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August 17, 2004

**VIA ELECTRONIC FILING**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: Missouri Small Telephone Company Group Written *Ex Parte* Communication  
Wireless Termination Service Tariffs, CC Docket No. 01-92**

Dear Ms. Dortch:

On July 8, 2004, T-Mobile USA, Inc. (T-Mobile) filed a written *ex parte* communication in this matter to renew its opposition to the use of wireless termination service tariffs by small rural local exchange companies (LECs). In addition, the *ex parte* presents new arguments regarding: (1) "opt in" tariffs; and (2) the right for rural LECs to compel negotiations. The majority of the arguments in T-Mobile's *ex parte* have already been addressed by the Initial and Reply Comments filed in this case by the Missouri Small Telephone Company Group (Missouri STCG).<sup>1</sup> The Missouri STCG's prior Comments are hereby incorporated by reference, and this letter will focus on the recent cases and new arguments included in T-Mobile's *ex parte* communication.

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<sup>1</sup> The Missouri STCG member companies are listed in Attachment A.

## INTRODUCTION AND SUMMARY

Before the wireless tariffs were approved in Missouri, wireless carriers were sending traffic to small rural exchanges without an agreement and without paying for it. T-Mobile used its indirect interconnection with the small companies to sidestep the federal Telecommunications Act's preference for negotiated compensation and interconnection agreements and ignore the Missouri Public Service Commission's (Missouri PSC) express requirement that wireless carriers negotiate agreements prior to delivering traffic to Missouri's small companies. The Missouri PSC approved the Missouri STCG wireless tariffs that apply to this traffic only in the absence of an agreement under the Act. The Missouri STCG tariffs are lawful, and they do not conflict with the small companies' duties to negotiate under the Act. Therefore, the Federal Communications Commission (Commission) should deny T-Mobile's *Petition* and reject T-Mobile's efforts to legitimize its unlawful actions.

T-Mobile's July 8, 2004 written *ex parte* renews T-Mobile's request for the Commission to declare that the Missouri STCG wireless tariffs are unlawful. In addition, T-Mobile's written *ex parte* now for the first time asks the Commission to: (1) declare that small rural carriers can initiate interconnection negotiations; and (2) offer an alternative that would allow small rural carriers to file "opt in" interconnection tariffs. T-Mobile's *Petition* and *ex parte* suggestions should be rejected for the following reasons.

First, as a matter of law, the federal Telecommunications Act of 1996 (the Act) provides T-Mobile with a clear procedure to request an agreement with small rural companies if that is what T-Mobile truly wanted to achieve. Many of the other wireless carriers in Missouri have negotiated agreements with small rural carriers, including Verizon Wireless, Sprint PCS, Cingular, ALLTEL Wireless, Dobson Wireless and Mid-Missouri Cellular. Indeed, T-Mobile's arguments are belied by the fact that T-Mobile has negotiated agreements with three small Missouri companies that have been approved by the Missouri PSC.<sup>2</sup>

Second, T-Mobile's new requests for the Commission to approve "opt in" tariffs and declare that the small companies have the right to compel negotiations are simply efforts to distract this Commission from the law that is already crystal clear. The Act provides that state tariffs may be enforced where they do not conflict with the Act's provisions. Thus, state law tariffs may apply to wireless traffic that is delivered without an agreement so long as the tariffs do not prevent a wireless carrier from exercising its rights under the Act and obtaining an agreement. The fact that T-Mobile has negotiated agreements with three small carriers in Missouri after the tariffs were approved dispels any argument that the tariffs prevent negotiated agreements. And if T-Mobile truly wanted to establish agreements with the remaining small rural carriers in Missouri, then T-Mobile could have done so years ago using the procedures set forth in the Act.

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<sup>2</sup> *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Ozark Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0166, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Seneca Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0167, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

## DISCUSSION

### 1. History of Wireless Tariffs in Missouri

Up until 1997, when a large incumbent LEC (ILEC) delivered wireless traffic to the Missouri STCG companies, the large ILEC was responsible for compensating the Missouri STCG company for the use of its facilities and services to complete the call. This arrangement changed in 1997 when the Missouri PSC relieved Southwestern Bell Telephone Company (now SBC) of this payment responsibility and placed the burden on the originating wireless carriers. Under the new system put into place in 1997, wireless carriers were supposed to establish agreements with the small carriers before sending traffic to small company exchanges.

