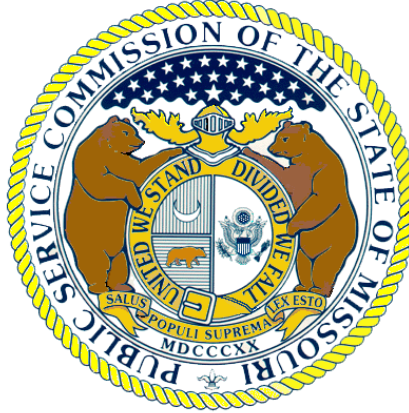


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



BPS Telephone Company, *et al.*,

Complainants,

vs.

Voicestream Wireless Corporation, Western Wireless  
Corp., and Southwestern Bell Telephone Company,

Respondents.

**Case No. TC-2002-1077**

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**REPORT AND ORDER**

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**Issue Date:** January 27, 2005

**Effective Date:** February 6, 2005

# BEFORE THE PUBLIC SERVICE COMMISSION

## OF THE STATE OF MISSOURI

BPS Telephone Company, <i>et al.</i> ,	)	
	)	
Complainants,	)	
	)	
vs.	)	<b><u>Case No. TC-2002-1077</u></b>
	)	
Voicestream Wireless Corporation, Western Wireless	)	
Corp., and Southwestern Bell Telephone Company,	)	
	)	
Respondents.	)	

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## **APPEARANCES**

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**Paul Lane** and **Leo J. Bub**, Attorneys at Law, Southwestern Bell Telephone Company, L.L.C., doing business as SBC Missouri, One SBC Center, Room 3520, St. Louis, Missouri 63101, for Respondent Southwestern Bell Telephone Company, L.L.C., doing business as SBC Missouri.

**Mark P. Johnson**, Attorney at Law, Sonnenschein, Nath & Rosenthal, L.L.P., 4520 Main Street, Suite 1100, Kansas City, Missouri, 64111, for Respondents T-Mobile USA, Inc., formerly known as VoiceStream Wireless, Inc., Western Wireless, Inc., and Aerial Communications, Inc.

**Bruce H. Bates**, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE:**    **Kevin A. Thompson, Deputy Chief.**

## **REPORT AND ORDER**

### **Procedural History**

This case has had a somewhat unusual procedural history. Complainants filed their complaint on May 15, 2002. After some delay occasioned by the possibility of mediation, Respondents filed their answers on July 16. The Commission adopted a procedural schedule on July 30 and the parties thereafter filed direct testimony on August 26 and rebuttal testimony on September 23. The parties filed a list of issues on October 2 and a stipulation of certain facts on October 10. However, on October 11, the

Commission canceled the hearing and set a briefing schedule when Staff moved on behalf of all parties that the case be resolved on the prefiled testimony and briefs.

The parties filed initial briefs in December 2002 and reply briefs in January 2003 and the case was then submitted. However, on May 5, 2003, the Commission reopened the record, stating:

As requested by the parties, the Missouri Public Service Commission canceled the scheduled evidentiary hearing in this matter and undertook to determine the complaint on the basis of the parties' stipulation of facts, their prefiled testimony, and their briefs. The final briefs were filed in January, 2003. The Commission has reviewed the record as submitted by the parties and has determined that it cannot resolve this matter without certain additional evidence. Therefore, the Commission will reopen the record herein for the limited purpose of receiving this evidence.

The evidence in question concerns the proportion of the traffic at issue that is interMTA, wireless-originated traffic and the proportion that is intraMTA, wireless-originated traffic. In the event that the parties are unable to adduce this evidence in any other way, the Commission will require that they cooperate in the performance of a traffic study or studies. The Commission will convene a prehearing conference to hear from the parties how this necessary evidence can best be provided.

A period of negotiation then followed during which the parties attempted to reach a consensus position with respect to the traffic proportions. This effort culminated with the filing of a non-unanimous stipulation and agreement on July 11, 2003. Respondent SBC Missouri filed its timely objection to the non-unanimous stipulation and agreement on July 16.

A new procedural schedule was established on September 3. Thereafter, the parties filed Direct Testimony on September 10 and 11, Rebuttal Testimony on October 9, and Surrebuttal Testimony on October 24 and 27. The parties filed lists of witnesses and issues and statements of position on the issues on October 29.

The Commission convened an evidentiary hearing on November 6 and 7, 2003. The Commission heard testimony from four witnesses and received six exhibits, in addition to the exhibits received on October 11, 2002. All parties were represented at the evidentiary hearing.

Following the evidentiary hearing, the Commission declined to set a briefing schedule and instead heard closing arguments on December 8, 2003.

On January 13, 2005, Complainants moved to dismiss their claims against Southwestern Bell Telephone Company, now doing business as SBC Missouri.

***Motion to Strike Prefiled Direct Testimony:***

On October 4, 2002, Respondents T-Mobile and Western Wireless moved to strike certain evidence offered by Complainants as inadmissible hearsay. In Missouri, the "admission of an agent or employee . . . 'may be received in evidence against his principal, if relevant to the issues involved, where the agent, in making the admission, was acting within the scope of his authority, . . . '"<sup>1</sup> Having reviewed that motion, the testimony and schedules objected to, and the responses filed by other parties, the Commission will grant the motion. The record does not establish the scope of the declarant's agency.

**Discussion**

As required by the procedural schedule, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. In setting out the issues developed by the parties and the parties' stated positions on those issues, the Commission seeks only to inform the reader of these

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<sup>1</sup> *Bynote v. National Super Mkts.*, 891 S.W.2d 117, 124 (Mo. banc 1995), *quoting* *Roush v. Alkire Truck Lines*, 299 S.W.2d 518, 521 (Mo. 1957), *itself quoting* 31 C.J.S. *Evidence* § 343.

items. The parties' framing of the issues may not accurately reflect the material issues under the applicable statutes and rules.

