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October 28, 2004

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: CC Docket No. 01-92  
Notice of Ex Parte Presentation**

Dear Ms. Dortch:

On October 27, 2004, Azita Sparano, Douglas Meredith and John Kuykendall of John Staurulakis, Inc. ("JSI") met with Commissioner Jonathan Adelstein and his legal advisor, Scott Bergmann, on behalf of JSI's Rural Local Exchange Carrier ("RLEC") clients. In the meeting, the JSI representatives discussed the attached presentation pertaining to two matters in the Commission's unified intercarrier compensation docket (CC Docket No. 01-92), T-Mobile's Petition for Declaratory Ruling regarding wireless termination tariffs and use of virtual NXX by CLECs and its impact on RLECs. The presentation is summarized below. Two Opinions issued by the Missouri Court of Appeals, Western District addressing lawfulness of wireless termination tariffs that supported the presentation and comments filed by JSI in the wireless termination tariff proceeding were provided to the attendees.<sup>1</sup> The representatives also provided a copy of an *ex parte* letter, which was filed with the Commission in the above-referenced proceeding on October 27, 2004 addressing matters related to Sprint's Petition for Declaratory Ruling.<sup>2</sup>

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<sup>1</sup> The two court cases provided to the attendees were *State of Missouri, ex rel, Sprint Spectrum, L.P. v. The Missouri Public Service Commission*, 112 S.W.3d 20; 2003 Mo. App. LEXIS 604 (Mo. Ct. App. W.D. 2003) ("Missouri Case 1"); *State of Missouri, ex rel, Alma Telephone Company v. Public Service Commission of the State of Missouri*, No. WD 62961 (Mo. Ct. App. W.D. rel. Oct. 5, 2004) ("Missouri Case 2") (attached). JSI's comments in the wireless termination tariff proceeding (CC Docket Nos. 01-92, 95-185, 96-98) were filed on October 18, 2002.

<sup>2</sup> The *ex parte* letter was addressed from JSI to Ms. Tamara Preiss, Chief of the Pricing Policy Division of the Wireline Competition Bureau. The JSI representatives met separately with Mr. Bergmann

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### **Wireless Termination Tariffs**

The JSI representatives demonstrated that wireless termination tariffs are lawful and necessary. In many cases, when wireless carriers terminate traffic to RLECs “indirectly” through Regional Bell Operating Companies (“RBOCs”), they fail to compensate the RLECs for terminating traffic on their networks. Although wireless carriers are entitled to request negotiation or arbitration under Section 252(a) or (b) of the Communications Act of 1934, as amended (the “Act”), RLECs are not afforded the same right. Further, the Act does not provide a procedure by which the wireless carriers are compelled to negotiate agreements with an RLEC to be compensated for traffic terminating on the RLEC’s network. Accordingly, absent voluntary action by wireless carriers to negotiate, RLECs cannot enforce a timeframe to reach an agreement.

Wireless termination tariffs provide an incentive for the wireless carriers to negotiate with RLECs. They are lawful and subordinate to wireless carriers’ rights and RLEC’s obligations in accordance with the Act. As recognized by the Missouri Court of Appeals for the Western District, wireless termination tariffs “reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction.”<sup>3</sup> Further, as recognized by the same court, wireless carriers can invoke their rights under the Act by requesting negotiations for an agreement that would supercede the tariff.<sup>4</sup> In conclusion, JSI respectfully requested the Commission to deny T-Mobile’s Petition seeking a declaration by the Commission that wireless termination tariffs are unlawful.

### **Virtual NXX**

The second issue discussed in the meeting is the use of “virtual NXX” by competing local exchange carriers (“CLECs”). Virtual NXX is the assignment of numbers from an NPA/NXX associated with one rate center to customers physically located in another rate center. Typically, this occurs when a CLEC assigns a Virtual NXX number to an ISP in an attempt to bypass paying access charges. CLECs argue that calls to such ISP numbers are “ISP Bound” traffic subject to compensation provided in the Commission’s ISP Remand Order.<sup>5</sup> The ISP Remand Order, however, prescribes

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and Ms. Preiss on September 27, 2004 to discuss issues related to the Sprint Petition. The *ex parte* letter was filed with the Commission as a follow-up to those discussions.

<sup>3</sup> Missouri Case 1 at III(1).

<sup>4</sup> Missouri Case 2 at 1.

<sup>5</sup> See *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (“*Worldcom*”), cert. denied, 123 S. Ct. 1927 (2003).

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compensation for calls destined to an ISP located within the calling party's local calling area, not outside of the area as is the case with Virtual NXX.<sup>6</sup> Accordingly, the CLECs reliance on the ISP Remand Order is misplaced.

JSI demonstrated that CLECs misplace their reliance on the Commission's ISP Remand Order. The ISP Remand Order addressed issues raised when CLECs entering into the local market targeted ISPs physically located in the local service area in order to be the net recipient of reciprocal compensation. Therefore, the Commission was addressing traffic that originates and terminates in the exchange area of the originating caller and not traffic that originates in one locale and terminates in another. JSI stressed that simply assigning a locally rated number to an ISP physically located outside the originating caller's exchange area does not classify calls to that ISP number as "ISP-Bound" traffic within the context of the ISP Remand Order.

In conclusion, the JSI representatives urged the Commission to not allow virtual NXX to be used for arbitrage. The use of virtual NXX shifts the burden of additional cost on the RLECs such as additional facilities and transit charges and breaks down the basic rules of numbering plan and regulatory structure. Instead, the Commission should confirm that physical location of the calling and called parties determine the rating of traffic, rather than rate center designation of calling and called parties' numbers. The Commission should also confirm that number assignment not be used for arbitrage to bypass toll access charges.

Respectfully submitted,

/s/ John Kuykendall

John Kuykendall  
Director – Regulatory Affairs

#### Attachments

cc: Commissioner Jonathan Adelstein  
Scott Bergmann

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<sup>6</sup> *Worldcom* at para. 1 ("In the order before us the Federal Communications Commission held that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers ("ISPs") located within the caller's local calling area").

T-Mobile Wireless Termination  
Tariff Petition  
and  
Unified Intercarrier  
Compensation NPRM - VNXX

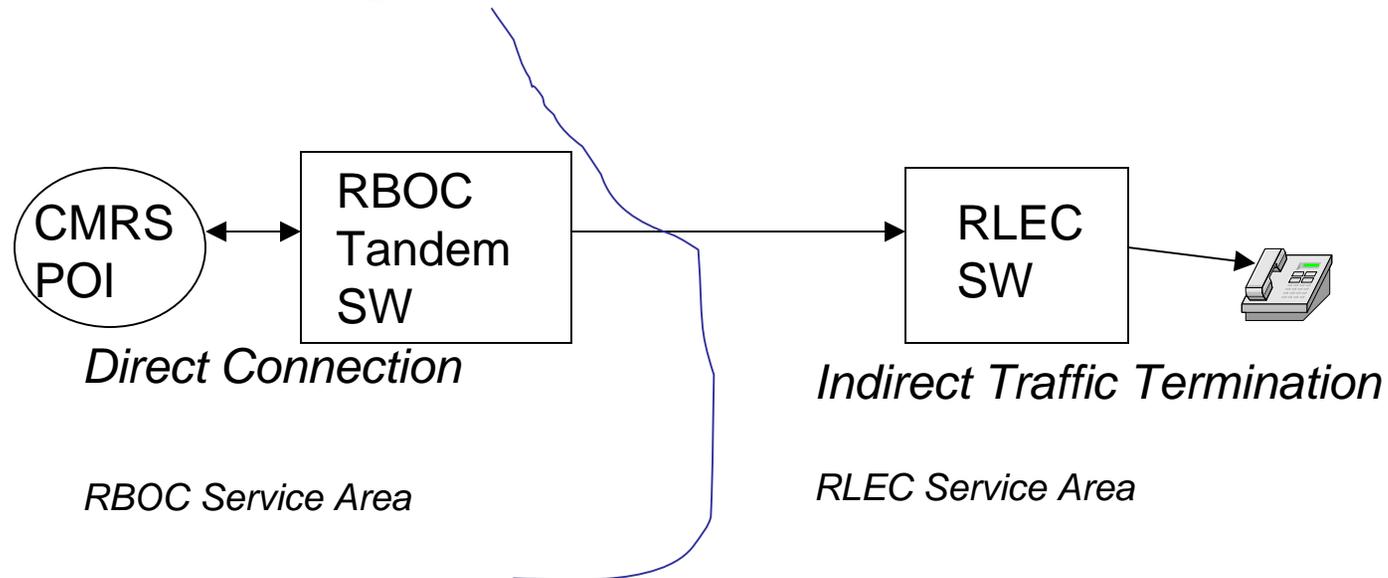
*Ex Parte* Presentation

John Staurulakis, Inc.