In response to small company concerns about the possibility of uncompensated traffic, the Missouri PSC clearly and unequivocally stated that wireless carriers were not to send calls until they had agreements with the small companies:

**Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunication Carrier's network unless the wireless carrier has entered into an agreement** with such Other Telecommunication Carriers to directly compensate that carrier for the termination of such traffic.<sup>3</sup>

Unfortunately, the wireless carriers failed to comply with the Missouri PSC's directive and continued to send traffic to the Missouri STCG companies without an agreement and without compensating them for that traffic. As a result, the Missouri STCG companies filed their wireless tariffs.

### 2. The Missouri Wireless Tariffs are Subordinate to the Act.

The Missouri STCG tariffs establish the rates, terms, and conditions for wireless traffic that is delivered in the absence of an agreement, and the Missouri STCG tariffs expressly state that they will be superceded by an approved compensation or interconnection agreement. Specifically, the tariff language provides:

This tariff applies except as otherwise provided in 1) an interconnection agreement between a [wireless] provider and the Telephone Company approved by the Commission pursuant to the Act; or 2) a terminating traffic agreement between the [wireless] provider and the Telephone Company approved by the Commission.

Thus, the wireless tariffs are not interconnection agreements or reciprocal compensation arrangements under the Act, and the tariffs are expressly subordinate to approved

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<sup>3</sup> *In the Matter of Southwestern Bell Telephone Company*, MoPSC Case No. TT-97-524, *Report and Order*, issued December 23, 1997. (Emphasis added.)

agreements under the Act. The tariffs only apply in situations where there is no interconnection agreement yet a wireless carrier is using the small companies' facilities in the absence of any agreement or payment.

A number of wireless carriers (but not T-Mobile) opposed the Missouri STCG tariffs, but the Missouri PSC approved the tariffs. The Missouri PSC held that the tariffs were lawful under the Act. On appeal, the Missouri Court of Appeals agreed and held, "**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.**"<sup>4</sup>

Since they were approved, the Missouri STCG wireless termination tariffs have not prevented any wireless carrier from negotiating a compensation or interconnection agreement. Indeed, many wireless carriers have come to the table and reached agreements with Missouri's small companies after the tariffs were filed. Specifically, Verizon Wireless, Sprint PCS, Cingular, ALLTEL Wireless, and even T-Mobile have negotiated agreements after the tariffs were approved.<sup>5</sup> After Sprint PCS (the wireless carrier) entered into agreements with Missouri's small companies, Sprint Missouri, Inc. (the ILEC) subsequently filed its own wireless termination service tariff.

Wireless termination tariffs are neither unlawful nor unreasonable; rather, they were necessary in Missouri to ensure that small rural ILECs are compensated for the use of their facilities. The rural ILECs have a constitutional right to a fair and reasonable return on their investment, and the Missouri PSC did not allow the wireless calls to continue terminating for free because this is potentially confiscatory.<sup>6</sup> In Missouri, the wireless tariffs led to negotiated agreements with wireless carriers because the tariffs provide an appropriate incentive to wireless carriers to pursue the negotiations envisioned by the Act and required by the Missouri PSC.

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<sup>4</sup> *Sprint Spectrum v. Missouri Public Serv. Comm'n*, 112 S.W.2d 20, 25 (Mo. App. 2003).

<sup>5</sup> See e.g. *Application of BPS Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. IO-2003-0207, *Order Approving Traffic Termination Agreement*, issued Feb. 3, 2003 (**Verizon Wireless**); *Application of Citizens Telephone Co. of Higginsville, Missouri for Approval of a Traffic Termination Agreement*, Case No. TK-2003-0533, *Order Approving Interconnection Agreement*, issued Aug. 20, 2003 (**Sprint PCS**); *Application of Fidelity Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TO-2004-0445, *Order Approving Interconnection Agreement*, issued April 6, 2004 (**Cingular**); *Application of Grand River Mutual Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TO-2002-0147, *Order Approving Interconnection Agreement*, issued Oct. 16, 2001 (**ALLTEL Wireless**); *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003 (**T-Mobile**).

<sup>6</sup> *Sprint Spectrum v. Missouri Public Serv. Comm'n*, 112 S.W.2d at 26 (citing *Smith et al. v. Ill. Bell Tel. Co.*, 270 U.S. 587, 591-92, 70 L.Ed. 747, 46 S.Ct. 408 (1946)).

### 3. The Missouri Wireless Tariffs are Consistent with the Act.

T-Mobile argues that wireless tariffs “are inconsistent with, and therefore preempted by, federal law,”<sup>7</sup> but this claim is simply not true. Small company wireless tariffs are not inconsistent with the Act, and they do not prevent interconnection. State commissions may impose requirements or prescribe regulations that are not inconsistent with the Act.<sup>8</sup> In fact, the Act preserves state commission authority to enforce any regulation, order, or policy that establishes access and interconnection obligations so long as it is consistent with the Act.<sup>9</sup> Therefore, if wireless-originated traffic is being delivered to small rural ILECs in the absence of an approved compensation or interconnection agreement under the Act, then state commissions may enforce existing wireless termination tariffs or approve new wireless termination tariffs.

