BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Petition of	)	
Alma Telephone Company	)	
for Arbitration of Unresolved	)	Case Nos. IO-2005-0468, et al.
Issues Pertaining to a Section 251	)	
Agreement with T-Mobile USA, Inc.	)	

<u>The Small Telephone Company Group's Comments on the Arbitrator's Draft Report</u>

COMES NOW the Small Telephone Company Group ("STCG"),[1] pursuant to Commission Rule 4 CSR 240-36.040(20), and offers the following comments on the Draft Report filed by the Arbitrator on September 9, 2005.

I. INTRODUCTION AND SUMMARY

The STCG member companies are all small incumbent local exchange telephone companies (ILECs) as defined by Missouri law and provide telecommunications service in the rural areas of the state of Missouri under the regulation of the Missouri Public Service Commission (Commission). The members of the STCG are also rural telephone companies as defined by the Telecommunications Act of 1996 ("the Act")[2] and the Federal Communications Commission (FCC). The STCG companies provide basic local exchange service to subscribers within one or more Commission-defined exchanges in the state of Missouri.

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[1] See Attachment A.
[2] 47 U.S.C. §153(37).

Many of the STCG member companies presently have interconnection agreements with various commercial mobile radio service ("CMRS" or "wireless") providers (including T-Mobile) that have been approved by and are on file with the Commission. These agreements govern the exchange of intraMTA wireless traffic between the STCG companies and wireless carriers.

The STCG offers these Comments in response to the portion of the Arbitrator's Draft Report that addresses the treatment of wireline-to-wireless traffic carried by an interexchange carrier ("IXC") because the Draft Report contradicts: (1) FCC Rules and decisions; (2) prior Commission orders; (3) industry practice in Missouri and elsewhere; and (4) more than seventy (70) agreements between small ILECs and wireless carriers that have been approved by and are on file with the Commission.

First, the STCG agrees that arbitrations before the Commission must comply with federal law and FCC rules, but the Draft Report errs as a matter of law in finding that wireline-to-wireless traffic carried by an IXC is subject to the Act's reciprocal compensation provisions that apply to traffic exchanged between ILECs and wireless carriers. The FCC's recent *Notice of Proposed Rulemaking* on intercarrier compensation and longstanding industry practice in Missouri both confirm that the opposite is true.

Second, the Draft Report's adoption of a 65/35 net billing ratio is arbitrary and unreasonable in that it is not supported by empirical evidence or actual evidence about the ratios of larger ILECs in Missouri such as SBC. Moreover, the 65/35 ratio adopted by the arbitrator fails to take into account the fact that in

Missouri, most, if not all, calls to wireless carriers from rural exchanges are dialed as "1+" toll calls incurring per minute toll charges, which is likely to result in both <u>fewer</u> calls and <u>shorter</u> landline-to-mobile calling.

II. COMMENTS

A. Landline-to-Mobile IntraMTA Calls

The Draft Order erroneously concludes that small rural ILECs must compensate wireless carriers for landline-to-mobile intraMTA calls that are carried by an IXC.[3] This conclusion contradicts current FCC rules, prior Commission decisions, standard industry practice in Missouri, and the terms of more than seventy (70) agreements that have been approved by the Commission.

The Commission clearly explained the issue in the context of Missouri's unique telecommunications network in its *Mark Twain Wireless Tariff* decision:

> At present, with the termination of the PTC [Primary Toll Carrier] Plan, it is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. The Filing Companies' expert witness, Robert Schoonmaker, explained that the CMRS carriers' switches are located outside of the local calling scopes of the small LECs and that such calls are necessarily toll calls, and thus carried by an IXC. The CMRS carriers' witnesses admitted that the traffic is being carried by IXCs, but contend that this is a business choice made by the small LECs in order to generate access charges. <u>**In either case, if the traffic is carried by an IXC, the IXC must compensate the CMRS carrier for the termination of the call**</u>.[4]

[3] Draft Report, page 16.

[4] *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 (emphasis added).

