

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

In the Matter of Southwestern Bell Telephone)
Company s Tariff Filing to Revise Its Wireless) **Case No. TT-97-524**
Carrier Interconnection Service Tariff,)
P.S.C. Mo.-No. 40.)
)

REPORT AND ORDER

Issue Date: December 23, 1997

Effective Date: January 6, 1998

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REGULATORY LAW JUDGE: Elaine E. Bensavage.

REPORT AND ORDER

Procedural History

On June 5, 1997, Southwestern Bell Telephone Company (SWBT) filed proposed tariff revisions to its P.S.C. Mo.-No. 40, Wireless Carrier Interconnection Service Tariff. The tariff revision bears an effective date of July 7, which was originally extended by SWBT to July 21, and then was subsequently extended again to July 24.

The Mid-Missouri Group of Local Exchange Companies (Mid-MO Group)¹ and the Small Telephone Company Group (STCG)² filed applications to intervene on June 27 and July 1 respectively, and requested suspension of the proposed tariff revisions.

SWBT explained in its cover letter that its filing

For purposes of this proceeding, the Mid-MO Group is comprised of the following companies: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, Pan Dial, Inc., Northeast Missouri Rural Telephone Company, and Peace Valley Telephone Company.

For purposes of this proceeding, the STCG is comprised of the following companies: BPS Telephone Company, Bourbeuse Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelis Telephone Company, Goodman Telephone Company, Inc., Granby Telephone Company, Grand River Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, KLM Telephone Company, Kingdom Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, London Telephone Company, Orchard Farm Telephone Company, Ozark Telephone Company, Park Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (the Small Telephone Company Group).

included tariff changes associated with wireless carrier-originated calls which transit SWBT's network and terminate in the network of an Other Telecommunications Carrier.³ SWBT also maintained that the tariff filing was intended to conform with the Missouri Public Service Commission's (Commission's) decision in Case No. TC-96-112, which involved a complaint filed against SWBT by United Telephone Company of Missouri d/b/a Sprint (United).

In its application to intervene, the Mid-MO Group contended that the Commission had determined in Case No. TC-96-112 that the appropriate compensation mechanism between SWBT and third-party LECs was the existing LEC access rate, and claimed that SWBT's tariff filing was therefore inconsistent with the Commission's Report and Order. The Mid-MO Group also complained that SWBT's tariff would require third-party LECs to negotiate separate agreements with a myriad of cellular carriers, which would be administratively inefficient. In addition, the Mid-MO Group noted that third-party LECs have no ability to block the termination of cellular traffic in their exchanges, and pointed out that there is little or no incentive for cellular carriers or SWBT to block this traffic.

The focus of the STCG was slightly different. In its application to intervene, the STCG expressed concern that if the proposed tariff revision was honored by wireless carrier customers,

or consistency, the Commission will refer to these other telecommunications carriers and third-party local exchange companies (LECs). While this phrase is narrower than other telecommunications carriers, it does adequately refer to the member companies of the Mid-MO Group and STCG.

the areas where wireless calls could be terminated would be severely restricted, since agreements with third-party LECs could not be completed in the time available. The STCG also stressed that the ability of third-party LECs to measure and bill wireless traffic terminating in their exchanges needed to be addressed before the third-party LECs could enter into interconnection agreements with wireless carriers.

On July 7, the Staff of the Commission (Staff) and SWBT filed responses to the requests to suspend the tariff. Staff stated that it was not prepared as of the time of its response to either support or oppose the requests to suspend. SWBT responded to several of the contentions contained in the applications to intervene, and specifically stated that it had no intention or desire to disrupt the present flow of wireless calls. As a result of discussions with the Staff, on July 9 SWBT filed two substitute sheets intended to replace the sheets originally filed on June 5.

On July 11, the Mid-MO Group filed a reply to SWBT's opposition to the applications to intervene. The Mid-MO Group asserted that SWBT should not be allowed to accomplish a complete change in customer relationships through minor tariff language revisions when the service SWBT is offering to cellular carriers -- LATA-wide termination -- remains unchanged. The Mid-MO Group stressed that SWBT is not refusing to terminate wireless traffic until wireless carriers have contracts with third-party LECs. The Mid-MO Group further stated that SWBT has not provided its member companies with the names and addresses of cellular carriers using

SWBT's services, and reiterated that third-party LECs have no way to identify or block wireless traffic.