If T-Mobile dislikes the wireless tariffs, then the Act provides T-Mobile with a mechanism to obtain reciprocal compensation agreements to establish terms, conditions, and rates for the exchange of local traffic. Specifically, the Act requires incumbent LECs to negotiate and, if necessary, arbitrate such agreements with requesting carriers.<sup>10</sup> In fact, this is exactly what the vast majority of the wireless carriers have done with the large ILECs in Missouri, and many wireless carriers including T-Mobile have now established agreements with Missouri’s small companies as well. The Missouri STCG recognizes its duties and responsibilities to negotiate and arbitrate reciprocal compensation arrangements with wireless carriers, and it has done so. The Missouri PSC has approved agreements between Missouri STCG member companies and wireless carriers such as Verizon Wireless, Sprint PCS, Cingular, ALLTEL Wireless, and even T-Mobile.

T-Mobile complains that after the wireless tariffs were approved, the small companies have “no incentive to agree to different terms during negotiations because tariffs ‘place a thumb on the negotiating scales.’”<sup>11</sup> First of all, this is simply not true, as demonstrated by the numerous agreements that have been approved between Missouri STCG companies and wireless carriers such as ALLTEL Wireless, Cingular, Dobson Wireless, Sprint PCS, Verizon Wireless, and T-Mobile, all of which contain rates lower than the wireless tariff rates. Second, T-Mobile confuses the necessary incentives. As long as T-Mobile gets a free ride on the small company networks, it will have no incentive to enter into an agreement with the small companies. The Missouri PSC and the Missouri Court of Appeals both recognized the inherent unfairness of this situation and approved the tariffs. The tariffs are expressly subordinate to any negotiated agreement under the Act. The Court recognized, **“The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.”**<sup>12</sup>

<sup>7</sup> T-Mobile written *Ex Parte*, July 8, 2004 (“T-Mobile *Ex Parte*”) p. 2.

<sup>8</sup> 47 U.S.C. § 261.

<sup>9</sup> 47 U.S.C. § 251(d)(3).

<sup>10</sup> See 47 U.S.C. §§ 251 and 252.

<sup>11</sup> T-Mobile *Ex Parte*, p. 6.

<sup>12</sup> *Sprint Spectrum v. Missouri Public Serv. Comm’n*, 112 S.W.2d 20, 25 (Mo. App. 2003).

The Missouri STCG's tariffs do not bypass the Act. Rather, the tariffs are expressly subordinated to any approved agreement under the Act. It is T-Mobile that has failed to comply with its responsibilities under the Act and failed to comply with the specific requirements of the Missouri PSC by sending traffic without an agreement. If T-Mobile is allowed to deliver traffic for free over an unlawful indirect interconnection, then what incentive does T-Mobile have to negotiate? The history in Missouri has shown that until the wireless tariffs were approved, T-Mobile, along with most of the other wireless carriers, sidestepped the obligations under the Act as long as possible in order to receive free call termination. The Commission should reject T-Mobile's efforts to make an end-run around the Act's requirements.

#### 4. The Missouri Wireless Tariffs are Not Preempted by the Act.

The Supreme Court explains that courts recognize preemption by express provision, by implication, or by a conflict between a state and federal law.<sup>13</sup> In the absence of explicit statutory language, state law is preempted where there is a scheme of federal legislation that is "so pervasive as to make reasonable the inference that Congress left no room for states to supplement it."<sup>14</sup> State law is preempted to the extent that it actually conflicts with federal law, but the Supreme Court has emphasized that preemption is the exception, not the rule. The Supreme Court states, "[W]e have worked on the 'assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.'"<sup>15</sup>

T-Mobile argues that the wireless tariffs are inconsistent with and therefore preempted by the Act.<sup>16</sup> However, recent federal court cases hold that state tariffs may continue to apply when they do not conflict with the Act.

In *Michigan Bell v. MCI*,<sup>17</sup> the U.S. District Court for the Eastern District of Michigan explained the differences and the relationships between state tariffs and interconnection agreements. The District Court held that states "cannot enforce a tariff in a manner that violates a party's rights under a negotiated interconnection agreement."<sup>18</sup> The District Court explained, "**State tariffs are obviously not agreements approved under the Act. Further, tariffs are inherently different from interconnection agreements.**"<sup>19</sup> The District Court concluded, "pursuant to the Act, **the State may impose and enforce tariff provisions**, but cannot enforce a tariff in a manner that violates a party's rights under negotiated interconnection agreement."<sup>20</sup> Because the Missouri STCG wireless tariffs only

<sup>13</sup> *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

<sup>14</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

<sup>15</sup> *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

<sup>16</sup> T-Mobile *Ex Parte*, p. 2.