October 2004

# RLECs Terminate Wireless Traffic without Receiving Compensation

- Wireless carriers obtain direct connection from RBOC
- Establish reciprocal compensation arrangement with RBOC
- Terminate traffic to subtending RLECs indirectly without providing compensation



# Asymmetry of Rights & Obligations

Carrier	Ability to Request 252(a) and (b) Negotiation/ Arbitration	
Wireless Carriers	Y	
ILECs	N	

- ILECs cannot request negotiation pursuant to Section 252(a) and (b)
- Request for negotiation by an ILEC does not trigger a solid timeframe to reach a negotiated or arbitrated agreement
- “The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction” (Opinion Missouri Court of Appeals Western District – case no WD60928, 4/29/2003).

# Wireless Termination Tariffs are not in Violation of the Act

- Act does not provide a procedure by which the wireless carriers can be compelled to negotiate compensation agreement with ILECs
- Absent voluntary action by wireless carriers to negotiate, ILECs cannot enforce a timeframe to reach an agreement
- Federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Act
- Wireless carriers can invoke their rights under the Act simply by requesting negotiations for an agreement that would supercede the tariff (Opinion Missouri Court of Appeals Western District – case no WD62961, 10/5/2004)

# Wireless Termination Tariffs

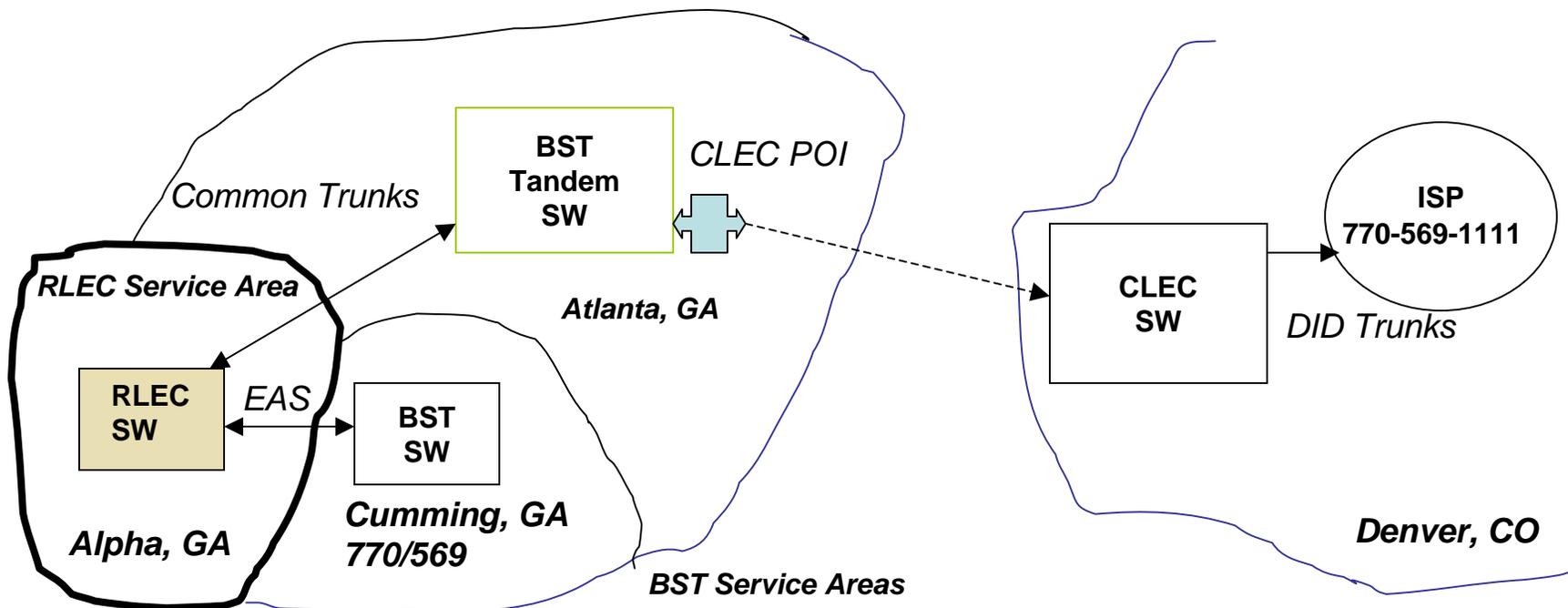
## Conclusion

- Wireless Termination Tariffs
  - Lawful
  - Subordinate to the Act
- Fill in the gap created by asymmetry of obligations & rights of ILECs vs. wireless carriers
- Places incentive to negotiate with the carrier entitled to request negotiations & arbitration
- T-Mobile's Petition Should be Denied
- Commission should uphold Missouri Court of Appeals Western District's Opinions

# Unified Inter-carrier Compensation NPRM - VNXX

# Virtual NXX = Arbitrage to Bypass Toll/Access

- VNXX: Assignment of numbers from an NPA/NXX associated with one rate center to customers physically located in another rate center
- VNXX is generally assigned by CLECs to ISPs
- Attempt to bypass toll/access



# CLECs Reliance on ISP Remand Order is Misplaced

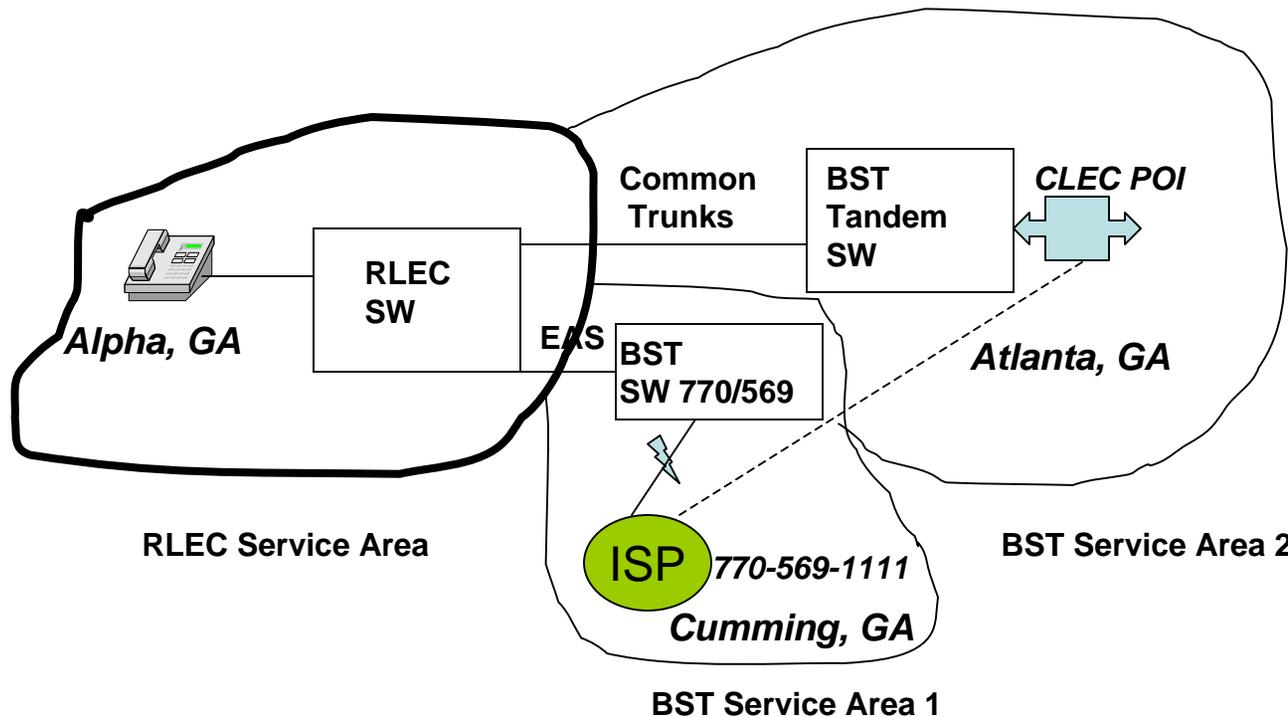
- Commission's ISP orders addressed concerns raised regarding CLECs' arbitrage of reciprocal compensation rules
  - **CLECs targeted ISPs located within an RBOC's local service area in order to be the net receiver of reciprocal compensation**
  - **ISP Remand Order prescribed compensation for calls destined to an ISP located within the callers local calling area**
- Definition of "ISP-Bound Traffic" is limited to traffic that originates and terminates in the exchange area of the originating caller