On July 15, Staff filed a memorandum containing its recommendation. Staff responded to the concerns raised in the applications to intervene, and ultimately recommended approval of the tariff as amended by the substitute sheets. Specifically, Staff maintained that third-party LECs have a duty to negotiate reciprocal compensation agreements with wireless carriers, pursuant to the Federal Communications Commission's (FCC's) Interconnection Order in CC Docket No. 96-325. Staff also stated that it believed the blocking of wireless traffic is against the public interest and should not be contemplated. In addition, Staff noted the concern that agreements could not be completed before the tariff would go into effect. Recognizing this, Staff requested that SWBT revise its tariff language, and SWBT provided that substitute sheet on July 9. The new language provided that wireless carriers must establish agreements with third-party LECs, but did not require that the agreements be in place before wireless carriers could send calls to SWBT which would terminate in the exchanges of third-party LECs. Further, Staff alluded to the inability of third-party carriers to bill and track wireless traffic terminating in their exchanges, and indicated that SWBT was planning to make available to all third-party LECs a monthly report containing the information necessary to bill the wireless carriers. Staff stated that according to SWBT, the report would contain at a minimum the identity of the originating wireless carrier, the terminating office, and the minutes-of-use

(MOUs).

Staff also stated that it found part of SWBT's original tariff language unacceptable, and requested that the company revise the proposed tariff sheets. Staff was first concerned that SWBT would not carry wireless traffic destined for third-party LECs with whom the wireless carriers had not reached agreement, with the result that on the effective date of the tariff filing, wireless calls which transit SWBT's network would only be allowed to terminate in SWBT exchanges. After assurances from SWBT that it did not intend to block wireless traffic, Staff became concerned that if wireless carriers sent traffic over SWBT's network to third-party LECs without first having agreements in place, the wireless carriers would be in violation of the tariff the moment it became effective. Staff maintained that it would be against the public interest for the Commission to approve tariff sheets which would automatically render several parties in violation thereof. Staff ultimately recommended that the Commission approve SWBT's proposed tariff sheets as amended, stressing that without approval of this filing, there would be little incentive for the wireless carriers to enter into reciprocal compensation agreements. With approval of the proposed tariff filing, Staff claimed that wireless carriers will have an incentive to negotiate agreements with third-party LECs, since in the absence of an agreement, they will have to indemnify SWBT for charges the third-party LECs impose on SWBT.

On July 17, the STCG filed a response to Staff's recommendation, contending that the amended language contained in the

substitute sheets would not resolve the problem of wireless carriers being in violation of the tariff on its effective date. The STCG also urged the Commission to suspend the tariff in order to allow sufficient time for the wireless carriers and third-party LECs to negotiate compensation agreements. Finally, the STCG noted that Staff apparently contemplated that SWBT would continue to compensate third-party LECs for wireless traffic terminated on their networks, but would be indemnified by the wireless carriers for these charges. However, the STCG asserted that the proposed tariff revisions do not assure such an arrangement. Instead, a situation could arise where SWBT would refuse to pay the third-party LECs because the wireless traffic was terminated in violation of SWBT's tariff.

The Commission issued its Order Granting Requests for Intervention and Suspending Wireless Carrier Interconnection Tariff on July 18. The Commission expressed concern that wireless carriers would be in violation of SWBT's tariff *ab initio*. In addition, the Commission found that it was unclear whether SWBT contemplated that third-party LECs would bill SWBT or the wireless carriers for termination of wireless traffic, and whether SWBT could use this tariff language to avoid paying proper charges billed by third-party LECs. The Commission suspended the tariff sheets filed by SWBT for a period of 120 days, from July 24 to November 21, and established a procedural schedule and set a hearing date. A Protective Order was issued on August 12. An evidentiary hearing was commenced on October 10. Because the Commission was unable to conclude the hearing on October 10, it continued the hearing to the afternoon of

October 15. As a result, the Commission further suspended the tariff for an additional period of 40 days from November 21 to December 31, and modified the procedural schedule. Simultaneous initial and reply briefs were thereafter filed by the various parties.

The Commission finds that it should further suspend the tariff to allow for additional time in which the Commission may consider its decision, and to allow an adequate amount of time from the issuance of its Report and Order to the effective date of that order. The Commission will thus further suspend the tariff, from its current effective date of December 31, to January 6, 1998.