The issues formulated by the parties and filed on October 2, 2002, are as follows:<sup>2</sup>

**1. Since February 19, 2001 (for all Complainants excluding Grand River Mutual and Fidelity Communication Services), since September 20, 2001 (for Grand River), and since November 23, 2001 (for Fidelity Communication), has T-Mobile terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SBC?**

**2. Since February 19, 2001 (for all Complainants excluding Grand River and Fidelity Communication), since September 20, 2001 (for Grand River), and since November 23, 2001 (for Fidelity Communication), has Western Wireless terminated wireless-originated traffic to the exchanges of Complainants via the transit services or facilities of SBC?**

**3. Has T-Mobile terminated such traffic in the absence of an agreement with Complainants regarding compensation?**

**4. Has Western Wireless terminated such traffic in the absence of an agreement with Complainants regarding compensation?**

**5. Has T-Mobile violated the terms of its Commission-approved interconnection agreement with SBC by sending traffic to SBC for termination in Complainants' exchanges without first obtaining a compensation or interconnection agreement?**

**6. Has Western Wireless violated the terms of its Commission-approved interconnection agreement with SBC by sending traffic to SBC for termination in Complainant exchanges without first obtaining a compensation or interconnection agreement?**

**7. Does T-Mobile owe compensation to Complainants for such traffic terminated during this time? What are the legal and factual bases for such compensation?**

**8. Does Western Wireless owe compensation to Complainants for such traffic terminated during this time? What are the legal and factual bases for such compensation?**

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<sup>2</sup> For consistency, the Commission has replaced references to "VoiceStream" with "T-Mobile" and references to "SWBT" with "SBC."

**9. Has SBC violated the terms of its Commission-approved interconnection agreements with T-Mobile and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of a compensation or interconnection agreement?**<sup>3</sup>

**10. Is SBC liable for Complainants' wireless tariff charges associated with the traffic T-Mobile and Western Wireless terminated to Complainants?**<sup>4</sup>

The issues formulated by the parties and filed on October 29, 2003, and the parties' positions on those issues, are as follows:

**11. Unopposed InterMTA Factors:** The interMTA factors listed below were negotiated between eleven (11) Complainants and Respondent wireless carriers, and are not opposed by any party. Should the Commission adopt these factors for the purpose of determining interMTA traffic in this complaint case?

- (a) Cass County Telephone Co. interMTA factor - 0%
- (b) Citizens Telephone Co. interMTA factor - 0%
- (c) Fidelity Comm. Services I, Inc. interMTA factor - 5%
- (d) Fidelity Telephone Co. interMTA factor - 5%
- (e) Grand River Mutual Tel. Corp. interMTA factor - 6%
- (f) Green Hills Telephone Corp. interMTA factor - 0%
- (g) Holway Telephone Co. interMTA factor - 0%
- (h) IAMO Telephone Co. interMTA factor - 0%
- (i) Kingdom Telephone Co. interMTA factor - 0%
- (j) KLM. Telephone Co. interMTA factor - 0%
- (k) Lathrop Telephone Co. interMTA factor - 0%

**Complainants:** Yes.

**Staff:** Yes, the Commission should adopt these factors negotiated and agreed to by the Wireless Carriers and the Complainants.

**SBC:** SBC Missouri does not contest these factors.

**Wireless Carriers:** T-Mobile and Western support the adoption of these interMTA factors. T-Mobile and Western believe that negotiation of mutually-agreed interMTA factors is the best method to reach resolution of this issue.

**12. Contested InterMTA Factors:** The interMTA factors listed below were negotiated between three (3) Complainants and Respondent wireless carriers, and

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<sup>3</sup> Complainants have dismissed their claims against SBC.

<sup>4</sup> Complainants have dismissed their claims against SBC.

are opposed by SBC Missouri. Should the Commission adopt these factors for the purpose of determining interMTA traffic in this complaint case?

- (a) BPS Telephone Co. interMTA factor - 52%
- (b) Craw-Kan Telephone Coop. interMTA factor - 53%
- (c) Mark Twain Rural Tel. Co. interMTA factor - 53%

**Complainants:** Yes. The interMTA factors that were negotiated between Complainants and the Respondent wireless carriers are based upon the way the Complainants' exchanges are located within Missouri's Local Access and Transport Areas (LATAs) and Metropolitan Trading Areas (MTAs), as well as the service areas of the Respondent wireless carriers and the way in which they interconnect with the landline network. In Mark Twain Rural Telephone Company's case, the agreed to factor was further supported by a traffic study performed by Mark Twain Rural.

**Staff:** The Commission should adopt these factors negotiated and agreed to by the Wireless Carriers and the Complainants.

**SBC:** No. Complainants have not met their burden of proof in that they have failed to present sufficient evidence to enable the Commission to determine appropriate factors with any degree of accuracy.

**Wireless Carriers:** T-Mobile and Western support the adoption of these interMTA factors. T-Mobile and Western believe that negotiation of mutually-agreed interMTA factors is the best method to reach resolution of this issue.

**13. Burden of Proof: Who has the burden of proof on the interMTA factors that will be used for the purpose of determining interMTA traffic in this complaint case?**

**Complainants:** In a complaint case, the complainants generally have the burden of proof. In this case, the Complainants have clearly demonstrated that Respondent wireless carriers are sending traffic to Complainants' exchanges (via Respondent SBC) without appropriate compensation. Complainants are unable to distinguish between the uncompensated interMTA and intraMTA traffic because it is delivered by SBC over common trunk groups. The carriers responsible for originating and delivering the traffic – Respondent SBC and the Respondent wireless carriers – have not produced jurisdictional information about the traffic. Under these circumstances, Complainants have met their initial burden and should not be required to face an additional burden of proof. Nonetheless, Complainants have submitted sufficient evidence to support the interMTA factors that were negotiated with the Respondent wireless carriers.



**Staff:** The Wireless Carriers and the Complainants have agreed on interMTA factors. Staff supports the concept of these parties negotiating and agreeing on these factors.

**SBC:** Complainants have the burden of proving the accuracy of their proposed interMTA factors as a necessary element of their claim.

**Wireless Carriers:** T-Mobile and Western have no position as to which party has the burden of proof on the interMTA factors.

### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

In making its Findings of Fact and Conclusions of Law, the Commission is mindful that it is required, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises."<sup>5</sup> Because Section 386.420 does not explain what constitutes adequate findings of fact, Missouri courts have turned to Section 536.090, which applies to

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<sup>5</sup> Section 386.420.2, RSMo 2000. All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

"every decision and order in a contested case," to fill in the gaps of Section 386.420.<sup>6</sup>

Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.<sup>7</sup> Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.<sup>8</sup>

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."<sup>9</sup> Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."<sup>10</sup>

With these points in mind, the Commission renders the following Findings of Fact.

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<sup>6</sup> State ex rel. Laclede Gas Co. v. PSC of Mo., 103 S.W.3d 813, 816 (Mo. App., W.D. 2003); State ex rel. Noranda Aluminum, Inc. v. PSC, 24 S.W.3d 243, 245 (Mo. App., W.D. 2000).

<sup>7</sup> Glasnapp v. State Banking Bd., 545 S.W.2d 382, 387 (Mo. App. 1976).

<sup>8</sup> *Id.* (quoting 2 Am.Jur.2d Administrative Law § 455, at 268).

<sup>9</sup> State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n, 806 S.W.2d 680, 684 (Mo. App., W.D. 1991) (quoting State ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n, 701 S.W.2d 745, 754 (Mo. App., W.D. 1985)).

<sup>10</sup> State ex rel. Monsanto Co. v. Pub. Serv. Comm'n, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on State ex rel. Rice v. Pub. Serv. Comm'n, 359 Mo. 109, 220 S.W.2d 61 (1949)).

***The Parties:***

The Commission finds that Complainant BPS Telephone Company is a Missouri corporation whose principal place of business is located in Bernie, Missouri. BPS provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 3,900 subscribers in three exchanges.

The Commission finds that Complainant Cass County Telephone Company is a Maryland limited partnership whose principal place of business is located in Peculiar, Missouri. Cass County provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 8,400 subscribers in six Missouri exchanges.

The Commission finds that Complainant Citizens Telephone Company is a Missouri corporation whose principal place of business is located in Higginsville, Missouri. Citizens provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 4,400 subscribers in one Missouri exchange.

The Commission finds that Complainant Craw-Kan Telephone Cooperative is a Kansas corporation whose principal place of business is located in Girard, Kansas. Craw-Kan provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 2,730 subscribers in nine Missouri exchanges.

The Commission finds that Complainant Fidelity Telephone Company is a Missouri corporation whose principal place of business is located in Sullivan, Missouri. Fidelity provides, and at all times herein pertinent provided, basic local, exchange access,

and wireless termination telephone services to about 17,000 subscribers in nine Missouri exchanges.

The Commission finds that Complainant Fidelity Communications Services I, Inc., is a Missouri corporation whose principal place of business is located in Sullivan, Missouri. Fidelity I provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 3,000 subscribers in the Rolla, Missouri, exchange.

The Commission finds that Complainant Grand River Mutual Telephone Corporation is a Missouri corporation whose principal place of business is located in Princeton, Missouri. Grand River provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 15,000 subscribers in 32 Missouri exchanges.

The Commission finds that Complainant Green Hills Telephone Corporation is a Missouri corporation whose principal place of business is located in Breckenridge, Missouri. Green Hills provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 3,959 subscribers in 13 Missouri exchanges.

The Commission finds that Complainant Holway Telephone Company is a Missouri corporation whose principal place of business is located in Maitland, Missouri. Holway provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 560 subscribers in two Missouri exchanges.

The Commission finds that Complainant IAMO Telephone Company is an Iowa corporation whose principal place of business is located in Coin, Iowa. IAMO provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 1,260 subscribers in four Missouri exchanges.

The Commission finds that Complainant KLM Telephone Company is a Missouri corporation whose principal place of business is located in Rich Hill, Missouri. KLM provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 1,700 subscribers in four Missouri exchanges.

The Commission finds that Complainant Kingdom Telephone Company is a Missouri corporation whose principal place of business is located in Auxvasse, Missouri. Kingdom provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 4,400 subscribers in seven Missouri exchanges.

The Commission finds that Complainant Lathrop Telephone Company is a Missouri corporation whose principal place of business is located in Lathrop, Missouri. Lathrop provides, and at all times herein pertinent provided, basic local, exchange access, and wireless termination telephone services to about 1,550 subscribers in the Lathrop exchange.

The Commission finds that Complainant Mark Twain Rural Telephone Company is a Missouri corporation whose principal place of business is located in Hurdland, Missouri. Mark Twain provides, and at all times herein pertinent provided, basic local, exchange

access, and wireless termination telephone services to about 4,844 subscribers in 14 Missouri exchanges.

The Commission finds that Respondents VoiceStream Wireless Corporation and Western Wireless Corporation are wireless or commercial mobile radio service (CMRS) telecommunications service providers certificated by the Federal Communications Commission ("FCC").<sup>11</sup> Western Wireless owned VoiceStream, now known as T-Mobile USA, Inc., during the period that is the subject of these complaints, but Western Wireless does not now own T-Mobile.<sup>12</sup> In 2000, T-Mobile acquired Aerial Communications and Aerial continues to be a component of T-Mobile. Western Wireless uses cellular technology while T-Mobile uses PCS technology.

The Commission finds that Respondent Southwestern Bell Telephone Company, L.P., doing business as SBC Missouri ("SBC"), is a telephone company that provides, and at all times herein pertinent provided, basic local, interexchange, and exchange access telecommunications services, among others.<sup>13</sup>

***Basic Telephony:***

Each of the Complainants is an incumbent local exchange carrier ("ILEC") that provides basic local telephone service in one or more exchanges by means of a central

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<sup>11</sup> Collectively, the Commission refers to T-Mobile (VoiceStream) and Western Wireless herein as the "Wireless Respondents."

<sup>12</sup> The Commission will refer to Respondent T-Mobile by its present name rather than its former name throughout this Order.