# ISP-Bound Traffic

- Assignment of a locally rated number to an ISP physically located outside the originating caller's exchange area does not classify calls to such ISP number as "ISP-Bound" subject to compensation prescribed in the ISP Remand Order
- CLECs incorrectly rely on the rate center designation to avoid access charges
  - **Assign Alpha, GA rated number to an ISP located in Denver**
  - **Incorrectly claim that calls to the ISP is ISP-Bound traffic subject to the ISP Remand Order**

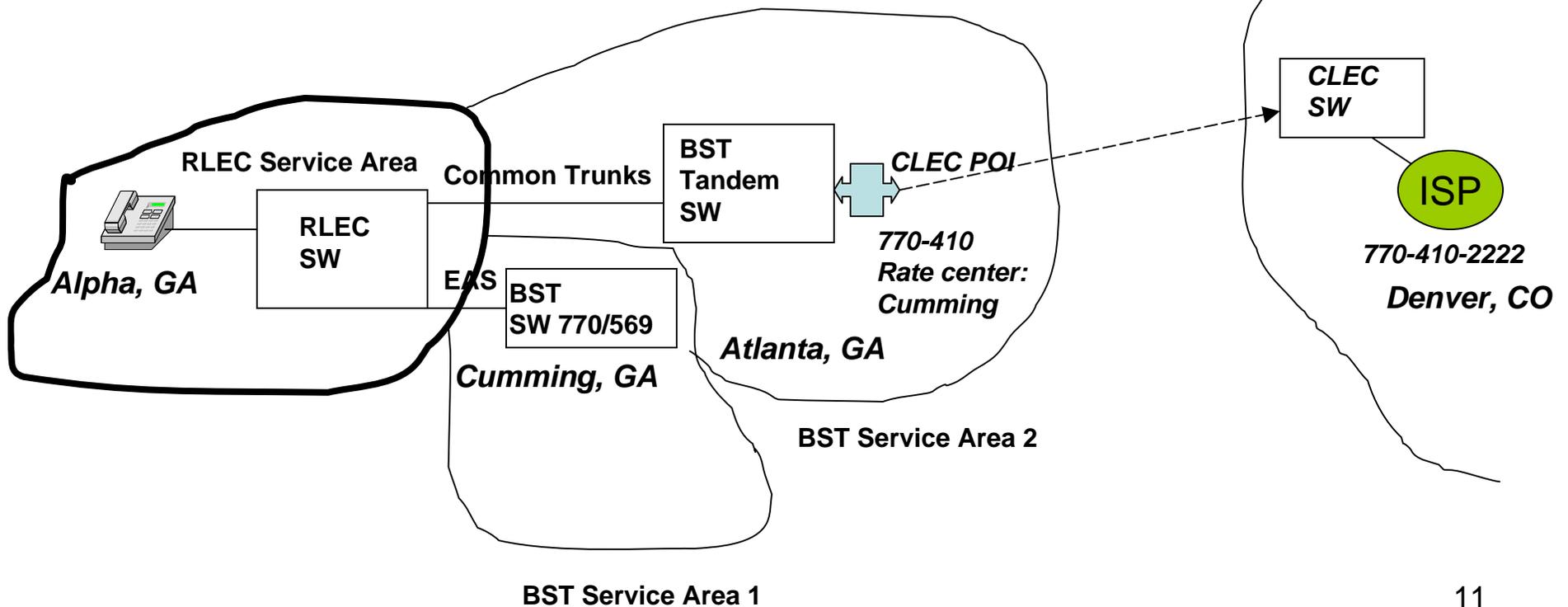
# ISP-Bound Traffic

- ISP is physically located and remains in Cumming, GA
- ISP changed local service provider from BST to CLEC
- Calls from Alpha, GA to Cumming, GA are EAS
- ISP-Bound Traffic Subject to ISP Remand Order



# Toll/Access Traffic

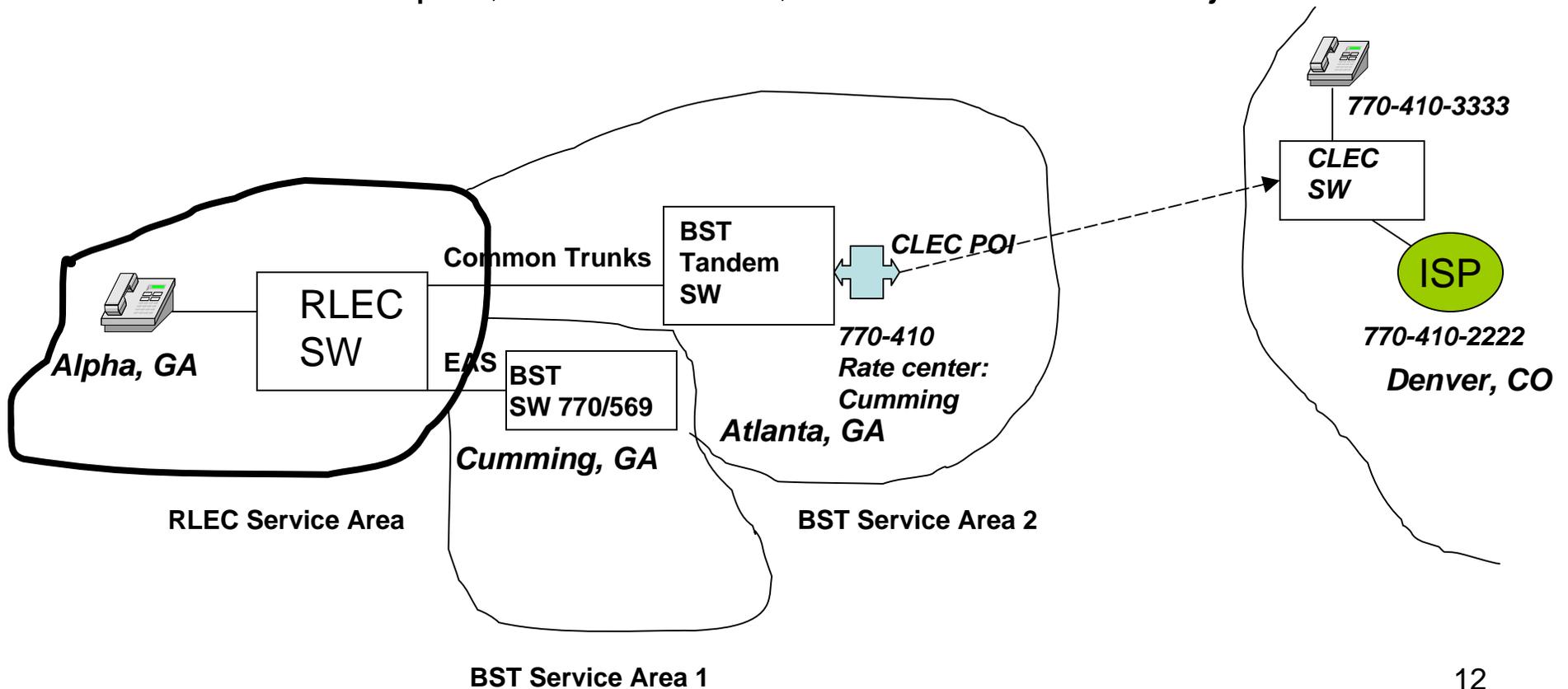
- ISP is not physically located in RLEC service area calling scope
- VNXX to bypass Toll/Access
- Calls from Alpha, GA to Denver, CO are toll calls subject to access
- NOT ISP-Bound Traffic subject to ISP Remand Order