Rulings on Late-filed Exhibits

Five late-filed exhibits were requested by the Commission during the course of the hearing. All late-filed exhibits were submitted on or before the filing deadline, with two exceptions. SWBT filed a request for an extension of time to file the following late-filed exhibits: (1) the percentage of traffic being sent to the Mid-MO Group and the STCG members from the wireless carriers SWBT has interconnection agreements with; and (2) a determination of the technical feasibility to provide an ASCII version of the cellular usage summary report, or to provide EMR records for the wireless calls at issue. The Commission granted SWBT a three-day extension, from November 10 to November 13, and also extended the deadline for responses or objections to these late-filed exhibits, from November 17 to November 19.

The following late-filed exhibits were submitted to the Commission:

(1) Late-filed Exhibit Nos. 20 and 20HC⁴ (both public and highly confidential versions), submitted by the Mid-MO Group, the STCG, and SWBT: Traffic sent to small LECs by AT&T or Ameritech;

(2) Late-filed Exhibit Nos. 21 and 21HC (both public and highly confidential versions), submitted by SWBT: Percentage of traffic being sent to small LECs by wireless carriers;

(3) Late-filed Exhibit No. 22, submitted by the Mid-MO Group and STCG: Communications received by small LECs from wireless carriers;

(4) Late-filed Exhibit No. 23, submitted by SWBT: Correspondence from the seven wireless carriers with whom SWBT has interconnection agreements, re compliance with requirement that they reach separate agreements with small LECs; and

(5) Late-filed Exhibit No. 24, submitted by SWBT: Feasibility and cost of providing Cellular Usage Summary Report (CUSR)⁵ in EMR format or ASCII format; feasibility and cost of blocking wireless-originated traffic destined to terminate in the exchange of a small LEC; and feasibility of applying Section 6 of SWBT's Intrastate Access Services Tariff to small LECs for the blocking of traffic from wireless carriers.

No objections were filed to Late-filed Exhibit Nos. 20,

The Commission notes that the index to Late-filed Exhibit Nos. 20 and 20HC inadvertently indicates that the material provided by SWBT refers to AT&T rather than Ameritech, and indicates that the material provided by the Mid-MO Group refers to Ameritech rather than AT&T.

The Commission notes that at various places in the testimony, this report has been referred to as the Cellular Usage Summary Report, the Cellular Summary Usage Report, and the Cellular Transiting Usage Summary Report.

20HC, 21, 21HC, and 22. The Commission will therefore admit Late-filed Exhibit Nos. 20, 20HC, 21, 21HC, and 22 into evidence. However, on November 17 and November 19, the STCG filed an objection to Late-filed Exhibit No. 23.⁶ The STCG claimed that it had reason to believe SWBT had not provided the Commission with a complete description of all contacts it made with the wireless carriers, and that SWBT had provided wireless carriers with a draft letter suggesting a bill-and-keep arrangement with third-party LECs. The STCG objected to SWBT's late-filed exhibit as being incomplete, and requested that the Commission order SWBT to provide a description of the contacts it had made with wireless carriers, including copies of any correspondence from SWBT to the wireless carriers, as well as copies of any language suggested to be used by wireless carriers in contacting third-party LECs.

SWBT filed a reply to the STCG's objection to Late-filed Exhibit No. 23 on November 26. Initially SWBT stressed that the Commission had asked it to contact the seven wireless carriers with which it had interconnection agreements. SWBT also explained that some of the wireless carriers had asked it for a copy of what other wireless carriers had done to start negotiations. SWBT then sent a form letter based on the letters Sprint Spectrum PCS had previously sent to various small LECs. It also attached to its reply the affidavit of Kevin Chapman, along with copies of the fax transmittals sent to the wireless carriers who had requested such information.

The pleading filed on November 19 appears to be identical to the one filed November 17.

The Commission finds that while reasonable minds could differ regarding the appropriateness of SWBT's actions given the potential for the appearance of impropriety, SWBT has violated no statute or Commission rule or order. The Commission further finds that in providing the affidavit of Kevin Chapman, along with copies of the material which was sent to the wireless carriers, SWBT has responded to the STCG's objection and essentially provided the relief requested. The Commission will therefore overrule the STCG's objection to Late-filed Exhibit No. 23 as moot.

On November 24 the STCG also filed a pleading objecting to Late-filed Exhibit No. 24. The STCG objected on the basis that some of the information contained in this exhibit was prepared by someone who was not a witness in this proceeding, and that the material was not subjected to cross-examination and is thus not competent and substantial evidence. SWBT filed a reply on December 4, noting that the objection was filed five days out-of-time, and that no witness is ever subject to cross-examination concerning late-filed exhibits, since such exhibits are submitted after the conclusion of a hearing.