<sup>13</sup> SBC is here termed a Respondent because that is the role SBC has played throughout this litigation. However, Complainants have moved to dismiss all claims against SBC.

office or switch and a network of radiating local loops.<sup>14</sup> Each local loop directly connects a subscriber's telephone to the central office or switch of the exchange in which the subscriber is located.<sup>15</sup> Each of the Complainants is regulated by this Commission and operates pursuant to tariffs filed with and approved by this Commission.<sup>16</sup> Under Complainants' Commission-approved tariffs, subscribers typically pay a fixed monthly rate for unlimited local telephone service.<sup>17</sup> Intrastate wireline calls between exchanges or local calling scopes are carried by an interexchange carrier ("IXC").<sup>18</sup> Subscribers pay by the minute for such long distance or toll calls pursuant to the IXC's Commission-approved tariffs. The IXC, in turn, pays originating access charges to the ILEC on whose network the call originated and pays terminating access charges to the ILEC on whose network the call

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<sup>14</sup> An "incumbent local exchange carrier" is "a local exchange telecommunications company authorized to provide basic local telecommunications service in a specific geographic area as of December 31, 1995, or a successor in interest to such a company," Section 386.020(22); an "exchange," in turn, is "a geographical area for the administration of telecommunications services, established and described by the tariff of a telecommunications company providing basic local telecommunications service." Section 386.020(16). "Basic local telephone service" is "two-way switched voice service within a local calling scope" and any of several additional services, including emergency (911) service, operator service, and exchange access service. Section 386.020(4). More simply, an ILEC is the telephone company that owns and operates the physical network in an exchange. There are also local exchange carriers ("LECs") that do not own local networks. See Newton's Telecom Dictionary 403 (19<sup>th</sup> ed., 2003).

<sup>15</sup> Newton's 472, 477.

<sup>16</sup> A "tariff" is a document that sets out the rates, charges, rules, and regulations governing the services provided by a regulated public utility, including a regulated telecommunications carrier. See Section 386.020(45): "'Rate', every individual or joint rate, fare, toll, charge, reconsigning charge, switching charge, rental or other compensation of any corporation, person or public utility, or any two or more such individual or joint rates, fares, tolls, charges, reconsigning charges, switching charges, rentals or other compensations of any corporation, person or public utility or any schedule or tariff thereof."

<sup>17</sup> Newton's 473.

<sup>18</sup> An "interexchange telecommunications carrier" is "any company engaged in the provision of interexchange telecommunications service," Section 386.020(23), which in turn is "telecommunications service between points in two or more exchanges." Section 386.020(24). In short, IXCs provide long distance telephone service. See Newton's 414, 475.

terminated pursuant to the Commission-approved exchange access tariffs of those ILECs.<sup>19</sup>

Respondent SBC, like the Complainants, is also an ILEC regulated by this Commission. However, SBC is a very large ILEC and operates 160 local exchanges in Missouri with over 200 switches.<sup>20</sup> SBC also provides intraLATA and interLATA long distance service in Missouri as an IXC regulated by this Commission. Unlike the other parties to this case, SBC is also a Regional Bell Operating Company ("RBOC"), one of the operating entities divested by AT&T on December 31, 1983, pursuant to the modified final judgment that ended the federal antitrust case against AT&T.<sup>21</sup>

Respondents T-Mobile and Western Wireless are cellular or wireless telephone companies. They are not regulated by this Commission, but by the FCC. They do not file tariffs, either with this Commission or with the FCC.

Wireless carriers design their networks based on the volume of traffic that they expect to trade with specific exchanges, selecting the most cost efficient option of those available. In some cases, the best choice is indirect interconnection at a tandem switch. In other cases, the lower cost option is termination through an IXC. In the present case, the

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<sup>19</sup> "'Exchange access service', a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service." Section 386.020(17). Long distance calls must use the local telephone company's network in order to access the local loop that connects to the subscriber's telephone. The IXC must compensate the ILEC for this use of its facilities. See Newton's 304.

<sup>20</sup> See In the Matter of an Investigation of the Actual Costs Incurred in Providing Exchange Access Service and the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri, Case No. TR-2001-65 (Report & Order, issued Aug. 26, 2003) at p. 9.

<sup>21</sup> Newton's 661. SBC Missouri's parent, SBC Communications, originally owned only Southwestern Bell Telephone but has since acquired Ameritech, including Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, and Wisconsin Bell, Pacific Telesis, including Pacific Bell and Nevada Bell, and Southern New England Telephone Company. *Id.*



Wireless Respondents interconnected with the Complainants indirectly through the SBC tandem in each LATA.

***MTAs and LATAs:***

The Commission finds that, pursuant to its statutory authority, the FCC has defined certain geographical areas termed Major Trading Areas ("MTAs").<sup>22</sup> Most of Missouri is contained in either the St. Louis MTA or the Kansas City MTA; however, Pemiscot County is in the Memphis MTA and Clark County is in the Des Moines MTA. The FCC has determined that, for the purposes of the Telecommunications Act of 1996, the local calling scope of a CMRS carrier shall be the MTA. Consequently, a call to or from a wireless subscriber that does not cross a MTA boundary is a local call; conversely, a call to or from a wireless subscriber that does cross a MTA boundary is a long distance or toll call.

The modified final judgment that ended the federal anti-trust litigation against AT&T established almost 200 Local Access and Transport Areas ("LATAs") in the United States. LATAs define the areas within which the RBOCs, including SBC, were permitted to transport and deliver traffic under the original terms of the modified final judgment. There are four LATAs in Missouri: St. Louis, Kansas City, Springfield, and the Columbia-Jefferson City area (the Westphalia LATA).<sup>23</sup>

***Complainants' Tariffs:***

The Commission finds that each of the Complainants has a Commission-approved Wireless Termination Tariff that was in effect at all times herein pertinent,

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<sup>22</sup> Newton's 488.