Thus, the issue for IXC-carried calls in Missouri is not whether the wireless carrier is entitled to reciprocal compensation, but rather, which carrier is financially responsible for compensating the wireless carrier for terminating the call. In 2001, the Commission correctly recognized that IXCs were responsible for compensating the wireless carriers.[5]

The Draft Order erroneously misapplies the FCC rules, state and federal tariffs, and business practices that govern relationships between LECs, end user customers, and IXCs. In short, the Draft Order erroneously relies on the mistaken assumption that IXC traffic is the same as traffic between LECs and wireless carriers. As demonstrated by the following examples, the Draft Order's error directly contradicts the Commission's prior findings in the *Mark Twain* case and current industry practice in Missouri.

EXAMPLE 1. **Wireline-to-Wireless Call with a Local NPA/NXX Number**

First, assume an intraMTA call from a Sprint local landline customer in Jefferson City, Missouri to a Cingular wireless customer with a Jefferson City NPA-NXX. This call would be dialed as a local call (*i.e.* **without dialing "1+"**) and would be switched and delivered to Cingular's facilities by Sprint. Under this scenario, the traffic is exchanged between Sprint and Cingular, and reciprocal compensation applies.

[5] See also *In the Matter of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-36, 2002 FCC LEXIS 3262, *Declaratory Ruling*, rel. July 3, 2002. This FCC case was a referral from the United States District Court for the Western District of Missouri, and it involved a wireless carrier (Sprint PCS) seeking compensation from an IXC (AT&T). The FCC held that Sprint PCS "was not prohibited from charging access fees" to AT&T. *Id*. at ¶1.

EXAMPLE 2. **<u>Wireline-to-Wireless Call with a Non-Local NPA/NXX</u>**

Now, assume an intraMTA call from a Sprint local landline customer in Jefferson City, Missouri to a Cingular wireless customer with a Columbia, Missouri NPA-NXX. This call would be dialed **<u>with a "1+"</u>** and would be handed off in Jefferson City to the Sprint wireline customer's chosen (i.e. presubscribed) IXC (e.g. AT&T) and carried to Cingular's facilities by that IXC. Under this scenario, the traffic is exchanged between the IXC (e.g. AT&T) and Cingular, and those two parties are responsible for compensating each other. Under this example, the wireline carrier (Sprint) has no responsibility for compensating the wireless carrier for terminating the call.

It is this second scenario that is most prevalent in rural areas because wireless carriers seldom have local NPA-NXX numbers in rural exchanges. Thus, virtually all traffic from rural ILECs to wireless carriers is dialed on a "1+" basis and carried by an IXC, and the IXC is responsible for compensation. The Commission properly recognized this fact in the *Mark Twain Wireless Tariff Order* quoted above.

B. "1+" calls from Rural Exchanges are IXC-CMRS Calls

In this case, Petitioners' rural end user customers are customers of the Rural ILECs for local service only. The Petitioners' local tariffs approved by the Commission define the Petitioners' local calling areas. All calls outside of these Commission-defined "local" areas are "toll" calls which by the FCC's presubscription rules must be carried by the customer's chosen IXC. The Petitioners' end users are not customers of the ILEC for toll services. Rather, these rural customers choose an IXC to be their “toll” carrier and carry “1+” calls through the FCC’s mandated presubscription process. The Petitioners’ customers purchase “toll services” from their IXC of choice and pay the toll carrier for those services under the IXC’s toll tariffs or price schedules. IXCs purchase the use of the ILEC’s facilities to “access” end users and provision their toll services to their presubscribed customers in the ILEC’s exchange. The IXCs have the business relationship with the end user customer placing the long distance call. The IXC has the right to receive compensation (i.e. toll) from the calling party and the obligation to compensate other carriers whose facilities the IXC uses to originate and terminate the call.

Thus, as demonstrated in the examples above, a call dialed “1+” and carried by an IXC is a call from an IXC end user to the wireless carrier customer, and responsibility for compensation is between the IXC and the wireless carrier. The call does not fall under the FCC’s rules for reciprocal compensation between ILECs and wireless carriers.[6] The Petitioners did not ask the Arbitrator to create “a new exception” to the reciprocal compensation regime or ignore FCC rules. On the contrary, Petitioners simply sought for IXC-carried traffic to continue to be exempted from traffic for which the LEC has an obligation to pay reciprocal compensation. The rural ILEC Petitioners’ final offer was consistent with FCC rules and decisions, past Missouri Commission precedent, standard industry practice in Missouri, and more than seventy (70) agreements that have been approved by the Missouri Commission.

