

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC. 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling: Lawfulness	)	CC Docket No. 01-92
Of Incumbent Local Exchange Carrier	)	
Wireless Termination Tariffs	)	

**Comments of  
Warinner, Gesinger & Associates, LLC (“WGA”)  
On Behalf of:**

KLM Telephone Company, a Missouri ILEC  
Holway Telephone Company, a Missouri ILEC  
IAMO Telephone Corporation, a Iowa/Missouri ILEC  
Logan Telephone Company, a Kentucky ILEC  
Mountain Telephone, Inc., a Kentucky ILEC  
JBN Telephone Company, a Kansas ILEC  
Haviland Telephone Company, a Kansas ILEC  
S&A Telephone Company, a Kansas ILEC  
Madison Telephone Company, a Kansas ILEC  
East Otter Tail Telephone Company, a Minnesota ILEC  
Twin Valley-Ulen Telephone Company, a Minnesota ILEC  
Callaway Telephone Company, a Minnesota ILEC

## **I. INTRODUCTION**

Warinner, Gesinger & Associates, LLC (“WGA”) submits these comments in response to the Federal Communications Commission’s (“FCC”) Public Notice requesting comments on the T-Mobile Petition regarding the intercarrier compensation regime applicable to certain types of wireless traffic.

WGA is a certified public accounting firm specializing in the provision of accounting and consulting services to local exchange telecommunications carriers throughout the United States. The majority of our clientele are rural Incumbent Local Exchange Carriers (“ILEC”).

The information presented in the comments of WGA reference sections of the Telecommunications Act of 1996 (“Act”) and focus on the issues and findings in Missouri, which result from many years of confronting the issue of compensation for the use of facilities in the termination of wireless traffic when tandem LECs have entered into interconnection agreements without consideration of the other LECs involved in the completion of the traffic.

WGA believes that the approach developed in Missouri, through due process, should be used as a blue print in other States to ensure that all telecommunications carriers receive just and reasonable compensation, whether through the negotiation process, including arbitration, or through the use of lawful State approved tariffs.

## **II. BACKGROUND**

The Commercial Mobile Radio Service (“CMRS”) Petitioners (T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners) filed a “Petition for Declaratory Ruling” on September 6, 2002, requesting that the FCC declare that “wireless terminating tariffs are not a proper mechanism for establishing reciprocal compensation

arrangements for the transport and termination of telecommunications under the Act.”<sup>1</sup> The CMRS Providers stated that: “A CMRS provider is directly connected to the network operated by the tandem switch owner, generally a regional Bell Operating Company (RBOC) .. to obtain indirect interconnection with all other networks that are connected (or ‘subtend’) the same LATA tandem switch.”<sup>2</sup>

In Missouri, from 1990 until February 4, 1998, Southwestern Bell Telephone Company (“SWBT”) terminated traffic from wireless carriers to small independent local exchange companies through its RBOC LATA tandem. The wireless carriers obtained indirect connections (Type 2) with ILECs using SWBT’s wireless interconnection tariff that provided LATA wide termination. However, SWBT refused to pay other incumbent local exchange carriers (“ILECs”) for the wireless traffic that was terminated to the subtending ILECs. United Telephone Company of Missouri (now Sprint, Missouri, Inc.), in Case No. TC 96-112, Chariton Valley Telephone Corporation in Case No. TC 98-251, and Mid-Missouri Telephone Company, in Case No. TC 98-340, filed complaints against SWBT with the Missouri Public Service Commission (“MPSC”). As a result of those cases, the MPSC determined that SWBT was responsible for the payment of the terminating cellular traffic.

Subsequently, SWBT modified its tariff to provide only a “transiting” function for the wireless traffic that would also allow SWBT to deliver wireless traffic that was destined for the exchanges of other ILECs. The MPSC approved SWBT’s tariff in Case NO. TT 97-524, and the transiting structure was upheld by the Circuit Court of Cole County Missouri in Case No. CV198-178CC and CV 198-261CC. However, it is important to understand that the MPSC’s approval of the “transiting” arrangement also instructed SWBT to include the following language:

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<sup>1</sup> Refer to Page 1 of the CMRS Petitioners’ Petition, CC Docket No. 01-92

<sup>2</sup> Refer to Page 2 of the CMRS Petitioners’ Petition, CC Docket No. 01-92

“Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carrier’s network unless the wireless carrier has entered into an agreement with such Other Telecommunications Carriers to directly compensate that carrier for the termination of such traffic.”