<sup>23</sup> See Newton's 456-7.

beginning on February 19, 2001.<sup>24</sup> The Complainants' Wireless Termination Tariffs contain rates, terms and conditions applicable to the termination of intraMTA, wireless-originated traffic delivered via the transit service or facilities of an intermediate LEC such as SBC.<sup>25</sup>

The Commission finds that each of the Complainants has a Commission-approved intrastate exchange access tariff that was in effect at all times herein pertinent. Most of the Complainants have concurred in the Oregon Farmers Exchange Access Tariff, that is, they have adopted that tariff as their own. The Complainants' exchange access tariffs contain rates, terms and conditions applicable to the termination of long distance traffic, including intrastate, interMTA, wireless-originated traffic delivered via the transit service or facilities of an intermediate LEC such as SBC.

***Interconnection Agreements:***

The United States Congress enacted the Telecommunications Act of 1996 in order to encourage competition in the telecommunications industry and thereby encourage the benefits of lower prices and increased technological innovation.<sup>26</sup> Local telephone companies are no longer protected monopolies but are required to share their networks

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<sup>24</sup> Approved by the Commission in *In the Matter of Mark Twain Rural Telephone Company*, Case No. TT-2001-139 (*Report & Order*, issued February 8, 2001); *aff'd, St. ex rel. Sprint Spectrum, L.P., d/b/a Sprint PCS, et al., v. Missouri Public Service Commission*, 112 S.W.3d 20 (Mo. App., W.D. 2003).

<sup>25</sup> See *below*, SBC's Transit Service, *infra* at p. 16.

<sup>26</sup> Public Law 104-104, 110 Stat. 56, *codified in* Title 47, United States Code.

with competitors.<sup>27</sup> A fundamental aspect of the Telecommunications Act is the obligation imposed on telephone companies to interconnect with other telephone companies. The Act contemplates that such interconnections will be governed by interconnection agreements, which the Act requires be approved by the appropriate State Commission.<sup>28</sup>

The Commission finds that neither T-Mobile nor Western Wireless had a Commission-approved interconnection agreement in effect with any of the Complainants at any time pertinent to this matter. The Commission further finds that SBC had a Commission-approved interconnection agreement with both T-Mobile and Western Wireless at all times herein pertinent, as well as with each of the Complainants.

***SBC's Transit Service:***

The Commission finds that, in addition to other telecommunications services, SBC offers, and at all times herein pertinent offered, a transit service to CMRS providers such as T-Mobile and Western Wireless, whereby wireless calls originated by customers of the CMRS providers are transported to landline customers of local telephone companies, including Complainants. SBC provides this transit service either pursuant to its Commission-approved, intrastate wireless interconnection tariff or under an interconnection agreement with the originating CMRS carrier. SBC delivers such traffic over common trunk groups owned by SBC, commingled with other traffic. None of the Complainants are able

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<sup>27</sup> AT&T Corporation v. Iowa Utilities Board, 525 U.S. 366, 371-73, 119 S.Ct. 721, 726-27, 142 L.Ed.2d 835, 844-46 (1999): "The Telecommunications Act of 1996 . . . fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation . . . to share its network with competitors. Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network 'on an unbundled basis'; and it can interconnect its own facilities with the incumbent's network. When an entrant seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties it would otherwise have under § 251(b) or § 251(c)."

<sup>28</sup> 47 U.S.C. § 252(a)(1) and (e).

to distinguish the wireless-originated traffic from other interexchange traffic delivered by SBC over the same trunk groups and are thus unable to block such traffic, even in cases in which the originating CMRS carrier had refused to pay for termination. SBC measures the traffic that it transits each month and provides a report, called the Cellular Transiting Usage Summary Report ("CTUSR"), to the Complainants. The CTUSR is summary in form and shows only the number of minutes of traffic delivered for each originating CMRS provider. The CTUSR does not distinguish interMTA traffic from intraMTA traffic.

***The Traffic at Issue:***

The record shows, and the Commission finds, that SBC delivered wireless-originated traffic from subscribers of T-Mobile and Western Wireless to subscribers of each of the Complainants during the period herein at issue.<sup>29</sup> The exact amount of the traffic is highly confidential. Each such call originated at a wireless telephone or "cell phone," was then transmitted to a radio tower and further transmitted by wire and the CMRS provider's switch to the point of interconnection ("POI") with SBC. From that point, the traffic was then transported over SBC's network and through its tandem switch to SBC's POI with the particular Complainant whose subscriber was called and was then transported over that Complainant's network, through its switch and over its local loop, terminating finally at the telephone of the called subscriber. The "cell phone" user that originated each such call paid either T-Mobile or Western Wireless for the service. T-Mobile or Western Wireless then paid SBC and any other carrier involved in transiting the

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<sup>29</sup> The Wireless Respondents' witness testified: "I don't dispute the fact that we generate traffic, that that traffic is transited through SBC's network and terminated to independent telephone companies." Tr. 4:117. These amounts have continued to grow during the life of this case and, on December 8, 2003, counsel for Respondents described the amount owed by T-Mobile as "several hundred thousand dollars" and by Western Wireless as "something in the tens of thousands[.]" Tr. 6:370. Thus, the Wireless Respondents do not deny that they originated the traffic and delivered it to SBC for termination to the Complainants' subscribers, over the Complainants' networks. See Tr. 6:370-1.

call, but made no payment to any of the Complainants. Although each of the Complainants has demanded payment from T-Mobile and Western Wireless, no payments have been received and Respondents refuse to pay.

The Commission finds that some of the traffic described above crossed an MTA boundary and is therefore interMTA, long distance traffic.<sup>30</sup> None of the Complainants is able to measure or even distinguish interMTA traffic from intraMTA traffic. The CTUSR report provided by SBC to Complainants does not distinguish interMTA traffic from intraMTA traffic.

The Wireless Respondents maintain that the intraMTA traffic that they exchange with the Complainants is symmetrical, that is, that equivalent volumes flow in both directions. Their expert witness testified, "Well, it's our experience that when calls are routed from mobile to land and land to mobile under the MTA rules as non-toll traffic, that traffic is roughly in balance between a wireless carrier and a wireline carrier."<sup>31</sup> The record shows, and the Commission finds, that the Complainants routed all traffic originating on their networks and intended for subscribers of the Wireless Respondents through an IXC.

