BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Petition of	**)**	
Alma Telephone Company	**)**	
for Arbitration of Unresolved	**)**	**Case No. IO-2005-0468, et al.**
Issues Pertaining to a Section 251(b)(5)	**)**	**(consolidated)**
Agreement with T-Mobile USA, Inc.	**)**	

Petitioners'List of Issues, Position Statements, Decision Point List <u>And Final Offers</u>

Pursuant to the Arbitrator's June 30, 2005 Order Setting Procedural Schedule, Petitioners Alma, Chariton Valley, Mid-Missouri, and Northeast ("Petitioners") submit this List of Issues, Position Statements, Decision Point List, and Final Offers. Many of the disputed issues involve differing legal interpretations. Legal authorities will be set forth within the position statements.

Introduction

Section 252 of the Telecommunications Act imposes obligations upon Petitioners that are disadvantageous as compared those of T-Mobile. What Petitioners negotiate or have arbitrated with any wireless carrier "can and will be used against them" by other wireless carriers.

Subsection (i) requires Petitioners, as ILECs, to make available to T-Mobile any interconnection, service, or network element provided under an agreement to any other requesting carrier on the same terms and conditions. Every agreement Petitioners have approved is subject to being adopted by T-Mobile, or another CMRS provider. The agreement awarded in this arbitration will likewise be subject to being adopted.

This system operates against ILECs such as Petitioners. T-Mobile has no such disability. T-Mobile is not bound to make available to an ILEC any provision of its interconnection agreements. It agreements are not subject to being adopted by Petitioners. There is little for T-Mobile to lose by attempting to arbitrate a lower intraMTA rate or attempting to include IXC traffic.

Petitioners have had to conduct all negotiations, and craft the offers and positions set forth herein with this in mind. They have recognized their obligation to make agreements available on the same terms and conditions, while simultaneously negotiating in good faith. They have never negotiated "upward".

Despite being between the proverbial rock and hard place, Petitioners have made concessions. Particularly with respect to the interMTA traffic factors, Petitioners Chariton Valley and Northeast have made extremely generous concessions to designate far less local traffic than their traffic studies support. If adopted these concessions will result in significant savings to T-Mobile. Thus far during the negotiations and this arbitration, T-Mobile has offered little or nothing, and compromised little or nothing.

Issues 1-5: Pre Negotiation Traffic Compensation

Issue 1: Coordinated Resolution of Past Compensation Issues with Prospective Termination Agreement

1a. Is the coordinated resolution of uncompensated T-Mobile traffic terminating to Petitioners prior to the commencement of negotiations an unresolved issue properly within the scope of these arbitrations?

1b. If the decision with respect to 1a is in the negative, TTA Section 5.5 should be ordered deleted, and Issues 2, 3, 4, and 5 need not be addressed in this proceeding.

1c. If the decision with respect to 1a is in the affirmative, should TTA Section 5.5 be ordered included as written.

Issue 2: Past Traffic Volumes

2a. What dates should be utilized for computing the past uncompensated traffic volumes?

2b. What traffic volumes have terminated without compensation to Petitioners between the dates determined in 2a?

Issue 3: Past Traffic Jurisdiction

3a. Of the past traffic volumes determined in 2a, what amounts of such traffic are intraMTA?

3b. Of the past traffic volumes determined in 2a, what amounts of such traffic are interMTA?

3c. Of the interMTA traffic determined in 3b, what amounts are terminating interstate traffic?

3d. Of the interMTA traffic determined in 3b, what amounts are terminating intrastate traffic?

Issue 4: Rates for Past Traffic Volumes

4a. What rate should be applied to the intraMTA traffic volume determined in 3a?

4b. What rate should be applied to the interMTA interstate traffic volumes determined in 3c?

4c. What rate should be applied to the interMTA intrastate traffic volumes determined in 3d?

Issue 5: Compensation for Past Traffic Volumes

5a. Taking the volumes of traffic determined in 3a times the rate determined in 4a, the volumes of traffic determined in 3c times the rate determined in 4b, the volumes of traffic determined in 3c times the rate determined in 4c, and adding those products together, what is the total compensation owed for past traffic?

Petitioners' Position Statement for Issues 1-5:

The reciprocal compensation agreement provisions of the 1996 Telecommunications Act do not envision uncompensated traffic terminating prior to the date of an interconnection request. In the situation the Act envisions the terms of the arbitrated interconnection agreement are made effective as of the date of an interconnection request that results in an approved or arbitrated agreement. This is done via interim rates which are "trued up" after final rates are established.

The situation in Missouri is different. T-Mobile has sent traffic to SBC, and SBC has transited it to Petitioners, in violation of tariffs, interconnection agreements, and Commission Orders. Utilizing a January 13, 2005 date of interconnection request as a

cutoff date for uncompensated traffic terminating will not suffice to address traffic that terminated prior to January 13, 2005.

Petitioners have included coordinated resolution of pre-negotiation traffic issues in Traffic Termination Agreements approved for Cingular, Sprint PCS, Alltel, and US Cellular. Petitioners had an obligation under 47 USC 252 (i) to make similar terms available to T-Mobile. Petitioners did so. T-Mobile agreed to similar terms with MoKan Dial Inc. and Choctaw Telephone Company, and interconnection agreements containing such terms have been approved. See TK-2005-0461 and TK-2005-0462. This has resulted in dismissals of all complaints in TC-2002-57 except those pending against T-Mobile.