[6] *See* Schoonmaker Testimony, pp. 33-35.

1. FCC Rules

The STCG agrees that the Arbitrator must “defer to the FCC’s view” of reciprocal compensation and apply the federal regime. Under FCC rules and industry practice, reciprocal compensation rules apply to agreements for intraMTA calls “exchanged” between an ILEC and a wireless carrier, and the STCG agrees that reciprocal compensation provisions apply where the LEC is exchanging (*i.e.* carrying) the traffic.[7] (See Example 1 above.)

But the Draft Report erroneously extends this requirement to IXC traffic. (See Example 2 above.) The Draft Report misreads and misapplies the FCC’s rules and decisions. The FCC’s reciprocal compensation rules apply to traffic that is “exchanged” between wireline and wireless carriers, but this rule only addresses the situation where a LEC is actually carrying the traffic to the wireless carrier. Reciprocal compensation rules simply do not apply in this case because the small rural ILECs do not carry the traffic to the wireless carriers. Rather, under the FCC’s presubsription rules these calls are dialed on a “1+” basis and handed off to the customer’s IXC. As a result, the call is exchanged between the IXC and the wireless carrier.

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[7] In a few limited circumstances, some of the STCG member companies do exchange traffic with wireless carriers. For example, (a) Lathrop and Orchard Farm are included in the Metropolitan Calling Area (MCA) Plans and exchange traffic with wireless carriers under the terms of those Commission-ordered plans; (b) a few of the small carriers have Extended Area Service (EAS) plans and exchange traffic with wireless carriers under the terms of those Commission-ordered plans; and (c) a few of the small carriers such as Fidelity do provide intraLATA toll service and exchange traffic with wireless carriers under the terms of their Commission-approved tariffs. The STCG agrees that the FCC’s reciprocal compensation rules do apply in these circumstances.

FCC decisions acknowledge that IXC traffic is not presently subject to the Act's reciprocal compensation provisions. For example, earlier this year the FCC issued a *Notice of Proposed Rulemaking* ("*NPRM*") questioning whether it should retain the intraMTA rule for wireless traffic.[8] In its March 3, 2005 *NPRM*, the FCC observed that IXCs, and not small rural ILECs, 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 that intraMTA calls dialed on a 1+ basis 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 **<u>changed</u>** 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:

> For instance, we recognize that the current Commission rules may require that intraMTA calls dialed on a 1+ basis be routed through IXCs. ***<u>Specifically, section 51.209 of the Commission's rules requires LECs to implement toll dialing parity through a presubscription process that permits a customer to select a carrier to which all designated calls on a customer's line will be routed automatically. Should this rule be changed</u>***? We ask parties to explain what technical or network changes would be needed if all intraMTA CMRS traffic were routed to CMRS providers. ***<u>We also seek comment on whether, in the alternative, all intraMTA calls can be made subject to reciprocal compensation without requiring LECs to alter the routing of their originated traffic</u>***. We ask parties supporting a particular approach to address any other Commission rules that may be implicated."[9]

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

[9] *Id*. at ¶138.

Here, the FCC clearly envisions that it would require a future ***<u>change</u>*** to its access and reciprocal compensation regimes to make IXC traffic subject to reciprocal compensation. This language clearly 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:

> ***<u>[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.</u>*** [10]

Thus, for IXC-carried traffic the IXC is the calling party's carrier, and it is the IXC that is responsible for compensating "the called party's carrier" (i.e. the wireless carrier) for the call. The Draft Report errs by placing this burden on small rural ILECs and thereby contradicts the FCC's existing compensation regimes.

The Draft Report recites the wording of FCC Rule 51.701, but the Draft Report misreads and misapplies that rule. Subpart (2) of the rule defines telecommunications traffic as that ***exchanged between a LEC and a CMRS provider*** that, at the beginning of the call, originates and terminates within the same Major Trading Area. The Draft Report erroneously concludes that IXC traffic is the same as traffic "exchanged" between a LEC and a wireless carrier. The word "exchanged" is a term of art used by the FCC to denote reciprocal compensation traffic. Reciprocal compensation was intended for two interconnected competitors who compete for local customers. The term

[10] *Id*. at ¶17.