***The Factual Stipulation:***

The parties stipulated to the following facts on October 10, 2002, and the Commission so finds:<sup>32</sup>

1. On a monthly basis, Complainants have sent invoices to T-Mobile and Western Wireless specifying the minutes terminated to each Complainant's exchange(s), the applicable rate, the total amount

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<sup>30</sup> The Wireless Respondents' witness admitted this liability: "Yes, we're responsible for the traffic generated from our networks that is inter-MTA traffic that is terminated to the Complainants." Tr. 4:160; *and see* Tr. 4:115-116, 119, 123.

<sup>31</sup> Tr. 4:126.

<sup>32</sup> For clarity, the Commission has replaced the name "VoiceStream" with the name "T-Mobile" wherever it occurs in the stipulation.

due, and payments made, if any. All written correspondence and verbal communications reflecting additional efforts to bill and collect the amounts sought by Complainants in this case from VoiceStream and Western Wireless for the traffic they originated are attached to or set forth in the Direct Testimony of each Complainant's witness, filed August 26, 2002.

2. Complainant BPS Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

3. Complainant Cass County Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

4. Citizens Telephone Company of Higginsville on July 26, 2001, asked Southwestern Bell for an estimate of the cost to block Southwestern Bell Mobile Systems', U.S. Cellular's and Western Wireless' traffic from being delivered to Citizens' exchanges. Southwestern Bell provided a cost estimate of \$4,000 on August 21, 2001 to Citizens. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Citizens did not ask Southwestern Bell to block any wireless-originated traffic.

5. Complainant Craw-Kan Telephone Cooperative, Inc. has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

6. Complainant Fidelity Communications Services I, Inc. has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

7. Complainant Fidelity Telephone Company did not ask Southwestern Bell about the cost of blocking wireless traffic. But based on blocking quotes provided to other companies, Fidelity believed the cost of blocking would exceed the benefit to be obtained from blocking and did not ask Southwestern Bell to block any wireless-originated traffic.

8. Complainant Grand River Mutual Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

9. Green Hills Telephone Corporation on August 27, 2001, asked Southwestern Bell for an estimate of the cost to block Cingular's and U.S. Cellular's traffic from being delivered to Green Hills' exchanges. Southwestern Bell provided a cost estimate of \$700 on October 11, 2001. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Green Hills did not ask Southwestern Bell to block any wireless-originated traffic.

10. Complainant Holway Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

11. Complainant Iamo Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

12. Kingdom Telephone Company on July 26, 2001, asked Southwestern Bell for an estimate of the cost to block Cingular's, U.S. Cellular's and Air Signal/Metro Call's traffic from being delivered to Kingdom's exchanges. Southwestern Bell provided a \$1,500 cost estimate on August 21, 2001. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Kingdom did not ask Southwestern Bell to block any wireless-originated traffic.

13. Complainant KLM Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

14. Complainant Lathrop Telephone Company has neither asked Southwestern Bell about the cost of blocking wireless traffic, nor requested, pursuant to the terms of its Wireless Termination Tariff, that Southwestern Bell block traffic from T-Mobile, Western Wireless or any other wireless carrier.

15. Mark Twain Rural Telephone on August 31, 2001, asked Southwestern Bell for an estimate of the cost to block Cingular's, Sprint's, U.S. Cellular's, Air Signal's and AT&T Wireless' traffic from being delivered to Mark Twain's exchanges. Southwestern Bell provided a \$500 cost estimate on October 11, 2001. Believing the cost of blocking may exceed the benefit to be obtained from blocking, Mark Twain did not ask Southwestern Bell to block any wireless traffic.

16. Complainants claim Southwestern Bell has violated its interconnection agreements with T-Mobile and Western Wireless by allowing them to transit wireless-originated traffic to Complainants in the absence of a compensation or interconnection agreement. The contractual provision this claim is based on is Section 3.1.3 of the T-Mobile/Southwestern Bell and Western Wireless/Southwestern Bell interconnection agreements, both of which are quoted on page 10 of Complainants' Complaint.

17. The Staff of the Missouri Public Service Commission does not dispute any of the facts set out in this Factual Stipulation, nor does it object to the Stipulation.

18. The Office of the Public Counsel does not dispute any of the facts set out in this Factual Stipulation, nor does it object to the Stipulation.

***InterMTA Factors:***

Because the proportion of interMTA traffic to intraMTA traffic was not measured at the time that the traffic at issue in this case was passed and is not recoverable now, the parties attempted to set interMTA factors by negotiation. The Commission finds that the parties negotiated certain interMTA factors as set out below. No one objected to these factors.<sup>33</sup>

Cass County Telephone Company interMTA factor	0%
Citizens Telephone Company interMTA factor	0%
Fidelity Communications Services I, Inc. interMTA factor	5%
Fidelity Telephone Company interMTA factor	5%
Grand River Mutual Telephone Corporation interMTA factor	6%
Green Hills Telephone Corporation interMTA factor	0%

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<sup>33</sup> The interMTA factors listed were negotiated between eleven Complainants and Respondent Wireless Carriers and are not opposed by any party. SBC did object to them initially, but later withdrew its objection.



Holway Telephone Company interMTA factor	0%
IAMO Telephone Company interMTA factor	0%
Kingdom Telephone Company interMTA factor	0%
KLM. Telephone Company interMTA factor	0%
Lathrop Telephone Company interMTA factor	0%

These factors were determined as follows. Wireless carriers typically route interLATA calls through IXC carriers for transport and termination. It follows, therefore, and the Commission finds, that all of the traffic at issue in this case is intraLATA traffic because none of it was routed through an IXC. Consequently, "zero" is necessarily the appropriate interMTA factor for all of those Complainants whose exchanges are in both the same LATA and the same MTA as the SBC tandem where the Wireless Respondents are interconnected, because none of the traffic crossed an MTA boundary.