SWBT also indicated that the material contained in the exhibit was provided through a company representative with personal knowledge of the information sought. The Commission finds that the STCG's objection is untimely, and therefore the Commission will not address the merits of the objection. The Commission notes that the STCG has given no reason for the untimeliness of its objection, nor has it sought leave to file its objection out-of-time. The Commission will therefore overrule the objection to Late-filed Exhibit No. 24 as untimely.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather than the omitted material was not dispositive of this decision.

The Commission has given a fairly lengthy exposition of the procedural history in this case to make clear what concerns were originally raised by the parties, the reasons for the Commission's decision to suspend the tariff, and to clarify that the tariff which is presently before the Commission is the tariff as amended by the substitute sheets filed on July 9. The Commission also wishes to emphasize that in the testimony and hearing, the parties have addressed concerns regarding both the tariff language at issue in this case, and the language contained in interconnection agreements SWBT has entered into with wireless carriers. In addition, a distinction has not always been made between agreements for interconnection and agreements for reciprocal compensation.

In reaching its ultimate findings of fact on the issues raised by the parties, the Commission finds as underlying facts the following:

(A) Wireless traffic is being sent to SWBT for termination in the exchanges of third-party LECs such as the member

companies of the STCG and Mid-MO Group.

(B) The member companies of the STCG and the Mid-MO Group currently do not have the technical capability to track wireless traffic that terminates in their exchanges.

(C) The member companies of the STCG and the Mid-MO Group currently do not have the technical capability to block wireless traffic that is destined to terminate in their exchanges.

(D) SWBT is attempting to alter its wireless interconnection tariff to clarify that it is offering wireless carriers a transiting service rather than a termination service for wireless-originating calls that are destined to terminate in the exchanges of third-party LECs.

(E) The traffic in question is the traffic of the wireless carriers whose customers initiate the calls, and not SWBT.

(F) SWBT's facilities provide an indirect interconnection between the wireless carriers and third-party LECs.

Issue 1: Are the changes which SWBT proposes to make to its wireless interconnection services tariff required by the Telecommunications Act of 1996, Federal Communications Commission (FCC) Rules and Regulations or the Commission's Rules?

The Mid-MO Group and the STCG both in essence contend that since SWBT has the direct physical interconnection with the wireless carriers and with the third-party LECs, SWBT will remain in the middle as the third-party LECs' customer under the Commission's holding in Case No. TC-96-112. Both groups also essentially maintain that the Commission should not approve SWBT's tariff because it is inconsistent with federal law. They claim that since the FCC has held that wireless carriers are not LECs for purposes of Section 251 and 252 of the Telecommunications Act of 1996 (the Act), wireless carriers are not required to negotiate with third-party LECs if they choose not to, and neither SWBT through its proposed tariff nor the Commission through its approval of the tariff can force the wireless carriers to negotiate interconnection or reciprocal compensation agreements.

The Office of the Public Counsel (OPC) did not take a position on this issue.

The Commission finds that the tariff changes proposed by SWBT are neither required nor prohibited by the Act, by the FCC, or by the Commission. Initially the Commission notes that it is unaware of any Commission rule which would require the proposed tariff changes. These changes are not, as originally contended by SWBT, a

compliance filing, since the Commission's decision in Case No. TC-96-112 did not mandate that SWBT file revised tariffs or change its tariff structure. Conversely, the Commission's Report And Order in Case No. TC-96-112 does not dictate the outcome of this case, as contended by the Mid-MO Group and the STCG. In that case the Commission found that SWBT had contracted with cellular carriers to provide end-to-end intraLATA termination, and that for purposes of the termination of cellular traffic under SWBT's Cellular Interconnection Tariff, P.S.C. Mo.-No. 40, SWBT was the customer of United. Nothing in the Report And Order suggested that SWBT could not alter its tariff or refuse to provide end-to-end service in the future.

The Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 251(a). All LECs have the additional duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 251(b)(5). Furthermore, incumbent LECs (ILECs) have additional duties, including the duty to negotiate in good faith. 251(c). This duty is also placed upon the requesting telecommunications carrier.

251(c)(1). Exceptions to these obligations are found in Section 251(f).⁷

The FCC in its First Report And Order involving

certain rural telephone companies may be exempted from the obligations imposed on ILECs under Section 251(c). Likewise, certain rural carriers with fewer than 2 percent of total subscriber lines installed in the aggregate may petition for the suspension or modification of the requirements of Section 251(b) or (c). The parties have not addressed these sections of the Act, and they will not be further discussed.

interconnection held that wireless carriers (referred to in the order as Commercial Mobile Radio Services (CMRS) providers) are telecommunications carriers under the Act and are obligated to comply with Section 251(a). In re the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, First Report And Order (released August 8, 1996), at 993.⁸ However, the FCC also determined that wireless carriers are not LECs subject to the obligations of Sections 251(b) and (c). Interconnection Order at 1005, 1006.