Petitioners are in receipt of the August 3 Order Regarding Motions in Limine. Petitioners respectfully disagree with the Arbitrator that complaint proceedings would be a better or more efficient vehicle for resolving past compensation issues. The complaint case has been pending for approximately 4 years. There have been two separate evidentiary hearings. There has been no decision rendered, even though the 1998-2001 traffic case was submitted over a year ago. There will need to be more proceedings to address 2001-2005 traffic.

Addressing pre-negotiations traffic in this arbitration would have been more efficient than limiting the arbitration to traffic terminating after January 13, 2005. Compensation for traffic terminating to Petitioners prior to January 13 was the subject of negotiations between Petitioners and Respondent. It was listed as an open issue in the Petition for Arbitration. It is a proper subject matter for arbitration.

In prefiled testimony T-Mobile has objected to the inclusion of pre-January 13 traffic in this arbitration. T-Mobile has not contradicted Petitioners' evidence with respect to past traffic volumes, past traffic jurisdiction, past traffic rates, or Petitioners' proposed compensation for past traffic volumes.

TTA Section 5.5 contains the language used in previous TTAs. It states:

> "5.5 At the same time that the Parties execute this Agreement, they are entering into a confidential agreement to settle all claims related to traffic exchanged between the Parties prior to the effective date of this Agreement. Each Party represents that this settlement agreement completely and finally resolves all such past claims.

Petitioners do recognize that it is awkward to impose such voluntary settlement language into an arbitrated agreement. Petitioners will accept the Arbitrator's direction with respect to pursuing past compensation separately. Therefore Petitioners will relent on issues 1-5.

Petitioners' Final Offer re Issues 1-5:

Petitioners offer to delete proposed section 5.5 from the TTA. Petitioners ask that the terms of the arbitrated TTA be made effective January 13, 2005. T-Mobile has not been paying FCC interim rates since January 13. Petitioners ask that the Arbitration Award direct T-Mobile to pay Petitioners pursuant to the TTA, as approved, back to January 13, 2005. Petitioners ask that the Award instruct or permit Petitioners to request inclusion of traffic terminating after 2001 and before January 13, 2005 in the complaint proceedings pending in TC-2002-57.

Issue 6: Prospective interMTA/Interstate Factors

6a. Have Alma and T-Mobile agreed that all T-Mobile traffic terminating to Alma is intraMTA?

6b. Which traffic studies does the Arbitrator believe to be the more accurate?

6c. What proportions of T-Mobile Traffic Terminating to Chariton Valley are interMTA and intraMTA?
6d. What proportions of T-Mobile Traffic Terminating to Chariton Valley are interMTA and intraMTA?
6e. What proportions of T-Mobile Traffic Terminating to Chariton Valley are interMTA and intraMTA?
6f. The proportions determined in 6a, 6c, 6d, and 6e should be ordered inserted into the respective TTA Appendix 2

Petitioners' Position Statement for Issue 6:

Alma has proposed a 0.0% interMTA factor, which T-Mobile has agreed to. There is no need for interstate/intrastate proportions of interMTA access traffic necessary for the Alma TTA. Traffic factors are not an issue between Alma and T-Mobile.

Chariton Valley, Mid-Missouri, and Northeast have performed traffic studies that indicate the proportions of interMTA traffic. These studies also indicate the proportions of interMTA traffic that are interstate and intrastate. T-Mobile has not provided any traffic studies. T-Mobile has not challenged the accuracy of Petitioners' traffic studies as performed. T-Mobile has challenged the methodology utilized in these studies. T-Mobile criticizes the studies for using the mobile caller's NPA NXX as a surrogate for his or her location. T-Mobile was asked to provide this information. It is Petitioners' understanding T-Mobile has not preserved this information. T-Mobile has failed to preserve and provide the only information T-Mobile claims is necessary. Given that the NPA NXX information is the only information available, Petitioners have performed their traffic studies on the best information available.

The Commission has previously accepted the validity of the method Chariton Valley, Mid-Missouri, and Northeast used. The Commission has approved similar studies by Mark Twain Rural Telephone Company regarding T-Mobile traffic in its January 27, 2005 Report and Order in TC-2002-1077.

Petitioners' studies indicate interMTA proportions of T-Mobile traffic. They also indicate the proportions of the interMTA traffic that are interstate and intrastate in jurisdiction.

Chariton Valley and Northeast have offered interMTA factors that are significantly less than their studies indicate. Chariton Valley and Northeast submitted their traffic studies in TC-2002-57. In that case there were alternative methods suggested for developing factors based upon mobile tower locations. Chariton Valley and Northeast offered T-Mobile interMTA factors lower than indicated by their traffic studies as a compromise between the factors their studies produced and those produced by Staff's tower count method. T-Mobile did not accept those compromise factors in TC-2002-57. In recognition of their obligation to negotiate in good faith Chariton Valley and Northeast still offer interMTA factors that are much less than those produced by their studies. This offer creates a great benefit to T-Mobile by producing much greater proportions of local intraMTA traffic than the studies themselves would produce.

The following is a summary of the factors Petitioners' studies establish, and those Petitioners have indicated they will accept:

Company	**Traffic Study InterMTA Factor**	**InterMTAFactor Factor Co. will Accept**	**Interstate Proportion of InterMTA Traffic**
Alma	N/A	0.0%	N/A
Ch. Valley	73.0%	26.0%	20%
Mid-Missouri	16.7%	16.0%	20%
Northeast	100.0%	22.5%	20%

Petitioners' Final Offer re Issue 6:

Petitioners offer that the following interMTA factors, and interstate proportions of interMTA traffic, be ordered inserted into appendix two respectively of the four TTAs that will result from this arbitration:

Company	**InterMTAFactor**	**Interstate Proportion of InterMTA traffic**
Alma	0.0	N/A
Ch. Valley	26.0%	20%
Mid-Missouri	16.0%	20%
Northeast	22.5%	20%

If awarded, these factors should be ordered entered into Appendix 2 of the respective TTAs.