The Commission finds that three of the Complainants have interMTA factors of 5% to 6%. Grand River has over 30 exchanges, all but two of which are in both the Kansas City MTA and the Kansas City LATA. The two other exchanges, which contain 6% of Grand River's access lines, are in the St. Louis MTA. The Commission finds that this figure is a reasonable approximation of the percentage of wireless-originated traffic delivered to Grand River subscribers that crossed the MTA boundary in the process. The 5% figure for Fidelity and FCS I was reached in a different manner. Those Complainants determined, by a traffic study, that 15% of the traffic terminated to their subscribers by the Wireless Respondents was interMTA traffic. Nonetheless, the two Complainants agreed to the 5% figure.

SBC refused to withdraw its objection to three other factors that were over 50%.<sup>34</sup> These three factors were negotiated by the respective Complainants and the Wireless Respondents. The Commission concludes that the record supports a finding that the final three Complainants have interMTA factors over 50%.

Complainant BPS's Steele exchange is located in the Memphis MTA and contains 52% of its access lines. The Commission finds that this figure is thus a reasonable approximation of the percentage of traffic that would cross the MTA boundary in being transported from the POI at the SBC St. Louis tandem, in the St. Louis MTA, to BPS's Steele exchange.

Approximately 53% of Complainant Craw-Kan's access lines are located in its two exchanges in the Springfield LATA, which is in the St. Louis MTA. The Commission finds that this figure is thus a reasonable approximation of the percentage of traffic that would cross the MTA boundary in being transported from the POI at the SBC Kansas City tandem, in the Kansas City MTA, to Craw-Kan's two Springfield LATA exchanges.

A month-long traffic study for Complainant Mark Twain, based on originating NXXs, suggested that 70% of the traffic is interMTA traffic. Complainant Mark Twain and the Wireless Respondents nonetheless agreed on the 53% factor after negotiation. Based on the traffic study, the Commission finds that 70% of this traffic is interMTA traffic.

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<sup>34</sup> These interMTA factors were negotiated between the three Complainants and the Wireless Respondents. When offered as a non-unanimous stipulation and agreement, they were opposed by Respondent SBC. However, SBC stated that it would have no objections to these factors if the Commission decided against the secondary liability theory asserted against SBC by the Complainants. The Complainants have since dismissed their claims against SBC and SBC, presumably, would therefore have no further objection to the factors.

## **Conclusions of Law**

The Missouri Public Service Commission has reached the following conclusions of law.

### ***Jurisdiction:***

The Commission has jurisdiction over this matter pursuant to Section 386.390.1, which authorizes the Commission to hear and determine complaints as to “any act or thing done or omitted to be done by any corporation, person or public utility . . . in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission[.]”

The Commission also has jurisdiction pursuant to Section 386.250, which provides that the "jurisdiction, supervision, powers and duties" of the Missouri Public Service Commission shall extend<sup>35</sup>

To all telecommunications facilities, telecommunications services and to all telecommunications companies so far as such telecommunications facilities are operated or utilized by a telecommunications company to offer or provide telecommunications service between one point and another within this state or so far as such telecommunications services are offered or provided by a telecommunications company between one point and another within this state, except that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the rates charged by a telephone cooperative for providing telecommunications service within an exchange or within a local calling scope as determined by the commission, except for exchange access service[.]

### ***Burden of Proof:***

The Complainants bear the burden of proof in a case, such as this one, in which a regulated utility charges that a customer has refused to pay according to its Commission-

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<sup>35</sup> Section 386.250(2), RSMo 2000. All subsequent statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 2000.

approved tariff.<sup>36</sup> Thus, Complainants must establish all facts necessary to support the relief they seek by a preponderance of the credible evidence.

***Violation of a Law:***

A complaint brought under Section 386.390.1 necessarily must include an allegation of a violation of a law or of a Commission rule, order or decision.<sup>37</sup> The complaints at issue here assert that the Wireless Respondents have refused to compensate the Complainants for wireless-originated traffic delivered over Complainants' networks to Complainants' subscribers, in violation of Complainants' Wireless Termination Tariffs, in the case of intraMTA traffic, and in violation of Complainants' exchange access tariffs, in the case of interMTA traffic. "A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature."<sup>38</sup> Thus, Complainants charge that the Wireless Respondents, in refusing to compensate them according to their tariffs, have violated the law.

***Complainants' Right to Compensation:***

The "Filed Tariff Doctrine," or Filed Rate Doctrine," governs a utility's relationship with its customers.<sup>39</sup> The United States Supreme Court first announced this rule, that the rate of a utility contained in tariffs filed with the appropriate regulatory agency is the only lawful charge from which no deviation is permitted, in 1915.<sup>40</sup> The utility has no choice and

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<sup>36</sup> Ahlstrom v. Empire District Electric Company, 4 Mo.P.S.C.3d 187, 202 (1995); Margulis v. Union Electric Company, 30 Mo.P.S.C. (N.S.) 517, 523 (1991).

<sup>37</sup> St. ex rel. Ozark Border Electric Cooperative v. PSC, 924 S.W.2d 597, 599-600 (Mo. App., W.D. 1996).

<sup>38</sup> A.C. Jacobs and Co., Inc. v. Union Electric Co., 17 S.W.3d 579, 582 (Mo. App., W.D. 2000); *quoting* Bauer v. Southwestern Bell Telephone Company, 958 S.W.2d 568, 570 (Mo. App., E.D. 1997).

<sup>39</sup> Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 568, 570 (Mo. App., E.D. 1997).

<sup>40</sup> Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 97, 59 L. Ed. 853, \_\_\_, 35 S. Ct. 494, \_\_\_ (1915); Orscheln Bros. Truck Lines, Inc. v. Ferguson Mfg., Inc., 793 S.W.2d 525, 530 (Mo. App., W.D. 1990).

can only collect the proper, tariffed rate for the service rendered.<sup>41</sup> "Pursuant to the filed rate doctrine, carriers have a right, as well as a duty, to recover the proper charges for services performed."<sup>42</sup>

The Wireless Respondents do not deny the factual basis of the Complainants' action. Their defense is that the Complainants' Wireless Termination Tariffs are unlawful because, under the Doctrine of Pre-emption, such tariffs may no longer be applied to traffic delivered over an interconnection because compensation for such traffic is now to be determined under the Telecommunications Act of 1996.