Further, the FCC held that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) is local traffic, and is subject to transport and termination rates under Section 251(b)(5), rather than interstate or intrastate access charges. Interconnection Order at 1035, 1036. In explaining the difference between access and reciprocal compensation, the FCC indicated that access charges are intended to address the collaboration of three carriers, usually the originating LEC, the interexchange carrier (IXC), and the terminating LEC, to complete a long-distance call, while reciprocal compensation for transport and termination is intended to address the collaboration of two carriers to complete a local call. Id. at 1034. The FCC's order does not appear to consider a situation in which three carriers

hereafter the FCC's First Report And Order will be cited as Interconnection Order at

are needed to complete a local call, as may be the case where interconnection is indirect rather than direct.

The FCC summarizes the duties of LECs and wireless carriers as follows:

As discussed above, pursuant to section 251(b)(5) of the Act, all local exchange carriers, including small incumbent LECs and small entities offering competitive local exchange services, have a duty to establish reciprocal compensation arrangements for the transport and termination of local exchange service. CMRS providers, including small entities, and LECs, including small incumbent LECs and small entity competitive LECs, will receive reciprocal compensation for terminating certain traffic that originates on the networks of other carriers, and will pay such compensation for certain traffic that they transmit and terminate to other carriers. We believe that these arrangements should benefit all carriers, including small incumbent LECs and small entities, because it will facilitate competitive entry into new markets while ensuring reasonable compensation for the additional costs incurred in terminating traffic that originates on other carriers networks. We also recognize that, to implement transport and termination pursuant to section 251(b)(5), carriers, including small incumbent LECs and small entities, may be required to measure the exchange of traffic, but we believe that the cost of such measurement to these carriers is likely to be substantially outweighed by the benefits of these arrangements.

Interconnection Order at 1045.

The FCC explicitly contemplates that wireless carriers will pay reciprocal compensation to other carriers, including small incumbent LECs, for transport and termination of local calls. The Commission finds nothing in the Act or the FCC's order that plainly prohibits SWBT from requiring wireless carriers to make compensation agreements with third-party LECs. The Commission also finds that the

FCC expressly contemplates the use of reciprocal compensation arrangements for the transport and termination of local traffic between wireless carriers and LECs. Whether the FCC also intends for reciprocal compensation arrangements to apply in situations where there is an indirect interconnection between a wireless carrier and a third-party LEC, and consequently three carriers are needed to terminate the traffic, is an open question. The parties have not cited to any FCC order or rule which addresses the question, nor have the parties provided the Commission with legal support for the proposition that it has jurisdiction to initially decide the issue in the absence of an FCC directive on the matter.

While third-party LECs may be required to initiate contact with the wireless carriers in order to seek compensation arrangements, the Commission believes that the wireless carriers are implicitly required to cooperate in negotiating such arrangements. Again the Commission is not in a position to decide the issue, since the Commission does not have jurisdiction to declare federal law.

Issue 2: Should SWBT's revision to its Wireless Carrier Interconnection Service Tariff be approved?

Both the Mid-MO Group and the STCG state that approval of SWBT's proposed tariff will drastically alter the traditional business relationship SWBT has had with wireless carriers and third-party LECs, and will concomitantly create substantial practical and administrative problems for third-party LECs. Because third-party LECs cannot track or block wireless traffic, both groups are concerned about the ability of their members to identify wireless carriers that terminate traffic in their exchanges via SWBT's network, and the amount of wireless traffic that is being terminated.

In addition, the third-party LECs state that they require access to information which can provide for timely and accurate billing, and the ability to validate that all wireless traffic being received is billed to some wireless carrier. Both groups also contend that the negotiation and administration of agreements with a large number of indirectly interconnecting wireless carriers will create economic and administrative burdens for third-party LECs. Finally, both groups are concerned with having the means to enforce compensation mechanisms if there is noncompliance with compensation terms.

OPC concurs that allowing SWBT to change its business

relationships could create substantial problems for third-party LECs, and submits that the current system should not be ended without a reliable and workable system to replace it.