<sup>17</sup> 128 F.Supp.2d 1043 (E.D. Mich. 2001).

<sup>18</sup> *Id.* at 1054.

<sup>19</sup> *Id.* at 1060. (Emphasis added.)

<sup>20</sup> *Id.* at 1054. (Emphasis added.)

apply in the absence of a negotiated compensation or interconnection agreement, the wireless tariffs do not conflict with the Act.

On appeal, the Sixth Circuit Court of Appeals also explained the relationship between state law tariffs and interconnection agreements. In *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Svcs, Inc.*,<sup>21</sup> the Sixth Circuit stated, “When a state law is not expressly preempted, courts must begin with the presumption that the law is valid.”<sup>22</sup> The Sixth Circuit explained:

**When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress’s goals and authorized states to implement additional requirements that would foster local interconnection and competition,** stating that the Act does not prohibit state commission regulations “if such regulations are not inconsistent with the provisions of [the Act].” 47 U.S.C. § 261. Additionally, **Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).**<sup>23</sup>

The Sixth Circuit held, “According to the Federal Communications Commission, **as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.**”<sup>24</sup> The Missouri STCG wireless tariffs meet this test because they do not prevent T-Mobile from taking advantage of Sections 251 and 252 of the Act.<sup>25</sup>

In *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm’n*,<sup>26</sup> the Seventh Circuit stated that **“the Act recognizes and specifically preserves state authority to regulate locally, as long as the regulations promote, and do not conflict with, the stated goals and requirements of the Act on its face or as interpreted by the FCC.”**<sup>27</sup> The Seventh Circuit quoted Section 261(c) of the Act:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.<sup>28</sup>

<sup>21</sup> 323 F.3d 348 (6<sup>th</sup> Cir. 2003).

<sup>22</sup> *Id.* at 358.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 359.

<sup>25</sup> Indeed, T-Mobile has subsequently negotiated agreements with three small Missouri companies after the wireless tariffs were approved. These three agreements were approved by the Missouri PSC. See e.g. *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

<sup>26</sup> 362 F.3d 348 (7<sup>th</sup> Cir. 2004).

<sup>27</sup> *Id.* at 392. (Emphasis added.)

<sup>28</sup> 47 U.S.C. §261(c).

The *Indiana Bell* court added, “Conversely, the FCC, in implementing regulations animating the Act, cannot scuttle state regulations consistent with the Act.” Because the wireless tariffs do not prevent T-Mobile from establishing an agreement, the tariffs are not precluded by the Act.

In *U.S. West Communications v. Sprint et al.*,<sup>29</sup> the Tenth Circuit explained that there is an incentive for carriers to negotiate prices and terms that are more favorable than those set forth in a local exchange companies’ existing tariffs.<sup>30</sup> In that case, the parties agreed that **carriers have “the right to purchase services from an ILEC pursuant to an ILEC’s tariffs without negotiating an interconnection agreement.”**<sup>31</sup> Thus, the Tenth Circuit allowed tariffs to be used in conjunction with the interconnection provisions of the Act.

In *BellSouth Telecommunications v. Cinergy Communications Co.*,<sup>32</sup> the United States District Court for the Eastern District of Kentucky found that the 1996 Act prohibits the Commission from precluding enforcement of state regulations that establish interconnection and are consistent with the Act.<sup>33</sup> The *BellSouth* court stated, **“According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.”**<sup>34</sup>

Thus, federal courts recognize that state law tariffs may exist in concert with the Act, and the decisions discussed above all demonstrate that the Missouri STCG wireless termination service tariffs have not been preempted by the Act. Wireless carriers need simply to request interconnection agreements if they want to supercede these lawful state tariffs.

## 5. The Missouri Court of Appeals Decision was Properly Decided.

T-Mobile argues that the Missouri Court of Appeals erred in upholding the Missouri wireless tariffs.<sup>35</sup> T-Mobile complains, “LECs cannot use the absence of interconnection contracts as an excuse not to comply with their explicit statutory obligations under Section 251(b).”<sup>36</sup> T-Mobile’s argument misses the point and tries to shift the blame for its “calculated inaction” and unlawful use of small company facilities and services.