"exchanged" refers to a swapping of local traffic originated by either the LEC or the CMRS provider, and that each reciprocally delivers to the other to terminate. This rule does not apply to situations involving IXCs.

2. Prior Commission Decisions

The fact that wireless carriers are compensated by IXCs for this traffic has also been recognized in prior cases before the Commission, including prior cross-examination of Respondent T-Mobile's own expert witness Mr. Billy Pruitt. Pursuant to Commission Rule 4 CSR 240-2.130, the Commission should take official notice of these prior admissions by wireless carriers that they are already being compensated for intraMTA traffic by IXCs. For example, in Case No. TT-2001-139, Mr. Pruitt expressly acknowledged that Sprint PCS (his employer at the time) receives access payments on intra-MTA wireless traffic that is delivered by IXCs:

> Q. Thank you, sir. In these data requests, I believe we asked a series of questions regarding Sprint [PCS]'s relationship with IXCs that deliver traffic to it from land-line customers. And if I may paraphrase, my understanding is that with the notable exception of AT&T, **<u>Sprint [PCS] is currently being compensated by IXCs for traffic that is terminated to it from land-line customers</u>**?
>
> A. **<u>That is correct</u>**.[11]

Thus, **<u>wireless carriers are already receiving compensation from the IXCs</u>**, and the Draft Order errs in that it would effectively allow the wireless carriers to

[11] *In the Matter of Mark Twain Rural Telephone Company's Wireless Termination Service Tariff*, Case No. TT-2001-139, Tr. 342-43 (emphasis added).

be compensated twice for the same call: once from the IXC and a second time from the small rural ILEC.[12] Again, in 2001, the Commission held that **"<u>if the traffic is carried by an IXC, the IXC must compensate the CMRS carrier for the termination of the call</u>**.[13]

3. Industry Practice

To the best of the STCG's information and belief, the Draft Order is the first time in Missouri where it has been suggested that reciprocal compensation applies to traffic that is carried by IXCs to wireless carriers. Indeed, at the arbitration hearing in this case, T-Mobile admitted that **<u>SBC, the largest ILEC in Missouri, does not pay reciprocal compensation for landline-to-mobile traffic that is carried by an IXC</u>**.

> Q. Do you know if Southwestern Bell is paying T-Mobile for landline to wireless IXC traffic?
>
> A. They are not.[14]

Thus, the Draft Report contradicts statewide industry practice in addition to FCC rules and prior Commission decisions.

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[12] If the Draft Report stands, then the wireless carrier is also responsible for the intraMTA traffic it sends to the ILECs via an IXC. But today when wireless carriers deliver intraMTA traffic to the small ILECs via an IXC, they do not pay reciprocal compensation because the IXC is responsible for paying terminating compensation to the LEC.

[13] *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 (emphasis added).

[14] Tr. 263.

4. Missouri's Approved Interconnection Agreements

The Draft contradicts the terms and conditions of over seventy (70) approved agreements between small rural ILECs and wireless carriers. In all of these agreements, traffic carried by IXCs is expressly excluded for purposes of reciprocal compensation. For example, the Traffic Termination Agreement between Kingdom Telephone Company and Verizon Wireless, which was approved by the Commission in Case No. IO-2003-0201, 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.[15]

The Draft Report erroneously departs from longstanding Missouri practice and precedent by subjecting IXC traffic to reciprocal compensation rules.

5. Precedent

The Draft Report erroneously concludes "it is well settled" that landline-to-wireless IXC traffic is reciprocal compensation traffic. But this is not the case, and all of the federal cases cited in the Draft Report arose from foreign jurisdictions with very different telecommunications networks. The Act requires that state commissions examine state-specific networks and grants state commissions the discretion, in the first instance, to review the facts, interpret

FCC rules, and reach their own decisions on the issues presented. In Missouri, the situation is unique in that the traffic at issue is being exchanged on a network operating after the termination of a Primary Toll Carrier (PTC) Plan. This is vastly different than the situation in Iowa, for example, because in Iowa the small rural ILECs all participate in their own centralized interexchange network called Iowa Network Services ("INS"). There is no such centralized toll network among all small rural ILECs in Missouri.