Issue 7: Prospective IntraMTA Rate

7a. What intraMTA rate should be adopted for intraMTA T-Mobile traffic terminating to Alma?
7b. What intraMTA rate should be adopted for intraMTA T-Mobile traffic terminating to Chariton Valley?
7c. What intraMTA rate should be adopted for intraMTA T-Mobile traffic terminating to Mid-Missouri?
7d. What intraMTA rate should be adopted for intraMTA T-Mobile traffic terminating to Northeast?
7e. The rates determined in 7a, 7b, 7c, and 7d should be ordered inserted in the respective TTA Appendix 1.

Petitioners' Position Statement for Issue 7:

Petitioners recognize that the intraMTA rate issue is perhaps the only true factual issue in this case. The Commission is going to have to choose between the cost support submitted by Robert C. Schoonmaker of GVNW, or that of Craig Conwell. Petitioners believe that the evidence discloses Mr. Schoonmaker's study was based upon the most widely accepted model for calculating forward looking costs. Petitioners believe that the

record will demonstrate Mr. Schoonmaker is intimately familiar with rural ILEC operations, and the inputs and modifications he made in his study are appropriate for Petitioners.

Petitioners' cost studies, as performed by Mr. Schoonmaker, demonstrate that Petitioners' forward looking costs are as follows:

Company	**Cost**
Alma	$0.912
Chariton Valley	$0.532
Mid-Missouri	$0.685
Northeast	$0.571

Petitioners have each offered a 3.5 cent rate for intraMTA traffic in the TTA. This 3.5 cent rate is between 1.82 to 5.72 cents less than the rate produced by their cost studies.

Petitioners have already agreed to a 3.5 cent rate in their approved TTAs for Cingular, Sprint PCS, Alltel, and US Cellular. They have an obligation to make the 3.5 cent rate available to T-Mobile, even if the rate is less than their cost. They did so.

T-Mobile has previously agreed to a 3.5 cent rate with other Missouri rural ILECs with similar forward looking costs as developed by Mr. Schoonmaker. TTAs with this 3.5 cent rate have been agreed to by T-Mobile and approved with Ozark Telephone Company, Seneca Telephone Company, and Goodman Telephone Company in TK-2004-0166, TK-2004-0167, and TK-2004-0165.

This 3.5 cent intraMTA rate has been negotiated and approved in 70 or so agreements between rural Missouri ILECs and wireless carriers. See the attached list of TTAs approved in Missouri. Each of these agreements with a 3.5 cent rate traces its origins back to the February 8, 2001 Report and Order in TT-2001-139, *in the Matter of*

Mark Twain Rural Telephone Company's Proposed Tariff to Introduce its Wireless Termination Service.

Mark Twain was not a reciprocal compensation agreement case. The decision is not an express approval of the Schoonmaker HAI study for purposes of reciprocal compensation. However, in its *Mark Twain* decision the Commission indicated acceptance of the validity of the HAI study performed by Mr. Schoonmaker. The Commission indicated acceptance of the use of the HAI model, and accepted the validity of the type of rural-specific default input modifications Mr. Schoonmaker makes in this arbitration. The Commission rejected wireless carriers proposals for lesser forward looking rates such as T-Mobile proposes here. The following excerpts from that decision, with underscoring, demonstrate:

> "The rates were developed using a forward-looking cost study generated by the HAI Model, Version 5.0a, which has been sponsored by AT&T in numerous proceedings in this state and elsewhere. The model has been extensively documented. The model provides outputs in the form of the cost of access. The model has over 1,000 user-definable inputs, some of which were modified by the Filing Companies' expert consultant, Schoonmaker, from the default values in order to better "fit" the model to the Missouri small, rural ILECs. In particular, the model was modified to reflect the significantly larger percentage of buried plant in rural Missouri; to reduce the overall rate of return to 11.25 percent; to reduce the level of total interoffice minutes to a level more representative of the small LECs; to increase central office switching equipment investment; to increase customer operations expense; to eliminate the network operations expense projected reduction; to reflect the small LECs' actual ratio of central office switching expense to investment; to reflect Staff's guideline depreciation rates for Missouri small companies; and to more realistically reflect the sharing of outside plant structures with other utilities.
>
> The HAI Model was run for each of the Rural ILECs and the result compared to each company's filed access rates. *See* Schedule RCS-2. The HAI Model resulted in per-minute rates ranging from $0.0454 to $0.4369, with an average of $0.1149. Because the HAI-developed rates were higher, in most cases, than the current filed, traffic-sensitive switched access rates, the latter were used to develop the proposed wireless termination tariff rates. The forward-looking rates produced by the HAI Model, including the adder, average $0.1149...

> The expert witnesses sponsored by the CMRS carriers uniformly take the position that the HAI-generated rates are too high and that the rates contained in the proposed tariffs are too high. SWBW's expert witness testified, for example, that most of the CMRS-to-small-LEC termination rates in this country are close to $0.0100 per minute, while the proposed tariffs herein at issue set per-minute rates ranging from $0.0506 to $0.0744 per minute of use, with an average of $0.0605. The Filing Companies' expert witness testified that, in his opinion, the experts sponsored by the CMRS carriers were generally unfamiliar with the cost characteristics of small ILECs.
>
> Switching costs, based on software costs and central processor costs, are significantly less for large ILECs such as SWBT, Sprint and GTE (now Verizon), than for small ILECs such as the Filing Companies. The cost of switching per call rises as the size of the switch gets smaller. The same applies to the cost of transport capacity. Small exchanges with low traffic volumes have very high per-call transport costs. Large LECs are able to spread their costs over much greater traffic volumes, resulting in substantially lower costs per call."