The Missouri Court of Appeals recognized that the wireless carriers were using the small companies’ facilities without payment, and it concluded that the tariffs were not preempted by the Act:

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<sup>29</sup> 275 F.3d 1241(10<sup>th</sup> Cir. 2002).

<sup>30</sup> *Id.* at 1250.

<sup>31</sup> *Id.* at note 10. (Emphasis supplied.)

<sup>32</sup> 297 F.Supp.2d 946.

<sup>33</sup> *Id.* at 953.

<sup>34</sup> *Id.*

<sup>35</sup> T-Mobile *Ex Parte*, pp. 8-9.

<sup>36</sup> T-Mobile *Ex Parte*, p. 9.

To supercede the tariffs, all the wireless companies have to do is initiate negotiations with the rural carriers and, thereby, invoke the Act's mandatory procedures for reciprocal compensation arrangements and pricing standards. The wireless companies have failed to follow prior Commission orders to establish agreements with the rural carriers before sending wireless calls to their exchanges. The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue terminating for free because this is potentially confiscatory. **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.<sup>37</sup>

The Missouri Court of Appeals properly interpreted the Act, the existing federal case law, and the facts presented to the Missouri PSC. The *Sprint Spectrum* case correctly held that the wireless tariffs were not preempted by the Act.

## **6. FCC and State Commission Decisions Recognize that Tariffs are Lawful When They do not Conflict with the Act.**

### **a. Federal Communications Commission Decisions**

In the 2001 *Airtouch Cellular* case, the Commission observed that the *CMRS Second Report and Order* states that the Commission “will not preempt state regulation of LEC intrastate interconnection rates applicable to cellular carriers at this time.”<sup>38</sup> Accordingly, the Commission concluded that its intent “was to mandate mutual compensation for the termination of traffic that originates on the LEC’s network, but to **not preempt state regulation of the actual rate paid by CMRS carriers for intrastate interconnection.**”<sup>39</sup> Thus, tariffs that establish the rates and terms for indirect interconnection in the absence of agreements under the Act are not preempted.

This Commission has also recognized that tariffs are an appropriate method for carriers to receive compensation. For example, in 2002 the Commission recognized that traffic to wireless carriers may be delivered pursuant to either an agreement or a tariff. In a decision that addressed intercarrier compensation arrangements between wireless carriers and interexchange carriers (IXCs), the Commission explained:

<sup>37</sup> *Sprint Spectrum v. Missouri PSC*, 112 S.W.2d 20 at 25. (Internal citations omitted.)

<sup>38</sup> *In the Matter of Airtouch Cellular*, FCC 01-194, *Memorandum Opinion and Order*, 16 FCC Rcd. 13502; 2001 FCC LEXIS 3594 (rel. July 6, 2001), ¶14.

<sup>39</sup> *Id.* (Emphasis added.)

There are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; **(2) tariff**; or (3) contract.<sup>40</sup>

Thus, it is both appropriate and lawful for the Missouri STCG to use tariffs that apply to traffic that is delivered in the absence of an agreement or contract. As a result, T-Mobile has the choice of either: (a) sending traffic via the Missouri STCG wireless tariffs; or (b) establishing an agreement pursuant to the Act. What T-Mobile may not do, however, is to unlawfully send wireless calls without compensation and in the absence of an agreement.

#### **b. Other State Commission Decisions**

Other state commissions are reaching the same conclusion as the Missouri PSC did about the need for wireless termination tariffs that apply to traffic delivered in the absence of an agreement. For example, the Minnesota Public Utilities Commission recently observed, “The fact that many wireless carriers have chosen to cooperate in arranging mutual compensation is not proof that all carriers will do so. And if a carrier does not do so, then a tariff provides an appropriate mechanism for securing compensation.”<sup>41</sup>

The Alabama Public Service Commission recognized that it has “a legal responsibility to ensure that the facilities in which utilities have invested are not utilized in a manner that is confiscatory to the utility in question.”<sup>42</sup> The Alabama Commission noted that wireless carriers “have the clear and unilateral option of invoking the remedies of the Telecom Act to address the issues they have presented, but have chosen not to exercise that option.”<sup>43</sup> Accordingly, the Alabama Commission stated:

Based on the foregoing, we find that this Commission has an obligation to preclude the Wireless Carriers from continuing to terminate the bulk of their indirect traffic on the networks of the Rural LECs without payment while the Wireless Carriers mull their decision of whether to invoke the Telecom Act’s provisions.<sup>44</sup>

The Alabama Commission concluded that strict enforcement of tariffs with respect to indirect wireless traffic would ensure that the rural LECs receive compensation for the use of their networks until such time as the wireless carriers employ the provisions in the Act for negotiated agreements.<sup>45</sup>

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<sup>40</sup> *In the Matter of the Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT No. 01-316, *Declaratory Ruling*, July 3, 2002. (Emphasis supplied.)