# Toll/Access Traffic

## Voice or Data

- ISP (data end-user customer) or voice end-user customer is not physically located in RLEC service area calling scope
- VNXX to bypass Toll/Access
- Calls from Alpha, GA to Denver, Co. are Toll calls subject to access



# Commission should not allow VNXX to be used for arbitrage

- Burden of additional cost on RLECs
  - Additional facilities
  - Transit Charges
- Breaks down basic rules of numbering plan and regulatory structure

# Recommended Policy

- Commission should confirm that physical location of calling and called party determines rating of traffic, rather than rate center designation of calling & called party's numbers
- Number assignment should not be used for arbitrage to bypass toll/access

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*This slip opinion is subject to revision and may not reflect the final opinion adopted by the Court.*

# Opinion

## Missouri Court of Appeals Western District

**Case Style:** State of Missouri, ex rel, Sprint Spectrum L.P., D/B/A Sprint PCS, Appellant; State of Missouri ex rel. Southwestern Bell Wireless LLC, Appellant, State of Missouri ex rel, Elco Partnership, Appellant, Cybertel Cellular Telephone Company d/b/a Verizon Wireless, Appellant; State of Missouri ex rel, AT&T Wireless Services, Inc., Appellant v. The Missouri Public Service Commission, Respondent; Southwestern Bell Telephone, Intervenor; Office of Public Counsel, Respondent; Small Telephone Company Group, Respondent; Missouri Independent Telephone Company Group, Respondent

**Case Number:** WD60928

**Handdown Date:** 04/29/2003

**Appeal From:** Circuit Court of Cole County, Hon. Thomas J. Brown, III

**Counsel for Appellant:** Charles W. McKee and Paul S. Deford

**Counsel for Respondent:** Dan K. Joyce

### Opinion Summary:

This appeal arises from the Public Service Commission's approval of tariffs allowing certain rural telephone companies to charge specified rates for delivering calls from wireless companies. As Appellants, the wireless companies assert the approved tariffs are preempted by the Federal Telecommunications Act of 1996 and violate Missouri laws which require just and reasonable rates and prohibit single-issue ratemaking.

### **AFFIRMED IN PART AND REVERSED IN PART.**

**Division Three holds:** 1) The Federal Telecommunications Act of 1996 requires the rural telephone companies to negotiate compensation arrangements for terminating calls, but the Act only applies to wireless companies if they consent to negotiate. Because the wireless companies have not voluntarily complied with this federal procedure, the Act does not preempt the Commission's authority to approve tariffs in the absence of negotiated compensation arrangements.

2) The call-blocking provisions of the approved tariffs do not violate the Federal Telecommunications Act of 1996 because nothing in the Act prohibits telephone companies from discontinuing service to carriers for non-payment.

3) The approved tariffs include a \$.02 surcharge or "adder" that was unsupported by evidence to justify the specific amount imposed. This portion of the tariffs is reversed because the evidence did not

establish that the surcharge was just or reasonable.

4) The approved tariffs do not violate Missouri's prohibition on single-issue ratemaking because they establish new rates and do not change existing rates.

The Commission's decision is reversed with regard to the \$.02 adder and affirmed in all other respects.

#### **Citation:**

**Opinion Author:** Lisa White Hardwick, Judge

**Opinion Vote:** AFFIRMED IN PART AND REVERSED IN PART. Smith, P.J. and Lowenstein, J., concur.

#### **Opinion:**

This appeal arises from the Public Service Commission's approval of tariffs allowing certain rural telephone companies to charge specified rates for delivering calls from wireless companies. As Appellants, the wireless companies assert the Commission erroneously applied the law in granting the tariffs. We affirm in part and reverse in part.

### **I.**

#### **Factual and Procedural History**

##### **A. Summary of Disputed Issue and Parties**

This litigation involves a dispute concerning how small rural telephone companies ("rural carriers") in western Missouri (FN1) can be compensated for delivering calls that originate from wireless phones. Currently, the wireless companies direct their originated calls to a large interexchange carrier for transport to the destination telephone within the network of one of the rural local exchange companies. Although the wireless customers pay the wireless companies for originating such calls, and the wireless companies compensate the large interexchange carrier for transporting the traffic, this dispute arose because no one compensates the rural carriers for the use of their networks in completing these calls. The rural carriers initiated this proceeding by filing tariffs, with the Missouri Public Service Commission, to establish rates, terms, and conditions for delivering the wireless originated traffic to their local customers.

The parties relevant to this appeal are as follows:

*"Rural carriers"* -- collectively refers to the local exchange companies that provide telephone services between points within an exchange; twenty-nine of these carriers (FN2) in the rural areas of western Missouri filed the "Wireless Termination Service" tariffs that are the subject of this litigation.

*"Wireless companies"* -- collectively refers to AT&T Wireless Services, Inc., Cingular, Sprint PCS, and Verizon Wireless, all of which provide cellular or wireless telecommunications services in western Missouri and filed motions to oppose the subject tariffs.

*Southwestern Bell Telephone Company ("SWBT")* -- a large telecommunications company providing interexchange, local exchange, and exchange access services in the western Missouri trading area; SWBT opposed the subject tariffs as an intervenor in the Commission proceedings.

*Missouri Public Service Commission ("Commission")* -- the administrative agency charged with regulating public utilities in Missouri; the Commission approved the subject tariffs over the objections of the wireless companies and SWBT.

##### **B. Historical Interrelationship of the Parties**

During the 1980's and early 1990's, wireless traffic was delivered to the rural carriers primarily through SWBT's wireless tariff. The tariff allowed wireless companies to send calls to SWBT's local exchanges but did not establish compensation for calls terminated in exchanges owned by the rural carriers. In a series of cases during the 1990's, the Commission found SWBT was liable to the rural carriers for their respective "terminating access" rates to complete the wireless calls. Thereafter, SWBT paid the rural carriers for those terminations until the tariffs were revised in 1998.

In February 1998, the Commission permitted tariff revisions that eliminated SWBT's obligation to pay for wireless traffic delivered to the rural carriers. ***In the Matter of SWBT's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff, P.S.C. Mo. No. 40, 7 Mo.P.S.C.3d 38 (December 23, 1997)***. However, the revisions also prohibited the wireless companies from sending calls through SWBT that terminated with the rural carriers, unless the wireless companies had an agreement to compensate the rural carriers. ***Id.*** Despite the fact that no such agreements were ever obtained, the wireless companies continued to send, and SWBT continued to transmit, wireless calls to the networks of the rural carriers without compensation. The rural carriers had no means to selectively block or refuse these wireless originated calls. The inability of the rural carriers to refuse these calls left the wireless companies with no incentive to make compensation arrangements when they could continue to terminate their calls at no cost.

Some of the rural carriers sought to obtain payment for the termination services by amending their intrastate-switched access tariffs (FN3) to apply to all traffic regardless of type or origin. The Commission rejected this proposal, concluding that calls originating and terminating in the same major trading area (intraMTA traffic) constitute "local traffic" not properly subject to switched access charges. ***In the Matter of Alma Tel. Co., 8 Mo. P.S.C.3d 520 (January 27, 2000)***. (FN4) As a result of that determination, the rural carriers filed the wireless termination tariffs at issue here in August 2000.

### **C. Commission's Report and Order**

In February 2001, the Commission issued a Report and Order approving the "Wireless Termination Service" tariffs requested by the rural carriers. The tariffs set rates, terms, and conditions applicable to wireless traffic originating and terminating within the western Missouri trading area, in the absence of negotiated agreements between the wireless companies and the rural carriers. The tariff rates differ for the various carriers, ranging from \$.0506 to \$.0744 per minutes of use, but uniformly include a \$.02 surcharge for the use of the each rural carrier's local loop in completing the wireless calls. A provision in the tariffs also requires SWBT to assist the rural carriers in blocking wireless traffic if the wireless companies default on their payment obligations.

The Commission's decision was affirmed by the Circuit Court of Cole County in November 2001. The wireless companies appeal.