In its testimony, T-Mobile calculates a single average cost of $0.0074, less than eight-tenths of a cent per minute. T-Mobile states individual Petitioner rates should not be allowed to exceed this figure. The rate T-Mobile proposes for Petitioners appears to be *less than* the rates T-Mobile pays for traffic exchanged with SBC. T-Mobile, via its corporate predecessors, has had three interconnection agreements with SBC approved in Missouri. Petitioners have found no approved agreements with SBC in the name of T-Mobile. In TO-98-12 the agreement between Western Wireless and SBC provided a $0.01 rate. In TO-99-322, the agreement between Aerial and SBC provided a $0.009 rate. In TO-2001-489, the agreement between Voicestream and T-Mobile provided a $0.01 rate. Each of these rates is higher than the $0.0074 rate T-Mobile proposes here.

It is counter-intuitive to conclude that the forward looking costs of Alma, Chariton Valley, Mid-Missouri, and Northeast would be less than those of SBC. Alma serves 350 customers in a very rural exchange. Chariton Valley serves about 8,600 customers in 18 rural exchanges. Mid-Missouri serves about 4,200 in 12 rural exchanges.

Northeast serves about 8,800 customers in 14 rural exchanges. On a combined basis Petitioners serve about 22,000 customers in 45 exchanges, and average of about 2000 per exchange. SBC serves about 2,200,000 customers in 160 exchanges, an average of about 13,750 per exchange.

T-Mobile's rate proposal should be rejected.

Petitioners' Final Offer re Issue 7:

Petitioners offer that the 3.5 cent intraMTA traffic rate be inserted into Appendix I of each of Petitioners' respective Traffic Termination Agreements.

Issues 8-10: Obligation of Petitioners to Compensate T-Mobile for Landline to Mobile IXC Provisioned Traffic

Issue 8: Obligation of Petitioners to Compensate T-Mobile for Landline to Mobile 1+ IXC Traffic

8a. Is landline to mobile 1+ dialed IXC carried traffic reciprocal compensation traffic for which Petitioners are responsible to compensate T-Mobile?

8b. If the answer to 8a is in the negative, the appropriate language should be ordered incorporated into TTA Section 1.1.

8c. If the answer to 8a is in the negative, there is no need to consider issues 9, 10, and 12.

8d. If the answer to 8b is in the affirmative, Issues 9, 10, and 12 should be addressed.

Issue 9: Obligation of Petitioners to Compensate T-Mobile for Landline to Mobile 1+ IXC Traffic Terminating to a Ported Number

9a. Do Petitioners have suspensions or modifications from the obligation to perform intermodal local number porting?

9b. Does this issue need to be resolved now in order to address the possibility that intermodal LNP suspensions or exemptions are eliminated or removed?

9c. If or when Petitioners' suspensions or modifications are eliminated, is it appropriate for calls to a ported number to be included within the scope of the TTA?

9d. The appropriate language should be ordered inserted in TTA Section 1.1.

Issue 10: Should Bill and Keep with Net Billing Be Ordered?

10a. Assuming Petitioners are responsible to compensate T-Mobile for intraMTA landline to mobile 1+ IXC calls, what portions of such traffic are intraMTA?

10b. As Petitioners and T-Mobile do not directly interconnect, is bill and keep appropriate under 47 CFR 51.713(a)?
10c. Of the intraMTA landline to mobile 1+ IXC calls, are the volumes of such traffic compared to the mobile to landline T-Mobile traffic "roughly balanced" as set forth in 47 CFR 51.713(b)?
10d. How will such landline to mobile traffic be measured?
10e. How will such landline to mobile traffic be recorded?
10f. What billing records will be used for such landline to mobile traffic?
10g. Should references to CTUSRs in the TTA be included?
10h. If the parties are unable to measure such traffic, should the formula T-Mobile proposes for determining such landline to mobile traffic, which takes the volume of mobile to landline traffic, divides it by 60%, and then multiplies that result by 40%, be used to determine the amount of landline to mobile IXC traffic?
10i. The appropriate language should be ordered with respect to TTA Sections 1.1, 2.4, 5.1.1, and 5.1.2.

Petitioners' Position Statement for Issues 8-10:

Petitioners are in receipt of the Arbitrator's August 3 Limine Order. Petitioners respectfully disagree that the *Atlas* decision is correct. The *Atlas* decision is bottomed almost exclusively on the language of 47 CFR 51.701, which is a rule that pertains to the establishment of reciprocal compensation arrangements. The *Atlas* decision fails to adequately address the statutory and regulatory authorities indicating that IXC carried traffic was never intended to be subject to reciprocal compensation. Petitioners' prefiled testimony, and this position statement, more fully develop the analysis we believe is appropriate for the Arbitrator.

The following is Petitioners' suggested TTA language pertinent to the IXC traffic issue. This language is found in the introductory paragraph, and in Section 1.1. This is the language that has been submitted and approved in many TTAs between rural ILECs and CMRS providers, including T-Mobile. The language reads:

> "ILEC may terminate traffic originated by its end user customers and terminating to TMUSA through the facilities of another local exchange carrier in Missouri."

> "1.1 This Agreement shall cover traffic originated by, and under the responsibility of, one of the Parties and terminated to the other Party without the direct interconnection of the Parties' networks, and which terminates to the other Party through the facilities of another local exchange carrier in Missouri. "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 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 Agreement shall cover both Local and Non-local Traffic as those terms are defined in Section 2 of this Agreement."