Prior to discussing the merits of SWBT's proposed tariff, the Commission will set forth the language contained in the two versions of the tariff. The pertinent portion of the original version of the language contained in Section 6.9 of 3rd Revised Sheet 16.02, filed on June 5, is as follows:

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 Telecommunications Carriers to directly compensate that carrier for the termination of such traffic. The wireless carrier shall indemnify SWBT against charges billed to SWBT by the Other Telecommunications Carrier.

The revised version of the language contained in Section 6.9 of 3rd Revised Sheet 16.02, filed as a substitute sheet on July 9, is as follows:

Wireless carriers shall establish agreements with Other Telecommunications Carriers to directly compensate those carriers for the termination of such traffic. Wireless carriers shall indemnify, defend and hold SWBT harmless against charges from Other Telecommunications Carriers for the termination of such traffic. SWBT will not block calls that terminate in Other Telecommunication Carriers' networks without regulatory approval.

The Commission acknowledges at the outset that this case presents legitimate concerns by both SWBT and third-party LECs, the ultimate resolution of which will require cooperation between SWBT, third-party LECs, and wireless carriers. This requires that proper

incentives be given to encourage that cooperation.

Initially the Commission notes that the FCC treats transport and termination as two separate functions with different costs, and acknowledges that various alternatives may exist for transport, but are unlikely to exist for termination. Interconnection Order at 1039, 1040. The Commission finds that SWBT's desire to provide solely a transport function is consistent with the FCC's determination. Thus, the Commission finds that SWBT should be permitted to realign its business relationship with wireless carriers by replacing its offer of end-to-end termination service with a transport service instead, if proper safeguards are in place to ensure that incentives flow in the right direction.

First and foremost, third-party LECs must have access to information which is sufficient for them to bill for wireless traffic that terminates in their exchanges. This is important not only for the obvious reason that third-party LECs cannot collect the revenues to which they are entitled without the ability to bill for their termination services, but also because measurement of the exchange of traffic will have an impact on the negotiation of reciprocal compensation agreements. See Interconnection Order at 1044, 1045.

SWBT has developed a CUSR report which contains the identity of the originating wireless carrier, the terminating office, and the MOUs. The report has two formats, one for wireless carriers and one for third-party LECs. The MOUs for termination of wireless traffic will equal the MOUs for transiting the wireless traffic. The CUSR report is a paper report that will be available on a monthly

basis. The Commission has reviewed the examples of the CUSR reports admitted into evidence, and finds that the CUSR reports will provide third-party LECs with adequate information with which to bill wireless carriers.

The Commission will thus order SWBT to make available to wireless carriers and third-party LECs the CUSR reports in substantially the same format as found in Exhibit Nos. 16HC, 17HC, 18HC, and 19HC, and containing at a minimum the same types of information. The Commission will not mandate that SWBT provide the CUSR reports free of charge, nor will the Commission mandate that SWBT provide this information in ASCII or EMR format, although the parties are free to reach agreement on the provision of the report in an electronic format. To the extent SWBT chooses to charge for the CUSR report, the rate must be just and reasonable. The arguments of the third-party LECs seem to suggest that SWBT is choosing to remain in the middle. However, that is not the case. If the members of the Mid-MO Group and the STCG are hostages to SWBT because they cannot track and bill for wireless-originating calls that terminate in their exchanges, SWBT is equally a hostage because its facilities interconnect with third-party LECs in such a way that, in the absence of blocking by either SWBT or the wireless carriers, once a call is connected to SWBT's system by a wireless carrier, it will automatically terminate in the exchanges of the third-party LECs if that is the call's destination. SWBT is required under Section 251(a) to interconnect its facilities with those of the wireless carriers, just as the wireless carriers are obligated to

interconnect directly or indirectly with third-party LECs, and vice-versa.

There was much discussion in this case regarding whether wireless carriers would have the proper incentive to negotiate and enter into agreements with third-party LECs. The problem of incentives is a two-sided question, and the Commission must also consider how its decision in this case will affect the third-party LECs incentive to engage in the negotiation of agreements with the wireless carriers. If third-party LECs are allowed to bill SWBT access charges for the termination of wireless traffic in their exchanges, the third-party LECs will have little or no incentive to negotiate reciprocal compensation agreements with wireless carriers. Conversely, a properly structured indemnity provision, which requires wireless carriers to reimburse SWBT against losses, may provide such an incentive to the wireless carriers.