## **II.**

### **Standard of Review**

We review the determination of the Commission, not the circuit court. ***State ex rel. City of St. Joseph v. Pub. Serv. Comm'n, 713 S.W.2d 593, 595 (Mo.App. W.D. 1986)***. The Commission's determination is presumed to be valid. ***Friendship Vill. of S. County v. Pub. Serv. Comm'n, 907 S.W.2d 339, 344 (Mo.App. W.D. 1995)***. On appellate review, we must first determine whether the Commission's order is lawful. **MO.CONST. art. V, section 18**. In doing so, we exercise independent judgment and correct any erroneous interpretations of law. ***Friendship, 907 S.W.2d at 344***. If the Commission's order is lawful, we must then determine if it is reasonable. ***Id.*** Reasonableness depends on whether the order is supported by competent and substantial evidence on the whole record, whether the decision was arbitrary, capricious, or unreasonable, or whether the Commission abused its discretion. ***State ex rel. Mobile Homes Estates, Inc. v. Pub. Serv. Comm'n of Mo., 921 S.W.2d 5, 9 (Mo.App. W.D. 1996)***.

## **III.**

### **Issues on Appeal**

The parties to this appeal all agree that the rural carriers should be compensated for terminating wireless traffic. The disputed issue is whether the Wireless Termination Service tariffs comply with federal and state law. In this regard, the wireless companies contend the tariffs should not have been approved because they violate preemptive provisions of Federal Telecommunications Act of 1996 and Missouri laws that require just and reasonable rates and prohibit single-issue ratemaking.

### **Federal Law**

#### **1. Preemption Doctrine**

Under the Federal Telecommunications Act of 1996 ("Act"), each "local exchange carrier" has the duty to "establish reciprocal compensation arrangements for the transport and termination of

telecommunications." **47 U.S.C. section 251(b)(5)**. This duty includes the responsibility to negotiate such compensation arrangements in good faith. *Id.* at **section 251(c)(1)**. If the local exchange carrier negotiates but can not reach agreement, any party in the negotiation can request the state utility regulation commission to mediate the compensation arrangement based on the Act's pricing standards. *Id.* at **sections 252(a)(2), 252(b)(1)-(2)**.

In Points I and II of this appeal, the wireless companies contend the Act provides the exclusive procedure by which the rural carriers can seek compensation for terminating telephone traffic. Where federal statutes establish a comprehensive scheme to address a particular issue, a state has no authority to use different procedures other than those prescribed by federal law. *Amalgamated Ass'n of Street Elec. Ry. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 288-89 (1971). Pursuant to this preemption doctrine, the wireless companies argue that a state's tariff proceedings cannot be used to supplant the negotiation requirements and pricing standards established in Sections 251 and 252 of the Act. *Verizon North, Inc. v. Strand*, 140 F.Supp.2d 803 (W.D. Mich. 2000); *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157 (D. Or. 1999). Because the Commission approved the Wireless Termination Service tariffs without following the Act's federally mandated procedures, the wireless companies seek reversal of the Report and Order, alleging an erroneous application of law. We disagree that federal laws preempted the Commission's authority to approve tariffs in the instant case. The Commission determined that the Act's "reciprocal compensation arrangements" were inapplicable because no agreements were ever entered into by the wireless companies and rural carriers. The Act requires "local exchange carriers" -- such as the rural carriers -- to negotiate in good faith and establish compensation arrangements for the termination of traffic, but it does not impose the same obligation on wireless carriers. The term "local exchange carriers" is expressly defined in the Act to *exclude* providers of "commercial mobile service," such as the wireless companies. **47 U.S.C. section 153(26)**. 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. In the absence of a comprehensive scheme to address the wireless companies' conduct, the Commission did not use its tariff-approval authority to supplant federal law.

If the wireless companies had voluntarily agreed to negotiate rates for terminating traffic, then the rural carriers could have requested the Commission to mediate the compensation terms under Sections 252(a)(2) and 252(b)(1)-(2) of the Act. Without this voluntary compliance, the Act's procedural scheme for reciprocal compensation arrangements could not be invoked. It was the unavailability of these federal procedures that caused the rural carriers to pursue regulatory options under State law. Although the wireless companies have done nothing to bring themselves within the purview of the Act, they now seek to invalidate the subject tariffs by claiming federal law must be applied. We agree with the Commission's determination that federal law does not preemptively govern under the facts of this case. Federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Act. *Mich. Bell Tel. Co. v. MCI*, 128 F.Supp.2d 1043, 1054 (E.D.Mich. 2001). The tariffs approved by the Commission expressly state that they are subordinate to any negotiated agreements under the Act. Thus, the Commission's action does not prevent the negotiation of reciprocal compensation arrangements or otherwise conflict with the Act's procedural requirements. This is a factor significantly distinguished from the cases cited by the wireless companies. State-approved tariffs were rejected in *Verizon North*, 140 F.Supp.2d at 809, because they displaced interconnection agreements under the Act, and in *MCI Telecomms. Corp.*, 41 F.Supp. at 1178, because they circumvented the Act. By stark contrast, the Wireless Termination Service tariffs are expressly subordinate to the Act. 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. *State ex rel. Mo. Pub. Serv. Comm'n v. Fraas*, 627 S.W.2d 882, 886 (Mo.App. W.D. 1981). The Commission cannot allow the wireless calls to

continue terminating for free because this is potentially confiscatory. *Smith et al. v. Ill. Bell Tel. Co.*, **270 U.S. 587, 591-92 (1926)**. The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements. Appellants' Points I and II are denied.

## **2. Call Blocking**

In Point V, the wireless companies contend the Commission's decision unlawfully requires SWBT to assist the rural carriers in blocking calls from defaulting wireless companies. They argue the blocking provision is a violation of the Federal Telecommunication Act's requirement that SWBT "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]" **47 U.S.C. section 251(a)(1)**. Further, they suggest that such blocking could subject SWBT to third party liability claims for discontinuing service.

We disagree that the Act prohibits blocking the traffic of a carrier in default of applicable tariff provisions, such as failing to pay approved rates. In fact, the subject blocking provision is similar to a provision in SWBT's wireless services tariff. It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given. *See Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, **937 S.W.2d 314, 316-18 (Mo.App. E.D. 1996)**. Significantly, the rural carriers have no ability to block wireless calls without the assistance of the interexchange company, SWBT.

The Commission noted that it was approving the blocking provision merely as a "request that SWBT enforce the provisions of its own tariff, because the wireless-originated traffic at issue is violative of SWBT's own tariff." The Commission also approved procedural safeguards -- such as thirty days notice of default to the wireless companies and an opportunity to cure -- that minimize SWBT's exposure to liability for discontinuing service. The tariffs allow SWBT to demand proof of notice and proof of actual default from the rural carriers before blocking can occur. The tariffs further provide that SWBT must be compensated for costs associated with the blocking services. SWBT is already entitled to indemnification for blocking under its own wireless service tariffs; thus, the Commission determined there was ample protection from liability.

The Commission did not act unlawfully in allowing the rural carriers to request assistance from the only entity, SWBT, capable of blocking wireless calls for non-payment. Point V is denied.

## **State Law**

### ***Just and Reasonable Rates***

Under Missouri law, tariff rates must be just and reasonable as to both the utility and the customer. **Section 392.200.1, RSMo 2000**. The wireless companies challenge the reasonableness of the \$.02 per minute "adder" or surcharge portion of the tariffs approved by the Commission. They contend the surcharge -- which is intended to cover the maintenance and construction costs of the rural carriers local networks or "loops" used to terminate the wireless calls -- is an arbitrary figure unrelated to the rural carriers' actual costs. In reviewing this claim on grounds of reasonableness, we can not substitute our judgment for that of the Commission if the rate determination is supported by substantial and competent evidence on the record as a whole. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, **706 S.W.2d 870, 874 (Mo.App. W.D. 1985)**.

The tariffs proposed by the rural carriers were based on their access charges for intrastate toll calls with the addition of a \$.02 surcharge for use of the local loop in terminating the wireless calls. The rural carriers' access rates had been approved by the Commission in prior proceedings and were, therefore, presumed lawful and reasonable. **Section 386.270, RSMo. 2000** With the \$.02 surcharge, the new Wireless Termination Service tariffs range from \$.0506 to \$.0744 per minutes of use, with an average rate of \$.0605.

