id.* at ¶138.

[U]nder the existing regimes, the calling party's carrier, whether LEC, IXC, or CMRS provider, compensates the called party's carrier for terminating the call.⁹

Thus, for IXC-carried traffic, the IXC is the calling party's carrier, and it is the IXC that is responsible for compensating T-Mobile for the call.

5. **The Commission's Enhanced Record Exchange Rule.** Petitioners' position is also consistent with the Commission's recently enacted Enhanced Records Exchange (ERE) Rules, located at Chapter 29 of the Commission's rules, which recognize the "originating customer's carrier pays" system and define IXC traffic as "that traffic which traverses an interexchange carrier point of presence." 4 CSR 240-29.020(15).

6. **T-Mobile v. BPS Telephone.** Language in a recent decision issued by the U.S. District Court for Western District of Missouri in *T-Mobile v. BPS Telephone*, Case No. 05-4037, on Aug. 24, 2005 (Laughrey, J.) supports Petitioners' factual and legal position. Specifically, the court stated:

"A call that originates from an MTA that does not correspond with a local telephone carrier's region is considered a "toll call" and a different system of compensation exists."

T-Mobile complains that the language is dicta and that the Judge made a "factual error" in the order, but T-Mobile was a party to that case. Indeed, T-Mobile filed the case and bore the burden of proof. In any event, this is a fact question for the arbitrator and the Commission to decide after hearing.

⁹ *Id.* at ¶17.

7. **Missouri's Approved Interconnection Agreements.** In more than seventy (70) agreements approved by this Commission, traffic carried by IXCs is expressly excluded for purposes of reciprocal compensation. For example, the Agreement between Ozark Telephone Company and T-Mobile, approved by the Commission in Case No. TK-2004-0166, expressly excludes traffic carried by an IXC:

This Agreement shall cover traffic originated by, and under the responsibility of, one of the Parties . . . "Traffic originated by and under the responsibility of," a Party means traffic that is originated by a party pursuant to that Party's rate schedules, tariffs, or contract with the end-user customer. This Agreement does not cover traffic for which the originating party has contracted with an Interexchange Carrier ("IXC") to assume the responsibility for terminating the traffic or traffic originated by an IXC pursuant to the IXC's rate schedules, tariffs, end-users contracts, or presubscription rules.

This is the same language proposed by Petitioners in this case and the same language that T-Mobile and all of Missouri's other major wireless carriers have accepted in other Missouri agreements.

IV. DUE PROCESS AND PUBLIC INTEREST

Petitioners were barred by Commission rule from participating as parties in the *Alma Arbitration* case. See 4 CSR 240-36.040(16). Thus, Petitioners did not have an opportunity to present their case and put on their own evidence or test the evidence put on by T-Mobile. By rule, Petitioners were only allowed to file comments after the arbitrator had already issued a draft decision. 4 CSR 240-36.040(20). The opportunity to file comments after the hearing is over and a proposed order has already been drafted is not the same as the opportunity to present evidence and test an opponent's case at hearing through cross-examination.

To the best of Petitioners' knowledge, the *Alma Arbitration Report* is the first time in Missouri that any LEC has been ordered to pay reciprocal compensation to wireless carriers for traffic that is carried by IXCs. The *Alma Arbitration Report* was a 3-2 decision by the Commission, so T-Mobile did not convince two Commissioners of its factual and legal positions. The *Alma Arbitration Report* is presently on appeal before the U.S. District Court for the Western District of Missouri, so it has not been affirmed by the courts.

The Petitioners in this case cannot be held to the factual record of the *Alma Arbitration* case. Petitioners are entitled to put on their case and build their own factual record addressing vital fact questions such as: (1) Do Missouri's large ILECs such as SBC Missouri pay reciprocal compensation on IXC-carried traffic? (2) Is T-Mobile already being compensated for IXC-carried traffic by the IXCs and/or T-Mobile's own end-user customers? (3) Should traffic carried by IXCs be considered traffic "exchanged" between wireless carriers and IXCs or between wireless carriers and small rural LECs? (4) Does T-Mobile's position conflict with the Commission's newly enacted Enhanced Records Exchange (ERE) Rule?

Ironically, T-Mobile recently filed a pleading in this case claiming that it cannot be bound by a Commission order where T-Mobile was not a party.¹⁰ T-Mobile wants to have it both ways by: (1) contesting issues regarding past due bills that T-Mobile has litigated and lost with the Petitioners; yet (2) precluding Petitioners from their first opportunity to litigate Issue E at hearing. Granting T-Mobile's motion would turn the

¹⁰ See *T-Mobile Reply In Support of Its Motion To Dismiss Petitioners' Issues A & B*, filed Dec. 7, 2005, pp. 11-12. ("These doctrines [*i.e.* res judicata and collateral estoppel] only apply if one was a party to prior litigation.") It should also be noted that T-Mobile was a party to the *BPS Complaint* case filed by a number of Petitioners and sustained by the Commission in Case No. TC-2002-1077.

principles of issue and claim preclusion upside-down. T-Mobile's motion is just the latest example of T-Mobile's "transparent litigation strategy"¹¹ with Missouri's small rural LECs, and it must be denied.

V. CONCLUSION

Petitioners have presented sufficient factual and legal information to proceed to hearing on the issue. Petitioners have not had an opportunity to present their case on this issue to the Commission, so summary judgment is not appropriate. This is Petitioners' first opportunity to present evidence on the issue and test T-Mobile's evidence. Under both state and federal law, due process requires that Petitioners be allowed an opportunity to try these issues at hearing. Summary judgment cannot be used here to deprive Petitioners of a full hearing on these fact issues, and any doubt as to the existence of a genuine issue of material fact must be resolved against T-Mobile. Therefore, the motion for summary determination must be denied.

By:

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¹¹ *T-Mobile v. BPS Tel. Co.*, U.S. District Court (W.D. Mo.) Case No. 05-cv-4037, Order, Nov. 11, 2005.

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 16th day of December, 2005, to the following parties:

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