<sup>41</sup> *In the Matter of Wireless Termination Tariff*, Docket No. P-551/M-03-811, 2004 Minn. PUC LEXIS 101, *Order Affirming Prior Order and Inviting Revised Filing*, July 12, 2004.

<sup>42</sup> *Petition for Declaratory Ruling by Alabama’s Rural Incumbent Local Exchange Carriers*, Docket 28988, 2004 Ala. PUC LEXIS 27, 232 P.U.R.4th 148, *Declaratory Order*, issued Jan 26, 2004 (Citations omitted.)

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

## 7. The Cases Cited by T-Mobile are Legally and Factually Distinguishable.

### a. Federal Court Cases

T-Mobile argues that several federal court decisions issued since T-Mobile's petition was filed "confirm that 'default interconnection tariffs' are unlawful and preempted" by the 1996 Act.<sup>46</sup> The cases cited by T-Mobile are not on point. For example, *Wisconsin Bell v. Bie*<sup>47</sup> involves a court preempting a state commission order that required an ILEC against its will to offer interconnection terms by a tariff. The Seventh Circuit found that this requirement "places a thumb on the negotiating scales by requiring one of the parties to the negotiation...to state its reservation price, so that bargaining begins from there."<sup>48</sup> Thus, the *Wisconsin Bell* case does not involve an incumbent that is affirmatively requesting a tariff.

The Missouri STCG tariffs are distinguishable because they were filed voluntarily by the Missouri STCG companies in order to put terms, conditions, and rates in place that would apply to wireless traffic that was delivered in the absence of negotiated agreements. The Missouri STCG companies have voluntarily stated their "reservation prices" and to the extent they may have inhibited further negotiations, they have done so only to themselves by placing a "ceiling" on the rate they can charge. The wireless carriers are free to argue for any price below that ceiling.

The *Wisconsin Bell* case is further distinguishable because it does not address a tariff that would cease to have effect upon the approval of a compensation or interconnection agreement. Moreover, the *Wisconsin Bell* case does not involve the exchange of traffic between wireline and wireless carriers, nor does the *Wisconsin Bell* case involve "efforts to remedy one party terminating traffic to another without an interconnection agreement."<sup>49</sup> In this case, the tariffs are expressly superceded by an agreement under the Act, and T-Mobile is presently paying nothing for its use of many of the Missouri STCG member companies' facilities. Thus, both the law and the facts distinguish the line of cases cited by T-Mobile.

### b. FCC Cases and Sections 201 and 332

T-Mobile continues to cite FCC *Orders* issued in the 1980's and argue that a landline company's filing of a tariff before an interconnection agreement has been negotiated indicates a lack of good faith.<sup>50</sup> Neither the law nor the facts support T-Mobile's argument. The 1987 and 1989 FCC *Orders* cited by T-Mobile are inapplicable to the present case because they pre-date the 1996 Telecommunications Act which establishes the Missouri STCG's duty to negotiate.<sup>51</sup> If T-Mobile truly wants an agreement, then the 1996 Act

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<sup>46</sup> T-Mobile *Ex Parte*, pp. 3-5.

<sup>47</sup> 340 F.3d 441 (7<sup>th</sup> Cir. 2003).

<sup>48</sup> *Id.* at 444.

<sup>49</sup> *In the Matter of Wireless Local Termination Tariff*, Minnesota PUC Docket No. P-551/M-03-811, *Order Affirming Prior Order and Inviting Revised Filing*, issued July 12, 2004.

<sup>50</sup> T-Mobile *Ex Parte*, pp. 6-7.

<sup>51</sup> The Minnesota Commission recently stated, "Indeed, given the support for state regulation of rates paid by CMRS providers for intrastate interconnection expressed in the *Local Competition Order* and the *AirTouch Cellular* order, it would be hard to reconcile these orders with the tariff preclusion language from the 1980s." *In*

provides T-Mobile with a clear mechanism to obtain one.<sup>52</sup> Indeed, the tariffs did not prevent T-Mobile from negotiating agreements with three Missouri STCG member companies that were approved by the Missouri PSC in November of 2003.<sup>53</sup>

T-Mobile cites Section 332 of the Act as an additional argument against the small company tariffs.<sup>54</sup> T-Mobile's analysis of Section 332 is erroneous and inapplicable to the facts in Missouri. First, Section 332 (c)(1)(B) applies only where a carrier requests interconnection, not where a carrier avoids interconnection obligations.<sup>55</sup> Second, Section 332 applies to direct interconnection, not indirect interconnection:<sup>56</sup>

Upon reasonable request of any person providing commercial mobile radio service, the Commission shall order a common carrier to **establish physical connections** with such service pursuant to the provisions of section 201 of this title.<sup>57</sup>

Thus, Section 332 offers no basis for the FCC to assert jurisdiction and mandate terms for the indirect interconnection between T-Mobile and small rural ILECs. Section 332 clearly addresses direct interconnection, but T-Mobile seeks to void the Missouri tariffs which only address indirect interconnection.