At the Commission hearing, the rural carriers examined their expert, Robert Schoonmaker, as follows regarding the rationale for the \$.02 adder:

Q. In an earlier answer you indicated that in developing the rates in the tariffs under consideration that you added to the switched access rates an amount of two cents per minute to contribute to the cost of

using the companies' local loop facilities. Can you explain your rationale for this?

A. Yes. In order to terminate calls from wireless carriers to the end user, the loop facilities of the company must be used. The wireless carriers benefit from the use of the loop in terminating this traffic. It therefore seems appropriate to have the terminating rate for wireless traffic contribute some amount to the overall cost of the loop facility.

Q. How was the two cents per minute contribution developed?

A. It was an arbitrary determination of a relatively low amount per minute so that the wireless carriers terminating traffic would make some contribution to the cost of using the loop facilities.

A witness for SWBT testified that SWBT's tariff includes a \$.018 common carrier line charge which is considered to be a loop recovery charge. The witness acknowledged that such a charge might now be unacceptable under recent Federal Communications Commission rulings. While the testimony confirmed that this type of surcharge has been used in the past, it did not establish the current validity or justification for a \$.02 adder.

We are unable to find any evidence in the record regarding the costs incurred by the rural carriers to construct and maintain their local loop facilities. There is no expert testimony to establish that the \$.02 adder bears a calculable relationship to the wireless companies' usage of the loop facilities in terminating their calls. The only available evidence indicates the \$.02 rate was an "arbitrary determination" based on the need to have the wireless companies "make some contribution" to the unspecified overall costs of the network facilities.

Although it may be difficult to calculate an appropriate contribution rate of the use of the local loop, there must be evidence to justify the imposition of specific amount assessed. As the Missouri Supreme Court recognized:

[H]owever difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that rates be "authorized by law" and "supported by competent and substantial evidence upon the whole record." Article V, section 22, Constitution of Missouri.

*State ex rel. Mo. Water Co. v. Pub. Serv. Comm'n*, 308 S.W.2d 704, 720 (Mo. 1957). The admitted "arbitrary" nature of the surcharge compels us to conclude that it is neither just or reasonable. We reverse the Commission's approval of the \$.02 adder because it is unsupported by competent and substantial evidence in the record.

## 2. Single Issue Ratemaking

Missouri's prohibition against single-issue ratemaking bars the Commission from allowing a public utility to change an existing rate without consideration of all relevant factors such as operating expenses, revenues, and rates of return. **Section 392.240.1; (FN5) *State ex rel. Mo. Water Co.*, 308 S.W.2d at 718-19; *State ex rel.***

***Util. Consumers Council of Mo., Inc. v. Mo. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56-58 (Mo. banc 1979).** The wireless companies contend the subject tariffs constitute single-issue ratemaking because they establish new rates for an existing service without the Commission undertaking a thorough examination of the overall rate structure.

The rationale behind the single-issue ratemaking prohibition is to prevent the Commission from allowing a utility to "raise rates to cover increased costs in one area without realizing there were counterbalancing savings in another area." ***State ex rel. Midwest Gas Users' Assoc. v. Pub. Serv. Comm'n of Mo.*, 976 S.W.2d 470, 480 (Mo.App. W.D. 1998).** This rationale does not apply in the instant case because tariffs have never been established for the rural carriers' termination of the wireless-originated traffic. Both of the cases cited by the wireless companies, in support of their claim of single-issue ratemaking, deal with attempts to increase or change *existing* rates. ***In the Matter of Southwestern Bell's Tariff Sheets Designed to Increase Local and Toll Operator Service Rates*, 5 Mo.PSC.3d 59 (June 21, 1996); *MCI Telecom Ins. Corp. v. Southwestern Bell Tel. Co.*, 6 Mo.P.S.C.3d 482 (1997).** These cases are clearly distinguishable from the subject dispute because no rates existed at the time the rural carriers filed for approval of Wireless Termination Service tariffs. The 1998 SWBT tariff revisions eliminated any responsibility for SWBT to pay for wireless traffic

delivered to the rural carriers' exchanges. *In the Matter of SWBT's Tariff Filing*, 7 Mo. P.S.C.3d 38. The revisions obligated the wireless carriers to negotiate rates with the rural carriers for termination of the wireless calls. *Id.* Despite this obligation, the wireless companies continued to send calls without compensating the rural carriers, and the rural carriers had no capacity to block the wireless calls. The rural carriers subsequently attempted to apply their intrastate-switched access tariffs to these termination services. The Commission rejected this proposal, concluding that this was "local traffic" and constituted a new service that was not subject to existing rates. *In the Matter of Alma Tel. Co.*, 8 Mo. P.S.C.3d 520.

Based on this history, we find no error in the Commission's determination that the termination services at issue here cannot be characterized as an "existing service" for which "existing rates" are being charged. The single-issue ratemaking prohibition does not bar the approved tariffs because they do not change existing rates. Point IV is denied.

#### IV. Conclusion

The Commission's decision is reversed with regard to the approval of the \$.02 surcharge for the use of the rural carriers' local loops in completing wireless originated calls. In all other respects, the Commissioner's decision is affirmed.

All concur.

#### Footnotes:

**FN1.** Missouri is roughly divided into two "major trading areas" for purposes of regulating telecommunications traffic. In this proceeding, the major trading area at issue largely encompasses the western half of the State. Telecommunications traffic originating and terminating within this area is referred to herein as "intraMTA" traffic.

**FN2.** The following rural carriers filed the subject tariffs: Citizens Telephone Co. of Higginsville, Missouri; Fidelity Telephone Co.; BPS Telephone Co.; Ellington Telephone Co.; Kingdom Telephone Co.; Oregon Farmers Mutual Telephone Co.; Alma Telephone Co.; Cass County Telephone Co.; MoKan Dial, Inc.; Peace Valley Telephone Co.; Farber Telephone Co.; Rockport Telephone Co.; Le-Ru Telephone Co.; Goodman Telephone Co.; Steelville Telephone Exchange, Inc.; Miller Telephone Co.; Lathrop Telephone Co.; Ozark Telephone Co.; Green Hills Telephone Co.; KLM Telephone Co.; Holway Telephone Co.; McDonald County Telephone Co.; Craw-Kan Telephone Coop., Inc.; IAMO Telephone Co.; Choctow Telephone Co.; Mark Twain Rural Telephone Co.; Seneca Telephone Co.; New Florence Telephone Co.; and Granby Telephone Co.

**FN3.** "Access tariffs" are the rates that local exchange companies (such as the rural carriers) charge a long distance company for access to their subscribers in completing a long distance call.

**FN4.** The Commission's decision (in what is commonly called the *Alma* case) was reversed and remanded by our court for failure to make sufficient findings of fact. *AT&T v. Pub. Serv. Comm'n*, 62 S.W.3d 545 (Mo.App. W.D. 2001). The Commission recently issued an amended *Report and Order*, which is under review by the circuit court. *In the Matter of Alma Tel.Co., Case No. TT-99-428 (Amended Report and Order, April 9, 2002)*.

**FN5. Section 392.240.1.** Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon a complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telecommunications company for the transmission of messages or communications, or for the rental or use of any telecommunications facilities or that the rules, regulations or practices of any telecommunications company affecting such rates, charges, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of law, or that the maximum

rates, charges or rentals chargeable by any such telecommunications company are insufficient to yield reasonable compensation for the service rendered, the commission shall with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and of the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified and shall fix the same by order to be served upon all telecommunications companies by which such rates, charges and rentals are thereafter to be observed, and thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the commission.

**Separate Opinion:**

None

***This slip opinion is subject to revision and may not reflect the final opinion adopted by the Court.***

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# Opinion

## Missouri Court of Appeals Western District

**Case Style:** State of Missouri, ex rel. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Moka Dial Inc., and Peace Valley Telephone Co., Respondents, v. Public Service Commission of the State of Missouri; Appellant, State of Missouri, ex rel. BPS Telephone Company, et al.; Respondent, AT&T Wireless Services, Inc.; Southwestern Bell Wireless d/b/a Cingular Wireless; Sprint Spectrum LP d/b/a Sprint PCS; Southwestern Bell Telephone LP d/b/a SBC Missouri, Appellants.

