

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

In the Matter of the Petition for Arbitration)
of Unresolved Issues in a Section 251(b)(5)) Case No. TO-2006-0147
Agreement with T-Mobile USA, Inc.)

In the Matter of the Petition for Arbitration)
of Unresolved Issues in a Section 251(b)(5)) Case No. TO-2006-0151
Agreement with Cingular Wireless.)

**PETITIONERS' MOTION FOR DETERMINATION ON THE PLEADINGS OR
DIRECTED VERDICT
REGARDING CINGULAR'S ISSUES 15-18**

COME NOW PETITIONERS pursuant to Commission Rule 4 CSR 240-2.117(2) and for their motion for determination on the pleadings or directed verdict with respect to Cingular's Issues 15-18 state to the Missouri Public Service Commission (Commission) as follows:

Determination on the Pleadings

1. Commission Rule 4 CSR 240-2.117(2) authorizes the Commission to decide any case or issue on the pleadings under appropriate circumstances and provides that "the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest." See *e.g. Staff of the Missouri PSC v. Port Perry Service Co.*, Case No. WC-2006-0062, *Determination on the Pleadings*, issued Nov. 10, 2005.

2. The Commission's rule for determination on the pleadings is "similar to judgment on the pleadings," and it is designed to "make litigation before the Commission more efficient and less costly for each entity and each

person involved.” *In the Matter of the Proposed Rulemaking, 4 CSR 240-2.117*, Case No. AX-2002-159, *Order Finding Necessity for Rulemaking*, issued Sept. 27, 2001.

3. Judgment on the pleadings is appropriate where the moving party has “clearly established that no material issue of fact remains to be resolved and he is entitled to judgment as a matter of law.” *National Car Rental System, Inc. v. Computer Associates Int’l*, 991 F.3d 426 (8th Cir. 1993).

Directed Verdict

4. The Commission also has authority to grant a motion for directed verdict when a party’s direct testimony fails to meet its burden of proof:

A directed verdict is simply a determination by the tribunal that the party having the burden of proof has failed to present sufficient evidence to carry its burden. In a civil court, a motion for directed verdict would be appropriate at the close of the case in chief of the party having the burden of proof.

In the Matter of Sewer and Water Tariff Filings Made by Osage Water Company, Case No. ST-2003-0562, *Order Regarding Motion to Dismiss*, Jan. 20, 2004 (granting motion to dismiss as motion for directed verdict after finding that a party had failed to present sufficient evidence to justify its case).

5. The Eighth Circuit’s standard is substantially the same as that used by the Commission. “The motion is to be granted only when the nonmoving party has presented insufficient evidence to support a jury verdict in his favor.” *Nolte v. Pearson*, 994 F.2d 1311 (8th Cir. 1993).

Cingular Has Taken No Position and Offered No Testimony on Issue 15.

6. Issue No. 15 raises the question of whether small rural ILECs must pay reciprocal compensation to wireless carriers for intraMTA wireline-to-wireless traffic that is carried by an interexchange carrier (IXC). Most calls from the Petitioners' small rural exchanges to wireless carriers are long distance calls and carried by the rural customers' chosen IXC (e.g. AT&T long distance or Sprint long distance). Thus, the question raised by this issue is whether the Petitioners must pay a wireless carrier for intraMTA land-to-mobile traffic that is carried by an IXC.

7. Cingular has taken "no position" in both its position statement and testimony before the Commission on Issue 15. Indeed, Cingular witness Pue's Direct Testimony specifically identifies the issue of whether the parties' compensation obligations apply to intraMTA traffic that one Party hands off to an IXC for termination to the other party and states as follows:

Question: What do you understand Petitioners' position to be on this issue?

Answer: I understand Petitioners' position to be that they owe no compensation on land-to-mobile traffic that they hand off to an IXC.

Question: What is Cingular's position on this issue?

Answer: Cingular takes no position on this issue.

(Ex. 19, Pue Direct, p. 16); see also Issues Matrix ("**Cingular takes no position on this issue.**") (emphasis added) Cingular has offered no evidence or position

on Issue 15, so Petitioners are entitled to judgment on the pleadings and/or a directed verdict resolving the issue in favor of Petitioners as to Cingular.

Issues 16-18 Become Moot If Issue 15 Is Resolved in Petitioners' Favor

8. Issue 16 raises the question of whether the Commission should establish intraMTA ratios for mobile-to-land/land-to-mobile traffic. If Issue 16 is answered in the affirmative, then Issue 17 raises the question of what those intraMTA ratios would be. Issue 18 raises the question of whether the agreement should allow for modification of the ratios. All three of these issues flow directly from Issue 15, so Issues 16-18 become moot if Issue 15 is resolved in favor of Petitioners. (In other words, if Petitioners are not responsible for IXC-carried traffic, then there is no need for an intraMTA traffic ratio.) Cingular has failed to take any position on Issue 15, so Issues 16-18 are moot and must also be resolved in favor of Petitioners. Cingular cannot stand on the sidelines and take no position on Issue 15 yet expect to take advantage of an intraMTA ratio to discount its compensation responsibilities. Accordingly, Petitioners are entitled to judgment on the pleadings and/or a directed verdict resolving Issues 16-18 in favor of Petitioners as to Cingular.

WHEREFORE, Petitioners respectfully request that the Commission grant determination on the pleadings pursuant to Commission Rule 4 CSR 240-2.117(2) and/or a directed verdict in favor of Petitioners as to Cingular's issues 15-18 and grant such other relief as is reasonable in the circumstances.

RESPECTFULLY SUBMITTED,

/s/ Brian T. McCartney

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or via electronic mail, or hand-delivered on this 8th day of February, 2006, to the following parties:

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