This language recognizes the right of T-Mobile to choose to interconnect indirectly through SBC, and the corresponding right of Petitioners to likewise do so. In order to do so over an indirect interconnection via SBC facilities, they would likely first have to obtain interexchange authority, amend their tariffs to make such calls local, and possibly entertain rate proceedings to address the revenue impacts of doing so. When and if they do these things, the agreement would then be "reciprocal and symmetrical", and would apply to non-1+ landline to mobile traffic transited by SBC as an ILEC.

The language also recognizes that traffic which is originated by an IXC pursuant to its rate schedules, tariffs, end-user contracts, or presubscription rules, is not reciprocal compensation traffic subject to the TTA. Petitioners suggest that FCC rulings make it clear that IXC carried traffic has been, and after the '96 Act continues to be, access traffic. It is not now subject to reciprocal compensation.

In Missouri there have been approximately 70 agreements between small rural ILECs and CMRS providers. A list is attached. All of these agreements exclude landline to wireless IXC traffic from those reciprocal compensation agreements. T-Mobile has

entered into five (5) such agreements, *none* of which include an obligation for the LEC to compensate T-Mobile for landline to wireless IXC traffic.[1]

The language of 47 CFR 51.701, which states that the local calling area for LEC/CMRS traffic is the MTA, only applies for the purpose of *developing* reciprocal compensation arrangements between a LEC and a CMRS provider. It is inappropriate to use this rule as a springboard from which to jump to the conclusion that intraMTA traffic provisioned by an IXC is reciprocal compensation traffic. Such a conclusion ignores the appropriate context of the rule. The rule does not answer the question of whether IXC traffic is subject to reciprocal compensation. Federal precedent demonstrates.

There is no dispute that prior to the 1996 Act landline to mobile IXC traffic was access traffic. It is Petitioners' belief that now, nine years after, no Missouri ILEC is paying reciprocal compensation for landline to mobile IXC traffic. There is good reason for this. Section 251(g) of the 1996 Act preserved the access regime for IXC traffic unless and until explicitly superseded by FCC prescribed regulations. The FCC Interconnection Order[2] was the FCC prescription of reciprocal compensation regulations. The FCC's Interconnection Order specifically retained the access regime for IXC traffic. Access was not superseded by reciprocal compensation for IXC traffic. The Interconnection Order did not include intraMTA IXC traffic within the scope of reciprocal compensation rules.

Paragraph 1036 of the Interconnection Order sets forth that the access regime was designed for situations where three carriers, with an IXC in the middle, collaborate to

[1] See the T-Mobile Agreements approved for Ozark, Seneca, and Goodman in TK-2004-0166, TK-2004-0167, and TK-2004-0165. Also see the T-Mobile Agreements approved for Choctaw and MoKan Dial in TK-2005-0461 and TK-2005-0462.
[2] August 8, 1996, CC Docket No. 96-98.

complete a call. The FCC contrasted the access regime with that intended for the reciprocal compensation regime. The FCC ruled that reciprocal compensation is intended for situations were two carriers, the LEC and the CMRS provider, collaborate to complete a local call. There is no dispute that where an IXC originates a call from an ILEC exchange, and carries it to the terminating CMRS providers, three carriers are involved in completing the call. The FCC Interconnection Order indicates that access, not reciprocal compensation, was intended for IXC provisioned traffic.

Paragraph 1043 of the Interconnection Order stated:

> "Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC..."

This indicates the FCC recognized that traffic carried by an IXC was subject to access. Based on its Section 254 (g) authority to preserve the access charge regime, in paragraph 1043 the FCC concluded IXC traffic would ***continue*** to be subject to the access regime, but not the reciprocal compensation regime:

> "Based on our authority under section 251(g) to preserve the current interstate access regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to access charges."

The underscored language means that IXC traffic, which the FCC recognized was currently subject to access charges, was to continue to be subject to access charges.

The Interconnection Order adopted rule §51.701(a), which defines the scope of the rules for reciprocal compensation for the transport and termination of local telecommunications traffic as follows:

> (a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

This rule limits the application of the reciprocal compensation to calls between LECs and other telecommunications carriers, and not to calls between IXCs and such carriers. This distinction from Paragraph 1036 is also made clear in the specific FCC definition of telecommunications traffic, found in §51.701(b) of the FCC's rules which states:

> (b) *Telecommunications traffic.* For purposes of this subpart, telecommunications traffic means:
>
> > (1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, <u>except for telecommunications traffic that is interstate or intrastate exchange access</u>, information access, or exchange services for such access (*see* FCC 01–131, paras. 34, 36, 39, 42–43); or
> >
> > (2) Telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

In regard to traffic where a CMRS provider is involved, the rule refers specifically and only to telecommunications traffic "between a LEC and a CMRS provider". Traffic between an IXC and a CMRS provider is not local telecommunications traffic under the FCC's rules.

In a 2000 decision[3] the FCC stated that traffic carried by an IXC fell under access rules:

> Pursuant to Section 51.703(b), a LEC may not charge CMRS providers for facilities used to deliver LEC-originated traffic that originates and terminates within the same MTA, as this constitutes local traffic under our rules. Such traffic falls under the reciprocal compensation rules if carried by the incumbent LEC, <u>and under our access charge rules if carried by an interexchange carrier</u>.

[3] *TSR Wireless, LLC v. U S West Communications, Inc.,* Memorandum Opinion and Order, Released June 21, 2000 FCC 00-194 (*"TSR Wireless Order"*), paragraph 31.