The Draft Order relies almost exclusively upon the conclusion from the Tenth Circuit's "*Atlas*" decision,[16] but more accurate (and more binding) precedent is found in the Eighth Circuit's "*Comptel*" decision. In *Comptel v FCC*, 117 F.3d 1068 (1997), the Eighth Circuit specifically held that the FCC's refusal to subject IXC traffic to the reciprocal compensation regime was lawful:

> ...it is clear from the Act that Congress did not intend all access charges to move to cost-based pricing, at least not immediately. The Act plainly preserves certain rate regimes already in place. . . . In other words, ***<u>the LECs will continue to provide exchange access to IXCs</u>*** for long-distance service, and continue to receive payment, under the pre-Act regulations and rates……..Comptel also challenges the FCC's interpretation of interconnection as having a discriminatory impact, by permitting LECs to charge different rates for the same service based on whether the carrier who is seeking interconnection and other network services is a long-distance provider or a local service provider. ***<u>But the two kinds of carriers are not, in fact, seeking the same services. The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service</u>***.

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[15] Case No. IO-2003-0201, Traffic Termination Agreement between Kingdom Telephone Company and Verizon Wireless, §1.1 – Scope of Agreement.
[16] *Atlas Tel. v. Oklahoma Corporation Comm'n*, 400 F. 3d at 1264.

The *Comptel* case confirms that the FCC's *Local Competition Order* intended to preserve access for IXC traffic separate and distinct from reciprocal compensation.

Finally, ***<u>all three</u>*** of the district court cases cited in the Draft Report's description of "every federal court" are presently on appeal to the United States Circuit Courts, and two of those cases (*Rural Iowa* and *Three Rivers*) have already been reversed and remanded once during the course of their first trip to the Eighth and Ninth Circuits, respectively. Clearly, the district court decisions cited in the Draft Report are neither final nor the solid precedent that the Draft Order makes them out to be.

C. 65/35 Traffic Factor

The Draft Report erred by imposing an arbitrary and unreasonable 65%/35% net billing factor for intraMTA traffic. First, this decision was unsupported by any empirical evidence. Although Mr. Pruitt states that this is an "industry standard" ratio, there is simply no competent evidence to support his claim. In fact, T-Mobile's agreement with Missouri's largest LEC – SBC – has an 80%/20% shared facility factor,[17] but the Draft Report failed to consider or even examine the "industry standard" factors in place between Missouri's largest ILECs and other wireless carriers generally or T-Mobile specifically. Thus, the Draft Report erroneously accepts the unsupported claims of T-Mobile rather than

[17] *See* Interconnection Agreement between SBC and T-Mobile, approved in Case No. TO-2001-489 on April 17, 2001.

considering the factors that the Commission has previously approved between ILECs and wireless carriers in Missouri.

Second, the 65/35 ratio advocated by T-Mobile fails to take into account the fact that in Missouri calls to wireless carriers from rural exchanges are dialed as "1+" toll calls incurring per minute toll charges, which is likely to result in both fewer calls and shorter calls. Therefore, the 65/35 ratio is both arbitrary and unreasonable on its face.

III. CONCLUSION

For the reasons detailed above, the STCG respectfully requests that the Arbitrator's Draft Report be amended to correct the errors of fact and law identified above.

Respectfully submitted,

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ATTACHMENT A

BPS Telephone Company
Citizens Telephone Company
Craw-Kan Telephone Cooperative, Inc.
Ellington Telephone Company
Farber Telephone Company
Fidelity Telephone Company
Goodman Telephone Company
Granby Telephone Company
Grand River Mutual Telephone Corp.
Green Hills Telephone Corp.
Holway Telephone Company
Iamo Telephone Company
Kingdom Telephone Company
KLM Telephone Company
Lathrop Telephone Company
Le-Ru Telephone Company
McDonald County Telephone Company
Mark Twain Rural Telephone Company
Miller Telephone Company
New Florence Telephone Company
Oregon Farmers Mutual Telephone Company
Ozark Telephone Company
Peace Valley Telephone Co., Inc.
Rock Port Telephone Company
Seneca Telephone Company
Steelville Telephone Exchange, Inc.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 19th day of September, 2005, to the following parties:

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