The Commission need not spend much time analyzing the Wireless Respondents' arguments. The very tariffs that the Wireless Respondents are accused of violating have been considered – and upheld – by the Missouri Court of Appeals. That decision is binding on this Commission. The Court stated:<sup>43</sup>

The rural carriers have a constitutional right to a fair and reasonable return upon their investment. *State ex rel. Mo. Pub. Serv. Comm'n v. Fraas*, 627 S.W.2d 882, 886 (Mo.App. W.D. 1981). The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. *Smith et al. v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92, 70 L. Ed. 747, 46 S. Ct. 408 (1926). 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.

The Commission has no choice but to uphold and enforce Complainants' tariffs. For the portion of the traffic that is intraMTA traffic, that tariff is each Complainants'

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<sup>41</sup> State ex rel. Associated Natural Gas Co. v. PSC, 954 S.W.2d 520, 531 (Mo. App., W.D. 1997).

<sup>42</sup> Orscheln Bros. Truck Lines, *supra*, 793 S.W.2d at 530-31.

<sup>43</sup> St. ex rel. Sprint Spectrum, L.P. v. Public Service Commission, 112 S.W.3d 20, 26 (Mo. App., W.D. 2003).

Wireless Termination Tariff. For the portion of the traffic that is interMTA traffic, that tariff is each Complainants' Exchange Access Tariff.

***InterMTA Factors:***

The record shows that the proportions of intraMTA traffic and interMTA traffic were not measured or recorded at the time the traffic was passed and cannot be recovered now. For 11 of the Complainants, the parties have agreed on interMTA percentages; the remaining traffic is necessarily intraMTA traffic.

For the three other Complainants, SBC refused to join the agreement reached by the other parties. However, an estimate of the interMTA traffic percentage was calculated in each case. The Commission has found those estimates to be reasonable approximations of the traffic percentages in question. The general rule is that, where more accurate information is unavailable, estimates should be considered.<sup>44</sup> As counsel for Complainants explained at oral argument:<sup>45</sup>

[T]hese three factors are intuitive. They are based upon an examination of where the Complainant exchanges lie within MTA and LATA boundaries and with relation to or reference to the interconnection points where the wireless carriers interconnect with Southwestern Bell's facilities.

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[I]n Mark Twain's case, Mark Twain did perform a traffic study of sorts. They examined all of the NPA/NXX's from T-Mobile callers that terminated calls to the Mark Twain exchanges and found that approximately 70 percent of those NPA/NXX's, those telephone numbers associated with those originating calls, were located outside the MTA in which Mark Twain's exchanges are located.

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<sup>44</sup> State ex rel. Martigney Creek Sewer Co. v. Public Service Com., 537 S.W.2d 388, 396 (Mo. banc 1976).

<sup>45</sup> Tr. 6:351-352.

The Commission has considered the three estimates at issue and concludes that, in the absence of more accurate information, they represent reasonable approximations of the actual traffic proportions.

***Secondary Liability:***

Complainants originally asserted claims against SBC, contending that SBC was secondarily liable for the traffic it delivered to Complainants and that SBC must therefore compensate them if T-Mobile or Western Wireless do not. However, Complainants have now dismissed their claims against SBC. Therefore, the Commission need not address the issue of secondary liability in this case.

**IT IS THEREFORE ORDERED:**

1. That the Motion to Strike Prefiled Direct Testimony, filed by Respondents T-Mobile USA, Inc., formerly known as VoiceStream Corporation, and Western Wireless Corporation on October 4, 2002, is granted. The items struck are: Lines 10-11, Page 6, of the Direct Testimony of David Beier offered on behalf of Fidelity Telephone Company; Lines 17-22, Page 9, of the Direct Testimony of Brian Cornelius offered on behalf of Citizens Telephone Company of Higginsville; Schedules 2 and 3 to the Direct Testimony of Brian Cornelius offered on behalf of Citizens Telephone Company of Higginsville; Lines 2-4, Page 8, of the Direct Testimony of Bill Rohde offered on behalf of Mark Twain Rural Telephone Company; Lines 13-15, Page 5, and Lines 6-7, Page 6, of the Direct Testimony of Randall Boyd offered on behalf of Kingdom Telephone Company; and Schedules 2 and 3 to the Direct Testimony of Randall Boyd offered on behalf of Kingdom Telephone Company.

2. That the Motion to Dismiss Southwestern Bell Telephone Company, doing business as SBC Missouri, filed on January 13, 2005, by BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communications Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company, is granted.

3. That the Complaints filed herein by BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Craw-Kan Telephone Cooperative, Inc., Fidelity Communications Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, IAMO Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company are sustained insofar as they state claims against Western Wireless Corporation and T-Mobile USA, Inc., formerly known as VoiceStream, for uncompensated, wireless-originated telecommunications traffic delivered to Complainants by SBC Missouri.

4. That the amount due shall in each case be calculated by multiplying the total minutes of traffic by the appropriate interMTA factor to derive interMTA minutes of traffic, which shall then be multiplied by the appropriate rate set out in Complainant's Exchange Access Tariff, to which shall be added an amount calculated by multiplying the intraMTA minutes of traffic, calculated by subtracting the interMTA minutes of traffic derived



above from the total minutes of traffic, by the appropriate rate set out in Complainant's Wireless Termination Tariff.

5. That to the amount due calculated pursuant to Ordered Paragraph No. 4, above, shall be added interest, late fees, and reasonable attorneys' fees to the extent allowed by Complainants' tariffs previously referred to.

6. That any pending motions not expressly ruled herein are denied.

7. That this Report and Order shall become effective on February 6, 2005.

8. That this case may be closed on February 7, 2005.

**BY THE COMMISSION**

**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

( S E A L )

Davis, Chm., Murray and Clayton,  
CC., concur;  
Gaw, C., concurs, with separate  
concurring opinion to follow;  
and certify compliance with the  
provisions of Section 536.080,  
RSMo 2000.  
Appling, C., not participating.

Dated at Jefferson City, Missouri,  
on this 27th day of January, 2005.