**Case Number:** WD62961 (Consolidated with Cases WD 62983, WD 62984, WD 62985, and WD 62986)

**Handdown Date:** 10/05/2004

**Appeal From:** Circuit Court of Cole County, Hon. Thomas J. Brown, III

**Counsel for Appellant:** Paul S. Deford, Alok Ahuja, Dan K. Joyce, Marc D. Poston, Larry W. Dority, Kenneth A. Schifman, Leo J. Bub and Paul G. Lane

**Counsel for Respondent:** Craig S. Johnson and William R. England, III

### **Opinion Summary:**

This appeal arises from the public service commission's rejection of amended tariffs that would have compensated certain rural telephone companies for completing wireless calls in their local exchanges. The rural companies contend the commission erroneously applied federal law in rejecting the tariffs.

### **REVERSED AND REMANDED.**

**Division Two holds:** The commission erred in determining that the amended tariffs were preempted by the compensation procedures set forth in the federal telecommunications act of 1996. The amended tariffs contain a subordination clause that avoids any conflict with federal law and preserves the option of the wireless companies, which oppose the tariffs, to negotiate compensation rates with the rural telephone companies and thereby invoke federal law if they desire to have it preemptively applied. The cause is reversed and remanded to the commission for reconsideration of the amended tariffs under the commission's state regulatory authority.

**Citation:**

**Opinion Author:** Lisa White Hardwick, Judge

**Opinion Vote:** REVERSED AND REMANDED. Spinden and Newton, JJ., concur.

**Opinion:**

This appeal arises from the Public Service Commission's rejection of amended tariffs that would have compensated certain rural telephone companies for completing wireless calls in their local exchanges. The rural companies contend the Commission erroneously applied federal law in rejecting the tariffs. We agree and, therefore, reverse and remand the proposed tariffs for further consideration.

**FACTUAL AND PROCEDURAL HISTORY**

**A .**

**SUMMARY OF DISPUTE**

This litigation involves a dispute concerning how certain rural telephone companies(FN1) should be compensated for delivering calls that originated from wireless telephones and terminated in the rural companies' local exchanges during February 1998 through January 2001. The telephone traffic at issue involves wireless calls that occurred within one of Missouri's two Major Trading Areas (MTA) for telecommunications. Thus, the traffic was intrastate, as well as intraMTA.

During the relevant period of February 1998 through January 2001, the wireless companies(FN2) directed their originated calls to a large interexchange carrier, such as Southwestern Bell Telephone L.P. (SWBT), for transport to destination phones within the network of one of the rural local exchange companies. The wireless customers paid their wireless companies for originating the calls. The wireless companies in turn compensated the interexchange carrier for transporting the calls. However, the rural companies were not compensated for use of their networks in completing these wireless calls.

In 1999, the rural companies initiated this proceeding with the Missouri Public Service Commission to amend their existing intrastate switched access tariffs to apply to all traffic originating from the wireless companies and terminating in the rural networks. The existing access tariffs were applicable to calls that were originated from a competitive local exchange carrier in Missouri, transited by an interexchange carrier, and then terminated in a rural company exchange. The amended tariffs sought to clarify that the existing access rates also applied to calls originated by wireless companies during the relevant three-year period.

**B.**

**HISTORICAL USE OF TARIFFS TO DELIVER WIRELESS TRAFFIC**

During the 1980's and early 1990's, wireless traffic was delivered to the rural companies primarily through SWBT's wireless interconnection tariff. The tariff allowed wireless companies to send intrastate calls to SWBT's local exchanges but did not establish compensation for calls terminated in exchanges owned by the rural carriers. In a series of cases during the 1990's, the Commission found SWBT liable to the rural companies under SWBT's existing access tariffs. (FN3) Thereafter, SWBT paid the rural companies for terminating the wireless traffic until the access tariffs were revised in 1998.

Effective in February 1998, the Commission approved tariff revisions that eliminated SWBT's obligation to pay for wireless traffic delivered to the rural companies.(FN4) However, the revisions also expressly prohibited wireless companies from sending calls through SWBT to the rural companies absent an agreement by the wireless companies to compensate the rural companies. The wireless companies failed to negotiate such an agreement, but SWBT continued to transmit the wireless calls to the rural companies' networks without compensation and in violation of the Commission's order. The rural companies had no means to selectively block or refuse these wireless originated calls, thereby leaving the wireless carriers without an incentive to make compensation arrangements when they could continue to terminate their calls at no cost.

The rural companies also attempted to use their existing access tariffs to bill the wireless companies for terminating the wireless calls. The existing tariffs established the rates the rural companies could charge for providing access to their local exchanges to complete a long distance or toll call. The wireless companies refused to pay the bills because it was unclear whether the existing tariffs applied to wireless originated traffic.

### C. REQUEST TO AMEND EXISTING ACCESS TARIFFS

When no compensation agreement was reached by 1999, the rural companies filed an amendment to their existing switched access tariffs to clarify that they were applicable to the wireless traffic.(FN5) The amendment proposed to add the following language to the tariffs:

The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended.

The wireless companies and SWBT intervened in the Commission proceeding and objected to the amended tariffs. After a hearing, the Commission rejected the amended tariffs. *In the Matter of Alma Tel. Co.*, 8 Mo. P.S.C.3d 520 (January 27, 2000). On appeal, this court reversed and remanded for further consideration in light of the Commission's failure to make adequate findings in support of the tariff denials. *AT&T Communications of the Southwest, Inc. v. Pub. Serv. Comm'n*, 62 S.W.3d 545 (Mo.App. 2001).

The Commission subsequently made additional findings in an Amended Report and Order. *In the Matter of Alma Tel. Co.*, No. TT-99-428 (Mo. P.S.C. April 9, 2002). The Commission found the amended tariffs violated provisions of the federal Telecommunications Act of 1996 that required the rural companies to establish reciprocal compensation agreements with the wireless companies. The Commission also relied on federal regulatory rulings in concluding that the intraMTA wireless calls were "local traffic" to which access charges could not be applied. Based on the preemptive effect of federal law, the Commission rejected the amended tariffs as unlawful.

The rural companies sought review by the circuit court. While the review was pending, we issued a decision in a separate case, *State ex rel. Sprint Spectrum, L.P., et al. v. Mo. Pub. Serv. Comm'n*, 112 S.W.3d 20 (Mo.App. 2003) , involving related tariffs and the same wireless traffic at issue here. The *Sprint* case arose following the Commission's initial rejection of the rural companies' amended switch access tariffs in January 2000. Later that year, the rural companies took a different approach by filing new *termination* tariffs to provide compensation for completing the wireless calls. The Commission

approved the new tariffs, which became effective in February 2001. On appeal, we affirmed the wireless termination tariffs as an appropriate payment remedy for the rural companies in the absence of a negotiated compensation agreement with the wireless companies. (FN6) *Id.* at 26.

On May 12, 2003, the circuit court reversed the Commission's rejection of the amended switched access tariffs. Relying on our decision in *Sprint*, the circuit court held that federal law did not preclude the rural companies from applying tariff rates in the absence of a compensation agreement with the wireless companies. The circuit court also determined the access charges were proper because the Commission had previously applied access rates to intraMTA wireless traffic in at least three cases arising after the enactment of the federal Telecommunications Act of 1996.

The Commission, the wireless companies, and SWBT now appeal to this court. However, because this court reviews the Commission's decision rather than the circuit court's ruling, the rural companies are placed in the position of appellants for purposes of briefing the issues on appeal. **Rule 84.05(e).**

## II . STANDARD OF REVIEW

Appellate review of the Commission's decision involves a two-part analysis: we must first determine whether the decision is lawful and then whether it is reasonable. **MO. CONST. art. V, section 18; *Sprint*, 112 S.W.3d at 24.** The burden is on the appellants to show that the decision should be reversed because it is either unlawful or unreasonable. **Section 386.430, RSMo. (2000)**

In determining whether the decision is lawful, we exercise unrestricted, independent judgment and must correct any erroneous interpretations of law. *State ex rel. Alma Tel. Co. v. Mo. Pub. Serv. Comm'n*, 40 S.W.3d 381, 388 (Mo.App. 2001). Lawfulness depends upon whether the decision is supported by statutory or other applicable legal authority. *State ex rel. AG Processing, Inc. v. Mo. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003).