It is interesting to note that SWBT, in its “Agreement for Interconnection and Reciprocal Compensation” with CMRS providers, refers to “Traffic to Third Party Providers”, as follows:

“Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider. The Parties agree to enter into their own agreements with Third Party Providers. SWBT agrees that it will not block traffic involving Third Party Providers with whom the Carrier has not reached agreement.”<sup>3</sup>

Because wireless carriers terminated traffic to the ILECs in violation of SWBT’s tariff and subsequently refused to pay for this service, twenty-six (26) ILECs in Missouri filed tariffs in August 2000 for “Local Exchange Service Wireless Termination Service” and the tariffs were approved, after Evidentiary Hearings in February 2001 (Case No. TT 2001-139). The tariffs apply to intraMTA traffic originated by a CMRS provider and terminated to end-user subscribers of the Telephone Company (i.e., wireless to wireline traffic) without a direct interconnection. The rates, terms and conditions of the tariffs apply except as otherwise provided in: (1) an interconnection agreement between the CMRS provider and the Telephone Company approved by the MPSC pursuant to the Act, or (2) a terminating traffic agreement between the CMRS provider and the Telephone Company, approved by the MPSC.

### **III. INTERCONNECTION**

Section 251 of the Act requires ILECs to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers upon request and to negotiate in good faith, the terms and conditions of agreements to fulfill the duties of telecommunications

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<sup>3</sup> From an Agreement between SWBT and Southwestern Bell Wireless, Inc.

carriers, including the establishment of reciprocal compensation arrangements for the transport and termination of telecommunications. Section 252(c)(2) specifically states that ILECs have a duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network. Under Section 252(c) of the Act, the obligations of ILECs are not triggered until a request for interconnection has been received, otherwise, how does an ILEC know who to provide interconnection? The request for interconnection begins the process of negotiating interconnection agreements and reciprocal compensation arrangements between ILECs and other telecommunications carriers.

In their petition before the FCC, the CMRS Petitioners state "some small ILECs have decided to bypass the bilateral negotiation process" and "have instead filed 'wireless termination tariffs' with their state commissions so they can unilaterally dictate the rates, terms, and conditions of the interconnection arrangement."<sup>4</sup> Nothing could be farther from the truth. It is the CMRS providers who have unilaterally decided to send their traffic to the ILECs indirectly through the RBOC LATA tandems and have failed to notify the ILECs of their intent to interconnect. In most cases, the CMRS providers have received and are still receiving "free" interconnection through their indirect connections which is inconsistent with the procedures in the Act, and, therefore, in violation of the Act.

In Missouri, the MPSC clearly determined that the CMRS Petitioners' have a duty to request interconnection agreements with the terminating ILECs. In Case No. TT 97-524, (mentioned above), where the MPSC approved SWBT's "transiting" structure, the MPSC stated that it would "not assume that the wireless carriers will violate the tariff by sending wireless traffic in absence of an agreement." In addition, the Circuit Court of Cole County, Missouri, in

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<sup>4</sup> Refer to Page 8 of the CMRS Petitioners' Petition, CC Docket 01-92

its Judgement of November 1, 2000, in Case 00CV323379<sup>5</sup>, involving thirty-one (31) ILECs, states:

Paragraph 33: “If the approval of interconnection agreements to which Realtors (the 31 ILECs) were not parties were to have such an effect, the result would be the termination of traffic to Realtors for which Realtors receive no compensation, and for which the Realtors have no mechanism to preclude the termination of traffic. This would, and indeed has, resulted in prejudice to the Realtors in that Realtors have suffered the use of their facilities without compensation, and has resulted in discrimination in that Realtors are effectively precluded from obtaining direct interconnection agreements following the identification of the responsible carrier, jurisdiction of the traffic, appropriate compensation rates, and the ability to preclude the delivery of such traffic until a business relationship was established, as SWBT has been able to obtain, in violation of 47 USC 252(e)(2)(A)(i).”

Judgement, Decision and Order: “The Telecommunications Act of 1996 (the Act) provides a clear procedure for CLECs (competitive LECs) and wireless carriers to negotiate, and if necessary, arbitrate an interconnection agreement providing reciprocal compensation terms with Realtors. Once a LEC receives a request for negotiation and the subsequently developed agreement is approved, the Act’s reciprocal compensation provisions apply. However, until the CLECs and wireless carriers request, negotiate, and reach an agreement that is approved by the Commission (MPSC), the LEC is entitled to receive access compensation under its lawfully approved access tariff.”