There is no mistaking this underscored language. The FCC, four years after establishing reciprocal compensation rules, stated that access charge rules apply to IXC traffic.

The conclusion that IXC traffic is not reciprocal compensation traffic is further supported by a common sense analysis of carrier responsibilities. Simply put, IXC traffic does not belong to Petitioners. T-Mobile's characterizations that Petitioners have "chosen" to route this traffic to IXCs is incorrect.

Petitioners are not certificated to provide interexchange service. They do not offer toll service. They are not IXCs offering to transmit interexchange calls. Petitioners are certificated to provide exchange access to interexchange carriers (IXCs). See § 386.020(17), which defines Petitioners' exchange access as a service provided to carriers which enables those carriers to enter and exit Petitioners' networks. IXCs pay Petitioners for the use of Petitioners' originating and terminating services. The traffic for which originating and terminating access is paid by the IXC is the IXC's traffic. The IXC is the "calling party's network" provider responsible for paying compensation.

Petitioners are required by federal and state rules to deliver IXC traffic to the IXC chosen by the end user. These same federal and state rules unequivocally state that this traffic belongs to the IXC. The end user customer for purposes of IXC call is considered the customer of the IXC, not Petitioners. Petitioners are considered the access customers of the IXC, and are obligated to deliver the call to the chosen IXC. Petitioners are subject to slamming penalties for not directing this traffic to the appropriate IXC.[4] It is the IXC responsibility to pay both originating and terminating compensation for these calls.

[4] The FCC slamming rules are found at 47 CFR 64.1120-1150. The Missouri slamming rule is 4 CSR 240-240-33.150. These rules make it clear that the choice of IXC belongs to the customer, and that the IXC traffic belongs to the IXC chosen by the customer.

The FCC has ruled that IXCs are responsible to pay CMRS providers compensation for IXC provisioned traffic[5]. This was a dispute wherein Sprint PCS, a CMRS provider, requested a declaration that AT&T, an IXC, was responsible to pay Sprint PCS terminating access compensation for IXC carried traffic. At paragraph 1 of that decision the FCC stated:

> "Based on the rules in effect during the period in dispute—from 1998 to present—we find that Sprint PCS was not prohibited from charging AT&T access charges..."

A reading of the entirety of the Sprint PCS decision confirms that the FCC considers access to be the appropriate regime for IXC traffic. The decision continually refers to the rights of both LECs and CMRS providers to charge access compensation for IXC traffic.

Petitioners disagree with the notion there can be both access compensation and reciprocal compensation owed on the same call. This makes little sense. A call is either subject to access or reciprocal compensation, but not both. Doubling intercarrier compensation on a single call is not good public policy.

Decisions of the Missouri Commission indicate understands that reciprocal compensation does not apply to IXC traffic. In a 1999 ruling in an arbitration between SBC and Mid-Missouri Cellular, the Commission ruled that landline to mobile traffic is properly a local reciprocal compensation call only if the ILEC and CMRS provider were locally interconnected, and the vertical and horizontal coordinates of the CMRS provider lie within the local calling area of the landline exchange:

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[5] See *In the Matter of Sprint PCS and AT&T's Petitions for Declaratory Ruling on CMRS Access Charge Issues*, WT Docket No. 01-316, Declaratory Ruling, 2002 FCC LEXIS 3262, released July 3, 2002. (Sprint PCS not prohibited from billing ATT access, but ATT only had to pay pursuant to contract. § 69.5b of the FCC rules enables a LEC to impose access on IXCs. CMRS never operated under Calling Party Network Pays ("CPNP"). CMRS providers charge their end users for this. Because both IXCs and CMRS charge their customer for their services, it does not necessarily follow that IXCs receive a windfall when no compensation is paid to a CMRS carrier.

> "The Commission agrees with SWBT that a call from a SWBT landline subscriber to an MMC cellular subscriber is properly rated as a local call only where: (1) the landline and cellular exchanges are locally interconnected; and (2) the V&H coordinates of the cellular exchange lie within the local calling area of the landline exchange. ... The Commission agrees with SWBT that local rating without local interconnection is inappropriate because the interexchange facilities of SWBT and of Sprint, a stranger to this action, would necessarily be employed in completing such calls." [6]

T-Mobile and Petitioners are not locally interconnected for purposes of IXC traffic.

In 2001 the Commission approved wireless termination tariffs for most small rural ILECs. The wireless carriers opposed the tariffs as not complying with federal reciprocal compensation statutes and rules. These wireless carriers argued that the rural carriers had been compensated by "defacto bill and keep" for landline to mobile IXC carried traffic. The Commission approved the tariffs, and rejected the wireless carrier argument. It held the rural carriers were not obligated to compensate wireless carriers for such IXC traffic:

> "At present, with the termination of the PTC Plan, it is the norm that traffic between the small LECs and CMRS carriers is one-way traffic. This is because traffic to CMRS subscribers from the small LECs' subscribers is transported by IXCs and treated as toll traffic. ... [I]f the traffic is being carried by an IXC, the IXC must compensate the CMRS carrier for the termination of the call."[7]

T-Mobile challenged the Missouri Commission's approval of these tariffs before the FCC. The arguments T-Mobile makes in this arbitration were also made to the FCC.

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[6] *In the Matter of Missouri RSA No. 7 Limited Partnership d/b/a Mid-Missouri Cellular's Petition for Arbitration Pursuant to 47 U.S.C. Section 252 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-99-279, Arbitration Order, p. 5 (Apr. 8, 1999).
[7] *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Report and Order, Case No. TT-2001-139, p. 17-18 (Feb. 8, 2001).