If the decision is lawful, we must then determine whether it is reasonable. *Sprint*, 112 S.W.3d at 24. Reasonableness depends on whether the order is supported by competent and substantial evidence, whether the decision is arbitrary, capricious, or unreasonable, or whether the Commission abused its discretion. *Id.* The decision of the Commission on factual issues is presumed to be correct until the contrary is shown, and we are obligated to affirm if the decision is supported by substantial evidence based on review of the whole record. *State ex rel. Atmos Energy Corp. v. Mo. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003).

## III . ISSUE ON APPEAL

All parties to this appeal agree that the rural companies are entitled to compensation for terminating wireless traffic. This court previously determined in *Sprint* that wireless termination tariffs can provide a lawful and reasonable means for the rural companies to secure compensation for this traffic in the absence of negotiated agreements. **112 S.W.3d at 26.** However, the instant case was filed before *Sprint* and proposed a different means of compensation through the application of switched access rates. The primary issue now in dispute is whether the switched access tariffs can be applied to intraMTA wireless traffic terminated in the rural companies' networks from February 1998 through February 2001, the three-year period prior to the implementation of the termination tariffs approved in *Sprint*.

As appellants, the rural companies contend the Commission misapplied the law in determining that the amended tariffs violated the reciprocal compensation provisions of the federal Telecommunications Act of 1996, 47 U.S.C. section 251(b)(5). The Act imposes a duty on local telephone companies to negotiate in good faith and establish compensation arrangements for the transport and termination of telecommunications traffic. **47 U.S.C. section 251(b)(5), (c)(1)**. However, the Act does not impose a similar obligation on the wireless companies with whom the rural companies would have to negotiate. The rural companies contend their efforts to establish compensation agreements have been frustrated by the calculated inaction of wireless companies who have no incentive to negotiate because their calls can not be blocked. Based on our recent holding in *Sprint*, the rural companies argue that tariffs are a lawful means of establishing payment rates when compensation agreements have not been negotiated. We are mindful that the Commission's Amended Report and Order was issued one year prior to our decision in *Sprint*. Nonetheless, it is clear the Commission's rejection of the amended tariffs was partially based on an interpretation of the Act's reciprocal compensation provision that is inconsistent with our more recent ruling. We recognized in *Sprint* that tariffs are permissible if they are expressly subordinate to the Act's requirements:

Federal courts have recognized the right of states to enforce tariff provisions [that] are not inconsistent with the Act. The tariffs approved by the Commission expressly state that they are subordinate to any negotiated agreements under the Act. Thus, the Commission's action does not prevent the negotiation of reciprocal compensation arrangements or otherwise conflict with the Act's procedural requirements.

**112 S.W.3d at 25-26** (citations omitted) .

Here, the language of the proposed amendments specified that the tariff rates would apply to all traffic "until and unless superceded by [a reciprocal compensation] agreement[.]" Thus, as in *Sprint*, the amended tariffs are expressly subordinate to the Act's federal mandates. Nothing in the amended tariffs precludes the wireless companies from negotiating compensation agreements or seeking mediation of the compensation rates as permitted by the Act. **47 U.S.C. sections 252(a)(2), 252(b)(1)-(2)**. The Commission misapplied the law in determining that the use of this tariff procedure violated the reciprocal compensation provisions of the federal Act.

As respondents, the wireless companies, SWBT, and the Commission argue that even if the tariff procedure is a proper remedy for compensation in the absence of negotiated agreements, the subject *access* tariffs could not be lawfully applied to the intraMTA wireless calls as local traffic. In making this argument, the respondents rely upon the FCC's First Report and Order, which implemented and interpreted the reciprocal compensation provisions of the federal Act. ***In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 F.C.C. Rcd. 15299 (1996)***. The FCC therein determined that the Act preserves the "legal distinctions" between transport/termination charges for local traffic and access charges for long distance traffic. ***Id.* at ¶1033**. The FCC further defined wireless traffic as being "local" when it originates and terminates in the same MTA. ***Id.* at ¶1036**. The Respondents contend the federal Act and related regulatory rulings support the Commission's conclusion that existing access tariffs cannot be lawfully applied to the wireless intraMTA traffic at issue.

We disagree that federal law is controlling in this situation where the wireless companies have not taken the necessary steps to invoke the reciprocal compensation procedures under the Telecommunications Act of 1996. The rural companies had no alternative but to pursue tariff options under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act. *Sprint*, 112 S.W.3d at 25. To avoid the tariffs, all the wireless companies have to do is engage in rate negotiations with the rural companies and, thereby, invoke preemptive application of the Act's reciprocal compensation procedures and pricing standards. *Id.* at 25-26. Until that happens, the wireless companies should not be heard to complain that the access tariffs must be rejected under federal law.

The Commission erroneously determined that the amended switched access tariffs were preempted by federal law. The subordination clause in the amended tariffs avoids any conflict with the federal Act and yet preserves the option of the wireless companies to invoke federal law if they desire to have it applied. Given the language of the amendment and the Commission's history of approving access charges on intraMTA traffic under its state regulatory authority, the rejection of the amended tariffs was neither lawful nor reasonable. In 1997 and 1999, the Commission ordered SWBT to pay the rural companies for terminating wireless intraMTA calls under SWBT's existing access tariffs. *In the Matter of United Telephone Co.*, 6 Mo. P.S.C.3d 224; *In the Matter of Chariton Valley Telephone Corp.*, 8 Mo. P.S.C. 3d 205. In another case decided shortly after the federal Act became law in 1996, the Commission approved the application of intrastate switched access rates to intraMTA wireless traffic until negotiated compensation arrangements could be made: *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Case No. TO-97-40, Arbitration Order (Mo. P.S.C. Dec. 11, 1996). No reasonable explanation is offered here as to why the rural companies' amended access tariffs could not be similarly approved until negotiated rates are in effect.

We reverse the Amended Report and Order and remand the amended tariffs for further consideration in light of the Commission's state regulatory authority.

All concur.

**Footnotes:**

**FN1.** "Rural companies" collectively refers to the local exchange companies that provide telephone services between points within an exchange. There are two groups of rural companies involved here: (1) the Alma group, comprised of Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc., and Peace Valley Telephone Company; and (2) the BPS group, comprised of BPS Telephone Company, Citizens Telephone Company of Higginsville, Mo., Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, New London Telephone

Company, Orchard Farm Telephone Company, Ozark Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.

**FN2.** "Wireless companies" collectively refers to AT&T Wireless, Southwestern Bell Wireless (now Cingular), and Sprint Spectrum L.P. d/b/a Sprint PCS, all of which provide cellular or wireless telecommunications services and oppose the amended tariffs.

**FN3.** See, e.g., *In the Matter of United Telephone Company of Missouri's Complaint against Southwestern Bell Telephone Company for Failure to Pay United Its Terminating Access for Cellular-Originated Calls which are Terminated in United's Territory*, Case No. TC-96-112, Report and Order, 6 Mo. P.S.C.3d 224 (April 11, 1997); *In the Matter of Chariton Valley Telephone Corporation and Mid-Missouri Telephone Company's Complaints Against Southwestern Bell Telephone Company for Terminating Cellular Compensation*, Case Nos. TC-98-251 and TC-98-340, Report and Order, 8 Mo. P.S.C. 3d 205 (June 10, 1999).

**FN4.** *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff*, P.S.C. Mo.-No. 40, 77-79 524, Report and Order 7 Mo. P.S.C. 3d 38 (December 23, 1997).

**FN5.** The proposed amendment did not affect the rate of the switched access tariff. The sole purpose of the amendment was to make the existing tariff rates applicable to the intraMTA wireless termination traffic.

**FN6.** While affirming the rural companies' entitlement to a new tariff, we also reversed \$.02 of the tariff amount, finding it was arbitrary and unsupported by the evidence. *Sprint*, 112 S.W.3d at 28.

**Separate Opinion:**

None

*This slip opinion is subject to revision and may not reflect the final opinion adopted by the Court.*