SC 86529

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel*.
ALMA TELEPHONE COMPANY, *et al*.

Relators-Respondents,

v.

PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI, *et al*.,

Appellants.

Appeal from the Missouri Court of Appeals for the Western District

---

SUBSTITUTE BRIEF OF THE MISSOURI PUBLIC SERVICE COMMISSION

Marc D. Poston
Senior Counsel
Missouri Bar No. 45722

Attorney for the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8701 (Telephone)
(573) 751-9285 (Fax)

June 1, 2005

TABLE OF CONTENTS

STATEMENT OF FACTS **10**

1. Historical Background **10**

2. History of the Wireless Compensation Dispute **11**

3. Procedural Background of Case No. TT-99-428, et al. **13**

4. Procedural Background of Case No. TT-2001-139 ..... **16**

STANDARD OF REVIEW **18**

ARGUMENT **20**

POINT I **20**

THE COMMISSION'S DECISION TO REJECT THE PROPOSED TARIFFS WAS LAWFUL BECAUSE ACCESS CHARGES APPLY TO LONG DISTANCE CALLS AND DO NOT APPLY TO LOCAL WIRELESS CALLS. (RESPONDS TO RESPONDENTS' POINT I). **20**

A. The FCC's Pre-1996 Telecommunications Act Decisions Consistently Reject the Application of Access Charge on Local Wireless Traffic. 20

B. The Telecommunications Act of 1996 and the FCC's 1996 Local Competition Order 24

C. The FCC's 2001 Notice of Proposed Rulemaking 28

D. The FCC's 2005 Wireless Termination Order 30

E. Case Law Confirms the Commission's Conclusions of Law 34

F. The Commission's Amended Report and Order is Consistent with the Past Commission Decisions cited by Respondents. 38

G. Access Charges are Not Allowed on Local Traffic Under the 251(g) Safe Harbor .. 39

H. The Constitutional Takings Claim is Baseless 40

CONCLUSION **42**

CERTIFICATE OF SERVICE **45**

TABLE OF AUTHORITIES

Other Authorities

; *State ex rel. Continental Hotel v. Burton*, 334 S.W.2d 75, 78 (Mo. 1960)..... 18
270 U.S. 587, 591 40
3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications, CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871 34
AT&T Communications of the Southwest, Inc. v. Public Service Commission, 62 S.W.3d 545 (Mo. App. W.D. 2001) 15
Atlas Telephone Company, et al. v. Oklahoma Corporation Commission, et al, 400 F.3d 1256 (10th Cir. 2005) 34
Atlas Telephone Company, et al. v. Oklahoma Corporation Commission, et al, 400 F.3d 1256, 1264 (10th Cir. 2005) 35
Smith et al. v. Illinois Bell Telephone Co., 270 U.S. 587; 46 S.Ct. 408 (1926)..... 40
State ex rel. Connor v. Public Serv. Comm'n, 703 S.W.2d 577, 582 (Mo. App. 1986) 18
State ex rel. Dyer v. Public Service Commission, 341 S.W. 2d 795, 802 (Mo. 1960), *cert. den.*, 366 U.S. 924, 81 S.Ct. 1351 (1961) 18
State ex rel. GTE North, Inc. v. Public Serv. Comm'n, 835 S.W.2d 356, 361 (Mo. App. 1992) . 18
State ex rel. Marco Sales v. Public Serv. Comm'n, 685 S.W.2d 216, 218 (Mo. App. 1984) 18
State ex rel. Mo. Public Service Co. v. Pierce, 604 S.W. 2d 623, 625 (Mo. App. 1980) 19
State ex rel. St. Louis-San Francisco Ry. Co. v. Public Serv. Comm'n, 439 S.W.2d 556, 559 (Mo. App. 1969) 18
State of Missouri ex rel. Sprint Spectrum, L.P., d/b/a Sprint PCS, et al. v. Missouri Public Service Commission, 112 S.W.3d 20 (Mo. App. W.D. 2003) 17
State of Missouri, ex re. Alma Telephone Company, et al. v. P.S.C., WD 62961, 2004 Mo. App. LEXIS 1450, October 5, 2004 15

Regulations

§ 252..... 23
386.540 RSMo 2000 17
47 C.F.R. § 20.11(e)..... 32
47 C.F.R. § 20.11(e) and (f). 7
47 C.F.R. § 51.701(b)(2)..... 25, 34
47 CFR § 24.202 10
47 CFR § 51.701(b)(2)..... 10
47 U.S.C. § 251..... 23
47 U.S.C. §§ 251-252. 5
Section 251(b)(5) 23
Section 251(g) 38
Section 386.020(17)..... 9
section 392.200.1 RSMo 2000 40
Sections 386.510 17
See Section 386.430 RSMo 2000 41
Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996) (*"Act").* 5