What T-Mobile really wants is something quite different from direct interconnection: T-Mobile wants to send wireless calls to rural ILECs over indirect interconnections with RBOCs and skirt paying its fair share of connecting with rural America. The provisions cited by T-Mobile provide no authority for the improper relief that T-Mobile requests.

### **8. T-Mobile's new "Opt In" Argument Does Not Solve the Problem.**

T-Mobile argues that rural carriers may use "opt in" tariffs, but this is just a smokescreen to cover T-Mobile's efforts to continue its free ride. At this point it should be clear to the Commission that T-Mobile will not "opt in" to any agreement with a small rural carrier as long as T-Mobile can receive free termination on small carrier networks through its calculated inaction. Under the Act, T-Mobile already has three clear choices: (1) "opting in" to the Missouri STCG's existing wireless tariffs; (2) "opting in" to one of the many other negotiated agreements between the STCG companies and other wireless carriers such as Verizon Wireless, Sprint PCS, ALLTEL Wireless, Dobson Wireless, or Mid-Missouri Cellular;

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*the Matter of Wireless Termination Tariff*, Docket No. P-551/M-03-811, 2004 Minn. PUC LEXIS 101, *Order Affirming Prior Order and Inviting Revised Filing*, July 12, 2004.

<sup>52</sup> Specifically, ILECs are required to negotiate, and if negotiations fail, then they are subject to mandatory arbitration. See 47 U.S.C. §§251 and 252.

<sup>53</sup> *Application of Goodman Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0165, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Ozark Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0166, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003; *Application of Seneca Telephone Co. for Approval of a Traffic Termination Agreement*, Case No. TK-2004-0167, *Order Approving Interconnection Agreement*, issued Nov. 5, 2003.

<sup>54</sup> T-Mobile *Ex Parte*, p. 6.

<sup>55</sup> See Alliance of Incumbent Rural Independent Telephone Companies Comments, pp. 19-20.

<sup>56</sup> See Missouri STCG Initial Comments, pp. 20-21.

<sup>57</sup> 47 U.S.C. § 332(c)(1)(B). (Emphasis added.)

or (3) negotiating (and, if necessary, arbitrating) an agreement with the STCG companies. The Missouri wireless tariffs do not prevent or prohibit negotiated or arbitrated agreements. Rather, they are expressly subordinate to agreements negotiated under the Act.

### **9. T-Mobile Has the Right to Compel Both Negotiation and Arbitration.**

T-Mobile argues that rural ILECs have the right to “open interconnection negotiations for a reciprocal compensation agreement under Section 251(b)(5).”<sup>58</sup> T-Mobile’s new argument is simply another attempt to cloud the issue and shift the blame for T-Mobile’s calculated inaction. Although the rights of rural ILECs to compel negotiations are not entirely clear,<sup>59</sup> there is no question that T-Mobile has always had the right to compel negotiations. Indeed, T-Mobile’s new proposal contradicts the history of wireless interconnection in Missouri. In 1997, the Missouri PSC issued an order that required wireless carriers to establish agreements before they sent traffic to the small companies.<sup>60</sup> But the agreements never materialized, and wireless carriers were content to send traffic without compensation or agreements. After the wireless tariffs were approved, this problem was solved for all major carriers except T-Mobile.

T-Mobile’s argument also defies common sense and traditional business practices. Small rural carriers should not be required to chase wireless carriers across the country to receive compensation for the use of their facilities and services. As a practical matter, businesses should not be forced into a position where they must track down customers that have used services and attempt to negotiate the terms and rates for that use of the service after the fact.

### **10. T-Mobile’s *Petition* Violates the Commission’s Procedural Rules.**

T-Mobile’s *Petition* violates the Commission’s procedural rules. On October 18, 2002, the Montana Local Exchange Carriers (“Montana LECs”) moved that the Commission dismiss the *Petition* because it seeks to invalidate a state commission order and preempt state law in violation of the Commission’s *ex parte* rules. Specifically, T-Mobile seeks to invalidate the Missouri PSC order that approved wireless termination tariffs, as well as the subsequent Missouri Circuit Court and Court of Appeals decisions approving the tariffs. The Missouri STCG concurred with the Montana LECs’ motion to dismiss on November 1, 2002, and the Missouri Independent Telephone Company Group (MITG) filed a *Motion to Dismiss* on the same grounds on August 3, 2004.