#### **IV. GOOD FAITH NEGOTIATIONS**

Section 252(a)(1) of the Act, which addresses the Procedures for Negotiation, Arbitration and Approval of Agreements, states in (a) Agreements Arrived at Through Negotiations:

“(1) Voluntary Negotiations – Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251” and “shall be submitted to the State commission under section (e) of this section.”

Section 252 (e) states:

(e) Approval by State Commission, (1) Approval Required: “Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission shall approve or reject the agreement with written findings as to any deficiencies.”

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<sup>5</sup> This Case addressed the validity of the ILECs access charges applying to the terminating wireless providers’ traffic until such time as an interconnection agreement has been approved.

The CMRS Petitioners state that “Section 251(c)(1) of the Act imposes upon ILECs a “duty to negotiate in good faith” and “that an ILEC may not avoid the rates contained in an interconnection contract simply by filing a tariff containing higher rates.”<sup>6</sup> The ILECs’ tariff states that the tariffs (rates, conditions, etc.) apply except as otherwise provided in an approved interconnection agreement or an approved terminating traffic agreement between the CMRS provider and the Telephone Company. The ILECs have not, and will not, refuse to “negotiate in good faith” if, and when, the wireless carriers request interconnection.

In fact, in Missouri, since the approval of the ILECs’ wireless terminating tariffs, several wireless carriers have requested indirect interconnection, and or terminating traffic agreements with specific ILECs. Some agreements have been approved, and/or settled through arbitration. Some of the wireless carriers have determined that the rates, terms and conditions of the tariff are acceptable, and a few are currently involved in the negotiation phase. Curiously, the requests for negotiation of these interconnection agreements, in most cases, were received after the approval of the tariffs, and the repetitive billing statements to the wireless carriers.

Most of the wireless carriers are now paying those ILECs with approved wireless terminating tariffs for the wireless terminating traffic. T-Mobile USA, Inc. (formerly VoiceStream), and Western Wireless, the CMRS Petitioners, are not paying for the termination of their traffic. In fact, complaints were filed with the MPSC on May 15, 2002, against these two CMRS providers, (Case No. C 2002-1077, with Direct Testimony filed on August 26, 2002, and Rebuttal Testimony on September 23, 2002.) Please note that the CMRS Petitioners’ Petition was filed in September 2002.

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<sup>6</sup> Refer to Page 9 of the CMRS Petitioners’ Petition, CC Docket 01-92

## V. BILL AND KEEP

The CMRS Petitioners state “Carriers that interconnect with each other often do so without an interconnection contract and pursuant to bill-and-keep, at least for mobile-to-land traffic.”<sup>7</sup> The Missouri terminating ILECs (and most small terminating ILECs) have not agreed to bill-and-keep. In fact, in compliance with the Act, the Circuit Court of Cole County, State of Missouri, (Cases No. 01CV323740, 01CV323803, 01CV323804 and 01CV323815), Conclusion of Law, states:

“Bill and Keep is not an option. Some of the wireless carriers argue that they have a ‘bill-and-keep’ compensation arrangement with some of the small companies, yet the wireless carriers pay nothing to the small companies for their wireless traffic that terminates to the small companies’ exchanges. The wireless carriers have not entered into any type of compensation arrangement with the small companies, and none of the small companies have agreed to a ‘bill-and-keep’ arrangement with the wireless carriers.”

The CMRS Petitioners also state that Iowa (Exchange of Transit Traffic) and Oklahoma (Arbitration Proceeding) have ruled that all intraMTA LEC-CMRS traffic should be exchanged subject to bill-and keep. Missouri is one of the States that expects an agreement to be negotiated between the parties for a bill-and-keep arrangement. (The Iowa bill-and-keep Order may have applied as a temporary measure until such time as formal negotiations are concluded.).