13

Case No. TT-2001-139, In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service 15
FCC *Local Competition Order*, ¶ 1036 10
Id 25
Id. 12, 15, 22, 24, 25
Id. at 1036 25
Id. at 1 27
Id. at 10 31
Id. at 1033 24
Id. at 11 FCC Rcd 5020, 5049 21
Id. at 11 FCC Rcd 5020, 5051-5052 21
Id. at 16 33
Id. at 4 30
Id. at 496 20
Id. at 6 30
Id. at 7 28
Id. at 85 28
Id. at 9 31
Id. at 94 28
In the Matter of an Inquiry into the Use of the Bands 8250845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, CC Docket No. 79-318, 86 F.C.C.2d 469, 495 (1981) 20
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 No. TC-98-251 and TC-98-340, *Report and Order,* June 10, 1999 37
In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking,* FCC 01-132, Released April 27, 2001 27
In the Matter of Developing a Unified Intercarrier Compensation Regime; In the Matter of T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket No. 01-92, *Declaratory Ruling and Report and Order,* FCC 05-42, Released February 24, 2005 29
In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, First Report and Order, ¶ 1036, August 8, 1996 (*"Local Competition Order"*) 10
In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, CC Docket No. 95-185, CC Docket No. 94-54, *Notice of Proposed Rulemaking,* 11 FCC Rcd 5020, 5030 (1996) 21
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, TT-97-524, *Report and Order,* December 23, 1997. (*"TT-97-524 Report and Order"*) 11

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff, PSC MO. NO. 40, Case No. TT-97-524, *Report and Order,* December 23, 1997 38
In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, FCC 86-85, 1986 FCC LEXIS 3878; 59 Rad. Reg. 2d (P&F) 1275, *Memorandum Opinion and Order,* Released March 5, 1986, Appendix B..... 20
In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, FCC 87-163, 2 FCC Rcd 2910, 2916; 1987 FCC LEXIS 3885; 63 Rad. Reg. 2d (P&F) 7, *Declaratory Ruling*, Released May 18, 1987 21
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, TC-96-112, *Report and Order,* April 11, 1997..... 37
Local Competition Order, at 1008 24
Local Competition Order, at 1033 31
Wireless Termination Order, at fn. 6 32
33, 34

INTRODUCTION

When Congress passed the Telecommunications Act of 1996 ("Act"), it created procedures for interconnection between the networks of competing local exchange carriers, including commercial mobile radio service providers ("wireless" or "CMRS" providers), with the networks of the incumbent local exchange carriers.[1] The Act's procedures ensure carriers the right to negotiate or arbitrate interconnection agreements to govern the terms of exchanged traffic.[2] In 1997, the Respondent local exchange carriers ("LECs") and wireless carriers began negotiating interconnection agreements; however, they failed to resolve their differences and ended negotiations without interconnection agreements in place.[3] In 1999, the Respondent LECs each filed proposed tariff revisions with the Commission to compensate the Respondents for terminating wireless-originated traffic by applying the Respondents' existing access rates to such traffic. Access rates are paid by interexchange carriers to LECs for terminating long distance calls delivered by the interexchange carrier to the LECs. The wireless carriers objected to the proposed tariffs and the Commission held an evidentiary hearing. The parties presented two issues to the Commission: (1) whether the proposed tariffs were lawful, and (2) whether the proposed tariffs should be approved.[4] In its *Amended Report*

---

[1] Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996) (*"Act").*

[2] 47 U.S.C. §§ 251-252.

[3] Transcript, Volume 2, pp. 38-39; Exhibit 11, Schedules 3-1 to 3-16.

[4] Legal File ("L.F."), p. 36.

and Order issued on April 9, 2002, in Case No. TT-99-428 et al, the Commission rejected the tariffs due to their proposed unlawful application of access charges on local wireless calls. Access charges are designed to compensate LECs for terminating long distance calls only, and the proposed tariff would have unlawfully applied access charges to terminate local wireless calls.

Although the tariff in question did not present the Commission with a lawful remedy to compensate Respondents for terminating wireless traffic, the Commission approved subsequent tariff amendments that provided compensation to the Respondents for terminating local wireless traffic. It is clear from those decisions that the Commission allowed compensation for the Respondents through a tariff where no interconnection agreement was in place. However, it is also clear that the Commission would only allow such compensation through a tariffed rate calculated to compensate LECs for terminating local wireless traffic rather than an existing rate calculated to compensate LECs for terminating interexchange traffic. The difference between the wireless termination tariffs approved by the Commission for the same Respondent companies, and the proposed tariff revisions rejected by the Commission in this case, is that the wireless termination tariffs did not propose to apply access charges to local wireless traffic. The proposed tariffs in this case would have applied access charges to local wireless traffic. The correct issue is whether a tariff can lawfully charge *access* to a wireless provider for terminating a *local* wireless call.