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<sup>58</sup> T-Mobile *Ex Parte* Comments, p. 13.

<sup>59</sup> T-Mobile claims that a “voluntary” right can be found and offers an unusual analysis of the Act to conclude that rural ILECs have “ample authority” to request interconnection negotiations. T-Mobile *Ex Parte* Comments, p. 13. Other courts and state commissions disagree. See e.g. *Sprint Spectrum v. Missouri Public Serv. Comm’n*, 112 S.W.2d 20, 25 (Mo. App. 2003) (“The Act does not provide a procedure by which the wireless companies can be compelled to initiate or negotiate compensation arrangements with local exchange carriers.”)

<sup>60</sup> *In the Matter of Southwestern Bell Telephone Company*, Missouri PSC Case No. TT-97-524, *Report and Order*, issued December 23, 1997. (Emphasis added.)

T-Mobile has repeatedly referred to the Missouri STCG wireless tariffs in its *Petition* and its most recent *ex parte* comments.<sup>61</sup> The Missouri STCG wireless tariffs were approved by the Missouri PSC after notice and hearing.<sup>62</sup> The tariffs have been upheld by Missouri's Cole County Circuit Court<sup>63</sup> and the Missouri Court of Appeals.<sup>64</sup> Thus, T-Mobile's *Petition* seeks to preempt Missouri law.<sup>65</sup>

T-Mobile did not comply with the Commission's *ex parte* rules because T-Mobile failed to serve the Missouri PSC.<sup>66</sup> Therefore, T-Mobile's *Petition* must be dismissed because it fails to comply with the notice and due process requirements of the Commission's rules. Additionally, T-Mobile failed to serve the Missouri STCG companies whose tariffs are at issue. Requests to invalidate tariffs should not be brought as declaratory ruling requests, but as formal complaints served upon each carrier whose tariff is targeted for invalidation.<sup>67</sup> Thus, T-Mobile's *Petition* is procedurally improper and must be dismissed. The Missouri STCG concurs with *Motions to Dismiss* filed by the Montana LECs and the MITG. The Missouri STCG respectfully renews its request that the Commission dismiss T-Mobile's *Petition* because it violates the Commission's *ex parte* rules.

## CONCLUSION

There is nothing unlawful about wireless termination service tariffs that establish the rates, terms, and conditions for wireless-originated traffic that is delivered in the absence of an approved compensation or interconnection agreement. State tariffs that do not prevent T-Mobile from taking advantage of the Act are not preempted. The Missouri wireless tariffs did not prevent Missouri's other major wireless carriers from establishing agreements with the Missouri STCG companies, and the tariffs did not prevent T-Mobile from establishing agreements with three of the Missouri STCG companies. Nothing in the tariffs prevents T-Mobile from establishing agreements with the remaining Missouri STCG companies. Therefore, the Commission should deny T-Mobile's *Petition*.

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<sup>61</sup> The Missouri wireless tariffs are specifically discussed on pages 5 and 6 of T-Mobile's *Petition* and pages 8 and 9 of T-Mobile's July 8, 2004 written *ex parte* comments.

<sup>62</sup> *In the Matter of Mark Twain Rural Telephone Company*, Missouri PSC Case No. TT-2001-139, *Report and Order*, issued February 8, 2001.

<sup>63</sup> *State ex rel. Sprint Spectrum L.P. v. Missouri PSC*, Case No. 01CV323740. (Decision issued Nov. 26, 2001.)

<sup>64</sup> *Sprint Spectrum L.P. v. Missouri PSC*, 112 S.W.3d 20 (Mo. App. 2003).

<sup>65</sup> See *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997)(A tariff approved by the MoPSC has "the same force and effect of a statute approved by the legislature.").

<sup>66</sup> 47 C.F.R. § 1.1206, note 1; *In the Matter of Amendment of 47 C.F.R. § 1.1206 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 14 FCC Rcd 18831, 18838, *Memorandum Opinion and Order*, (released November 9, 1999).

<sup>67</sup> *In the Matter of Communique Telecommunications, Inc. d/b/a Logically*, 14 FCC Rcd 13635, 13649 (released August 9, 1999).

Respectfully submitted,

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## **ATTACHMENT A**

### **Missouri Small Telephone Company Group**

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