## VI. RECIPROCAL COMPENSATION

The CMRS Petitioners state “Some small ILECs have decided that they want to receive reciprocal compensation despite the small volume of traffic exchanges with carriers indirectly interconnecting with them. The CMRS Petitioners are willing to negotiate an interconnection agreement with these small ILECs, upon request, even though the dollars involved often do not justify the time and expense associated with negotiating an interconnection contract, preparing monthly statements, and auditing amounts billed.”<sup>8</sup>

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<sup>7</sup> Refer to Page 3 of the CMRS Petitioners’ Petition, CC Docket 01-92

<sup>8</sup> See Page 4 of the CMRS Petitioners’ Petition, CC Docket 01-92

The Circuit Court of Cole County, Missouri, in its Judgement, Decision and Order, Case No. 00CV323379 states:

Page 13: “It is only *after* a voluntary or arbitrated interconnection agreement is approved that reciprocal compensation must be used in lieu of Realtors access tariffs. Thus, until an interconnection agreement is reached, an ILEC which has no such approved interconnection agreement is entitled to be compensated pursuant to its access tariff rates for any traffic terminated to it. This also comports with public policy, since otherwise ILECs would be forced to stand idle and allow carriers to terminate traffic for free.”

The Circuit Court of Cole County, Missouri, Findings of Fact, Case No. CV198-178CC and CV 198-261CC, states:

Paragraph 9: “The (M)PSC speaks in terms of “compensation arrangements” or “compensation agreements” without specifying that they be reciprocal in nature. This language is evidence that the (M)PSC was not intending to require that only reciprocal agreements be used.”

## **VII. JURISDICTION**

The following items were also addressed in the Conclusions of Law (Cases No. 01CV323740, 01CV323803, 01CV323804 and 01CV323815), Circuit Court of Cole County, State of Missouri:

“State Law. Under Chapter 392 of Missouri’s Revised Statutes, the Commission has authority over the rate and charges that are charged or collected by small telephone companies. These statutes require the Commission to set just and reasonable rates for telephone service.”

“Pursuant to Section 386.510 RSMo. 2000, an order of the PSC may be reviewed only for its lawfulness or reasonableness.”

“Federal Law. The FCC’s pricing rules, including the provisions that require the use of forward-looking economic costs, apply only to negotiated or arbitrated reciprocal compensation agreements under the Act. They do not apply to tariffs filed in the absence of such agreements. Thus, the only requirement for the small companies’ tariffed rates is that they must be just and reasonable. The small companies proposed (wireless terminating) rates satisfy this test.”

## **VIII. OPINION SUMMARY**

It is the duty of all CMRS providers to notify an ILEC of their intent to interconnect with the ILECs network (directly or indirectly) for the termination of CMRS traffic to the ILEC. It is the duty of the ILEC to interconnect with the facilities of the CMRS providers upon request and to negotiate in good faith reciprocal compensation arrangements for the termination of telecommunications services on each carrier's network. "Free" interconnection is not provided for in the Act unless agreed to by both interconnecting carriers or stipulated under arbitration provisions of Act in reference to "bill-and-keep" arrangements where a "balance of traffic" is demonstrated.

The wireless terminating tariffs, which are the subject of the petition filed by the CMRS Petitioners, serve as a vehicle for small ILECs to receive compensation for the use of their facilities. The evidence in Missouri clearly demonstrates that the implementation of such tariffs provide a catalyst for wireless carriers to request interconnection agreements with ILECs. The Circuit Court and Court of Appeals determined that ILECs can charge rates from their lawful access tariffs. Twenty-six (26) ILECs are currently charging lawful rates from their wireless terminating tariffs. Since the effective date of the ILECs' tariffs (February 2001), most wireless providers are now paying for the use of the ILECs' facilities; VoiceStream (now Mobile-T USA) and Western Wireless are not. Furthermore, bill-and-keep is not an option without due process beginning with a request from wireless providers and the subsequent negotiation process and arbitration, if necessary.

WGA believes that the FCC should deny the CMRS Petitioners' Petition for a Declaratory Ruling that "wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation agreements for the transport and termination of telecommunications under the Communications Act." The FCC should not preempt the states from implementing

mechanisms for the recovery of costs associated with the termination of wireless traffic absent an interconnection agreement. These mechanisms provide an incentive for CMRS providers to establish agreements for indirect interconnection arrangements where none currently exist today. Instead, the FCC should instruct the CMRS Petitioners, as ordered and upheld in Missouri, to request interconnection agreements for the termination of local wireless traffic to ILECs, including requests for, but not limited to, reciprocal compensation. Until such time as interconnection agreements have been reached with other telecommunications carriers, an ILEC should be entitled to charge the just, reasonable and lawful rates contained in its State approved tariffs.

Respectfully submitted,

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[Filed Electronically]

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