The FCC denied T-Mobiles challenge.[8] T-Mobile again argued that LECs had been compensated by defacto bill and keep for the landline to mobile IXC traffic. The FCC did not accept this argument, and approved the use of state tariffs.

In 2001 AT&T Wireless opposed a CLEC's wireless termination tariff in part because it did not recognize the LEC's responsibility to pay reciprocal compensation for landline to mobile IXC calls. The Missouri Commission rejected AT&T's argument, relying upon the fact that all of the CLEC's landline to wireless traffic was provisioned by an IXC:

> "All of Mark Twain's traffic that is destined for the NXXs of wireless carriers operating in Missouri, including AT&T Wireless and Sprint PCS, is currently dialed: (a) on a 1+ basis and carried by Mark Twain's customers' presubscribed interexchange carrier ("IXC"); or (b) on a 101XXX basis and carried by an IXC."[9]

In a 2005 complaint case T-Mobile contended that it was due compensation for landline to mobile IXC carried traffic because such traffic was "equivalent in volume" to wireless to landline traffic which was the subject of state wireless termination tariffs. The Missouri Commission rejected this contention because the landline to mobile traffic was carried by an IXC:

> "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. ... 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."[10]

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[8] *See the February 17, 2005 Declaratory Ruling and Report and Order regarding T-Mobile, et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, FCC 05-42, CC Docket No. 01-92.*

[9] *In the Matter of Mark Twain Communications Company's Proposed Tariff to Introduce its Wireless Termination Service*, Order Approving Tariffs, Case No. TT-2001-646, para 14 (October 16, 2001)

[10] *BPS Telephone Company, et al. v. Voicestream Wireless Corporation, Western Wireless Corp., and Southwestern Bell Telephone Company*, Case No. TC-2002-1077, Report and Order, p. 14 (Jan. 27, 2005).

The Commission's rulings denying these wireless carrier arguments, make sense because such traffic is the provisioning and compensation responsibility of the IXC, not of the ILECs in whose exchange these toll calls originate. As such traffic is the IXC's compensation responsibility, Petitioners are not responsible to pay compensation.

The Enhanced Record Exchange Rule (4 CSR 240-29.040(4)) imposed a requirement that calling party number (CPN) be included information on wireless to landline traffic placed on the LEC to LEC network. T-Mobile and other wireless carriers opposed this provision. They argued that ILECs such as Petitioners should be required to do the same for landline to mobile IXC traffic. The Commission's May 6, 2005 Order 0f Rulemaking rejected this argument as "frivolous and unsubstantiated" as the wireless carriers failed to establish "any instance where rural carriers transmit compensable calls to wireless carriers."

It is clear from the underlying context of the Commission's decision that it believed such traffic is the provisioning responsibility of the IXC, and ILECs have no compensation responsibilities to the wireless carriers for this traffic.

Based upon the foregoing precedent, Petitioners are not responsible to compensate T-Mobile for landline to wireless IXC provisioned calls. Such calls are not reciprocal compensation calls, and are not within the scope of a reciprocal compensation agreement. As such the Arbitrator, and the Commission, should exclude any and all consideration of such traffic in ruling on the arbitration requests pending in this proceeding.

As Petitioners are not responsible for such landline to wireless IXC traffic, the Arbitrator cannot find that the traffic exchanged is "roughly balanced" justifying the imposition of bill and keep pursuant to 47 CFR 51.713.

Likewise, a "net billing" approach is unavailable. As Petitioners are not responsible for landline to wireless IXC traffic, there is no traffic Petitioners are responsible to pay T-Mobile for that should be netted against the T-Mobile traffic terminating to Petitioners.

If the Arbitrator agrees, the following TTA sections 5.1.1, 5.1.2, and 5.1.3, proposed by T-Mobile, should be rejected:

> "5.1.1 Based on the assumption that the Local Traffic exchanged by the Parties will be roughly balanced (i.e., neither Party is terminating more than sixty (60) percent of the Parties' total terminated minutes for Local Traffic), the Parties shall initially terminate each other's Local Traffic on a Bill and Keep basis."
>
> "5.1.2 If Local Traffic is determined to be out of balance, each Party will pay the other for the Local Traffic it originates and that is terminated on the other Party's network. The Parties agree that, in light of the Parties' inability to measure the amount of interMTA traffic exchanged between the Parties and other traffic, the following traffic percentages will be applied to determine compensation owed for terminating Local Traffic: x% T-Mobile originated and x% ILEC originated. Should either Party believe there has been a material change in the ratio of land-to-mobile and mobile-to-land traffic, the foregoing traffic ratio will be adjusted by mutual agreement of the parties following a valid traffic study."
>
> "5.1.3. ILEC will calculate the amount T-Mobile owes ILEC based on one hundred (100) percent of the traffic originated by T-Mobile and terminated to ILEC. ILEC will calculate the estimated ILEC traffic terminating to T-Mobile based on the following formula: Total Minutes of Use will be calculated based on total IntraMTA MOUs (identified by CTUSR records plus records of intraMTA calls handed off to IXCs or other mutually acceptable calculation), divided by 0.60 (sixty percent). The Total Minutes of Use will then be multiplied by 0.40 (forty percent) to determine the traffic originated by ILEC and terminated to T-Mobile. ILEC will bill T-Mobile based on the total amount T-Mobile owes ILEC minus the amount ILEC owes T-Mobile."

Assuming Petitioners prevail on the issue of whether landline to mobile IXC calls are subject to reciprocal compensation, it will not be necessary to address Issues 10d, 10e, 10f, or 10h.