The Commission has considered SWBT's interpretation of its indemnity provision, and finds that it is unreasonable. Indemnity may be defined as follows: Indemnity is a right which inures to one that discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other. 41 AM. JUR. 2D *Indemnity* 1 (1995). In addition, a cause of action on a provision indemnifying against a loss does not arise until the indemnitee has actually incurred the loss, therefore the obligation to indemnify arises at the time of payment of the underlying claim, the payment of a judgment on the underlying claim, or payment in settlement of an underlying claim. *Id.* at 43. SWBT has indicated that it will not

pay third-party LECs, but will instead forward any bills to the wireless carriers.

The Commission finds that the following interpretation of the relationships of the parties may provide the maximum incentives on the part of all parties for the negotiation of reciprocal compensation agreements. The wireless carriers are primarily liable to the third-party LECs for reciprocal compensation for the termination of wireless-originating traffic in the exchanges of third-party LECs, and third-party LECs will be required to bill the wireless carriers and make good-faith efforts to collect. In the event a wireless carrier refuses to pay a third-party LEC for such termination and the wireless carrier does not have a reciprocal compensation agreement with the third-party LEC, SWBT will remain secondarily liable to the third-party LEC for the termination of this traffic, but will be entitled to indemnification from the wireless carrier upon payment of the loss.

If wireless carriers know they may be required to reimburse SWBT, they may have a greater incentive to negotiate with the third-party LECs. Since the third-party LECs cannot simply continue with the status quo and collect access fees from SWBT, they too may have more of an incentive to negotiate with the wireless carriers. Similarly, if SWBT knows it will be secondarily liable to the third-party LECs, it will have an incentive to enforce the provisions of its tariff and its interconnection agreements, which require wireless carriers to enter into agreements with third-party LECs.

Finally, the Commission will address the language of SWBT's proposed tariff. The language which is presently before the Commission states as follows: Wireless carriers shall establish agreements with Other Telecommunications Carriers to directly compensate those carriers for the termination of such traffic. The Commission determines that this language is inadequate. As was noted by the STCG's witness Schoonmaker, although this language is sufficiently vague that wireless carriers would not be in violation of the tariff at its inception, because of that very vagueness the legal threat of wireless carriers being held in violation of the tariff is removed, and with it any incentive on the part of the wireless carriers to negotiate agreements with the third-party LECs. See Schoonmaker Surrebuttal, Exh. 7, p. 9.) This concern was also addressed at the hearing. In response to a question regarding when a wireless carrier could be considered in violation of this tariff language, SWBT witness Chapman stated that there was not a date certain by which a wireless carrier could be considered in violation of the tariff, but opined that he thought a wireless carrier could be considered in violation if it had not made a good faith effort after a reasonable amount of time. He further opined that a reasonable amount of time would be six to eight months.

The Commission finds that the above language, which was submitted by SWBT in a substitute sheet at the behest of Staff, is essentially unenforceable. However, the language contained in SWBT's original tariff filing of June 5 does not share that infirmity. That language states as follows: 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 Telecommunications Carriers to directly compensate that carrier for the termination of such traffic. The Commission does not share the concerns originally expressed by Staff with regard to this language. The Commission will not assume that the wireless carriers will violate the tariff by sending wireless traffic in the absence of an agreement. The Commission also notes that the delay which has necessarily resulted from the Commission s suspension of this tariff has provided an adequate amount of time for wireless carriers and third-party LECs to negotiate appropriate agreements.

Because the Commission has found that one of the provisions in SWBT's proposed tariff is unenforceable, the Commission finds that it should reject the tariff submission. However, as previously stated, the Commission finds that SWBT may discontinue offering end-to-end termination to its wireless customers, and may offer transport service instead. The Commission will thus order SWBT to file a new tariff revision which contains language similar to the language originally proposed in its June 5 filing prior to replacing end-to-end termination with transport service. The Commission is aware that there may exist matters which remain unresolved, but the Commission determines that its decision in this case provides the fairest balance among the interests of the parties.

Issue 3: Should SWBT be allowed to block wireless traffic transiting SWBT's facilities and terminating in third-party LEC exchanges where the originating wireless carrier has either: a) failed to enter into an interconnection agreement with the third-party LEC, or b) has failed to pay the third-party LEC the appropriate charges for terminating such traffic?