With respect to Issue 9, Petitioners have been granted suspensions from and/or modifications to intermodal Local Number Portability requirements. Official notice of these Orders the Commission approved for Alma (IO-2004-0453), Chariton Valley (CO-2004-0469), Mid-Missouri (TO-2004-0455), and Northeast (Case No. IO-2004-0468) is hereby requested by Petitioners. Petitioners have not ported any landline numbers to T-Mobile subscribers.

Petitioners agree with T-Mobile that the following language proposed for Section 1.1 should not be included in the TTAs:

> "This Agreement shall not apply to traffic or calls completed by either Party in compliance with any obligation to port numbers of the former customers of one Party when that customer takes service from the other Party."

With respect to issue 10g, SBC has for some time discontinued the provision of CTUSRs to Petitioners. The TTA should contain no references to CTUSRs. T-Mobile's requested § 2.4, which reads as follows, should <u>not</u> be included in the TTA:

> CTUSR" - Cellular Transiting Usage Summary Report, provided by Southwestern Bell Telephone Company, tracks the minutes of Transiting Traffic for calls originating from CMRS providers and terminating to LECs.
>
> There should be no references to CTUSRs in Section 5.1, billing records.

Petitioners' Final Offer with Respect to Issues 8-10:

The Arbitrator should order the following language be utilized in the introductory paragraph of each respective TTA:

"ILEC may terminate traffic originated by its end user customers and terminating to TMUSA through the facilities of another local exchange carrier in Missouri."

The Arbitrator should order the following language be utilized in Section 1.01, Scope of Agreement, for each respective TTA:

"1.1 This Agreement shall cover traffic originated by, and under the responsibility of, one of the Parties and terminated to the other Party without the direct interconnection of the Parties' networks, and which terminates to the other Party through the facilities of another local exchange carrier in Missouri. "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 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 Agreement shall cover both Local and Non-local Traffic as those terms are defined in Section 2 of this Agreement."

Petitioners agree to drop their request that language excluding calls made to a ported number. The Commission should <u>not</u> incorporate the following language into Section 1.1 of the respective TTAs:

"This Agreement shall not apply to traffic or calls completed by either Party in compliance with any obligation to port numbers of the former customers of one Party when that customer takes service from the other Party."

The Commission should reject T-Mobile's proposed language which would include references to CTUSRs in definition section 2 or billing records section 5.1.

The Commission should reject T-Mobile's proposed sections 5.1.1, 5.1.2, and 5.1.3. IXC traffic is not reciprocal compensation traffic. As such there is no basis for surrogate factors for landline to mobile traffic, there is no basis for bill and keep, and there is no need for "net billing" provisions.

<u>Issue 11: Should Future Traffic Studies Use Wireless Telephone Numbers?</u>

11a. Is it appropriate for traffic studies to be conducted utilizing the NPA NXX of a T-Mobile customer?
11b. The appropriate language should be ordered with respect to TTA Section 5.2.

Petitioners' Position Statement for Issue 11:

Yes it is appropriate for traffic studies to be conducted utilizing the NPA NXX of a T-Mobile customer. This is the only information available to Petitioners upon which to conduct such a study. In the past T-Mobile has failed to retain the mobile customer location information that could make such studies more accurate. This Commission recognized this, and approved the use of traffic studies utilizing NPA NXXs. This was adopted by the Commission for T-Mobile traffic terminating to Mark Twain Rural Telephone Company in the Commission's January 27, 2005 Report and Order in TC-2002-1077.

Petitioners' Final Offer Regarding Issue 11:

Petitioners object to the language suggested by T-Mobile to modify sections 5.1 and 5.2 of the TTA.

Issue 12: Scope of Compensation for Traffic Exchanged

12a. Depending upon the resolution of Issue 8, should the TTAs include an explicit statement that the compensation obligation for intraMTA traffic is reciprocal and symmetrical?

Petitioners' Position Statement with respect to Issue 12:

See Petitioners' legal memoranda common to issues 8 through 10 above. As IXC traffic is not subject to reciprocal compensation, there is no reciprocal traffic terminating to T-Mobile. The language T-Mobile proposes amounts to nothing more than an abstract

statement of law. Even were their reciprocal traffic such a provision would not be necessary to be in the agreement.

Petitioners' Final Offer with Respect to Issue 12:

T-Mobile's proffered language should not be included in the TTAs.

Issue 13: Effective Date of Traffic Termination Agreements

13a. Depending in part upon the resolution of Issue 1, what dates should be selected as the effective dates for the respective TTAs, and inserted into the first introductory paragraph of the TTAs.

Petitioners' Position Statement with Respect to Issue 13:

In accordance with Petitioners' Position Statement and Final Position with respect to Issues 1-5 above, Petitioners believe that the effective date of the agreement should be the date the negotiations began, January 13, 2005. Petitioners do not believe this is an issue in light of their offer to drop the inclusion of past compensation claims in this Arbitration.

ANDERECK, EVANS, MILNE, PEACE
& JOHNSON, L.L.C.

By /s/ Craig S. Johnson
Craig S. Johnson MO Bar No. 28179
The Col. Darwin Marmaduke House
700 East Capitol
P.O. Box 1438
Jefferson City, MO 65102-1438
Telephone: (573) 634-3422
Fax: (573) 634-7822
Email: CJohnson@aempb.com

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 5th day of August, 2005, to the following representatives of Respondent:

Mark P. Johnson
Trina R. LeRiche
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, Mo 64111
Email: mjohnson@sonnenschein.com
Email: tleriche@sonnenschein.com

/s/ Craig S. Johnson
Attorney for Petitioner