The Mid-MO Group expressed a strong desire that blocking of wireless traffic destined to terminate in the exchanges of third-party LECs be available as an option to third-party LECs in order to provide an incentive for wireless carriers to negotiate compensation agreements. Although the STCG originally took the position that compliance with SWBT's proposed tariff would result in a severe restriction of the areas in which wireless calls could be terminated, in the hearing memorandum the STCG took the position that if SWBT had the option of blocking wireless traffic in the event wireless carriers fail to pay SWBT compensation or otherwise fail to comply with the terms and conditions of SWBT's tariff, third-party LECs should likewise be given that option. However, in its reply brief the STCG again states that it does not advocate blocking because of the potential for disruption of the telephone network.

OPC opposes blocking as against the public interest, but ultimately concedes that if agreements cannot be reached with the wireless carriers or billing disputes arise, blocking of wireless traffic to third-party LECs may be an appropriate legal remedy.

Although raised in the Hearing Memorandum as an issue, the question of whether and when the blocking of wireless traffic by SWBT might be appropriate was not a basis for the Commission's suspension of the tariff. The original tariff language did not address the issue, and the substituted tariff language only states that SWBT will not block wireless calls without regulatory approval. The Commission notes that SWBT currently has a tariff which offers network blocking with respect to traffic covered under its access tariff. If SWBT

wished to have authority to block wireless traffic, it would in all likelihood be required to file a tariff which authorizes such blocking. While the Commission makes no determination regarding the appropriateness of blocking wireless traffic by SWBT, if SWBT were to submit a tariff⁹ The Commission further notes that the appropriateness of blocking wireless traffic by the wireless carriers themselves is beyond the scope of this proceeding.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

SWBT, the members of the STCG, and the members of the Mid-MO Group are telecommunications companies and public utilities as defined in Sections 386.020(51) and 386.020(42), RSMo Supp. 1996, and as such are subject to the jurisdiction of the Commission pursuant to Chapters 386 and 392 of the Missouri Revised Statutes.

The Commission has the authority, after a hearing upon its own motion or upon complaint, to determine whether the rules, regulations, or practices of any telecommunications company are unjust or unreasonable, and to determine the just, reasonable, adequate, efficient, and proper regulations, practices, and service to be observed and used by a telecommunications company.

392.240.2, RSMo 1994.

⁹The Commission recognizes that such blocking may not be feasible once Local Number Portability is implemented.

The Commission has found that federal law does not prohibit SWBT from realigning its relationship with wireless carriers to provide only a transport function, and that such a realignment should be permitted. The Commission has also found that SWBT should be required to make available a Cellular Usage Summary Report that contains information sufficient to allow third-party LECs to bill wireless carriers for wireless-originating traffic which terminates in the exchanges of the third-party LECs. The Commission has further found that SWBT's interpretation of its indemnity language is unreasonable, and that some of the other language in its current tariff is unenforceable. The Commission concludes, based on the above findings of fact, that SWBT's proposed revisions to its Wireless Carrier Interconnection Service Tariff, filed on June 5 and amended on July 9, should be rejected, but that SWBT should be ordered to file new tariff revisions consistent with this Report And Order prior to realigning its relationship with wireless carriers to provide only a transport function.

IT IS THEREFORE ORDERED:

1. That the tariff sheets filed by Southwestern Bell Telephone Company on June 5, 1997, as amended on July 9, 1997, are suspended for an additional period of 6 days from December 31, 1997 to January 6, 1998.

2. That the objection to Late-filed Exhibit No. 23 by the Small Telephone Company Group is overruled as moot.

3. That the objection to Late-filed Exhibit No. 24 by the Small Telephone Company Group is overruled as untimely.

4. That Late-filed Exhibit Nos. 20, 20HC, 21, 21HC, 22, 23, and 24 are received into evidence.

5. That the revisions filed by Southwestern Bell Telephone Company to its Wireless Carrier Interconnection Service Tariff on June 5, 1997, as amended on July 9, 1997, are rejected.

6. That Southwestern Bell Telephone Company is directed to file with the Commission tariff revisions consistent with this Report And Order.

7. That the tariff revisions required to be filed pursuant to ordered paragraph 5 above shall be filed no later than 60 days after the effective date of this order, and shall contain a 30-day effective date.

8. That Southwestern Bell Telephone Company is directed to make immediately available to the member companies of the Small Telephone Company Group and the Mid-Missouri Group of Local Exchange Companies, and to wireless carriers, its Cellular Usage Summary Report, consistent with this Report And Order.

9. That this Report And Order shall become effective on
January 6, 1998.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Drainer
and Murray, CC., concur and
certify compliance with the
provisions of Section 536.080,
RSMo 1994.

Dated at Jefferson City, Missouri,
on this 23rd day of December, 1997.