Earlier this year the FCC amended its rules regarding interconnection between LECs and wireless providers.[5] The new rules prohibit LECs from imposing compensation obligations for traffic not subject to access upon wireless providers pursuant to tariffs. The new rules also determine that a LEC has the ability to request interconnection with the wireless providers and to invoke the negotiation and arbitration procedures outlined in the Act. The purposes of these new rules are to ensure that the compensation mechanism between LECs and wireless providers for traffic not subject to access, such as local wireless traffic, will be through an interconnection agreement rather than through a tariff.

Admittedly, the Respondents' only purpose for attempting to overturn the Commission's decision is to have their access rates apply retroactively to past traffic terminated by Respondents. The Respondents state that "the narrow question that remains in this case is whether the [Respondent's] state access tariffs applied to [local] wireless traffic that was delivered in the absence of an approved agreement between February of 1998 and January of 2001."[6] The Respondents' apparently wish to use a decision allowing access charges on local wireless calls in future collection actions against the wireless carriers.

The Commission's rejection of the tariffs is not meant to suggest that the Respondents are not entitled to compensation for terminating wireless traffic. This is

[5] 47 C.F.R. § 20.11(e) and (f).

[6] Respondent's Substitute Brief at pp. 36-37.

evident from the Commission's approval of wireless termination tariffs in a later case, which were proposed to compensate the Respondent companies for terminating wireless originated traffic. However, now that the FCC has clarified its conclusions that compensation for non-access traffic cannot be achieved through a tariff, the unlawful nature of the proposed tariffs is even more apparent than it was when the Commission first rejected the tariffs. Accordingly, the Commission's *Amended Report and Order* rejecting the proposed tariffs should be affirmed.

STATEMENT OF FACTS

1. Historical Background

The background of the present case involves the interrelationship of local telephone companies and long distance telephone companies (also referred to as interexchange carriers or IXCs). Access charges compensate the local exchange carrier (LEC) for long distance calls that originate or terminate on the LEC's network. The IXC compensates the LEC for use of its network by paying originating access charges to the LEC serving the end user making the long distance call, and by paying terminating access charges to the LEC that completes the long distance call.

To understand the proper application of access charges in this case, it is important to first understand what distinguishes a local call from a long distance call. If the call originates and terminates in different exchanges, it is a long distance or "interexchange" call and is subject to access charges. If the call originates and terminates in the same exchange, it is a local call and is not subject to access charges. Simple geography controls the application of access charges. [7]

For wireless networks, the local service boundaries differ from those of the landline networks. The FCC determined that the largest authorized service areas for

[7] Section 386.020(17) defines "exchange access service" as "a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service."

wireless carriers are defined as major trading areas ("MTAs"), rather than exchanges.[8] The FCC further concluded that calls originating from a wireless carrier and terminating within the same MTA (intra-MTA calls) are local calls, and calls that terminate outside the originating MTA (inter-MTA calls) are long distance calls.[9] Only long distance calls incur access charges, and since intra-MTA calls are local, the FCC concluded that intra-MTA calls are not subject to access charges.[10] However, since LECs terminate both local wireless calls and long distance calls, the FCC provided LECs with a compensation mechanism for terminating wireless-originated calls by concluding that intra-MTA calls are subject to transport and termination charges, rather than access charges.[11]

2. History of the Wireless Compensation Dispute

During the 1980s and early 1990s, Southwestern Bell Telephone Company ("SWBT") had a wireless termination tariff under which SWBT undertook to terminate traffic originating from wireless carriers anywhere within the LATA (local access and

[8] 47 CFR § 24.202.

[9] 47 CFR § 51.701(b)(2).

[10] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; In the Matter of Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, ¶ 1036, August 8, 1996 (*"Local Competition Order"*).

[11] FCC *Local Competition Order*, ¶ 1036.

transport area). In a series of cases in the 1990's, the Commission required SWBT to compensate the LECs for terminating wireless-originated traffic transited by SWBT. SWBT paid the LECs for termination until SWBT changed its tariffs in Case No. TT-97-524.[12]

In Case No. TT-97-524, the Commission allowed SWBT to alter its tariff to clarify that it is offering wireless carriers a transiting service rather than a termination service for wireless-originated calls that are destined to terminate in the exchanges of third-party LECs. In other words, SWBT would no longer be responsible for compensating the third-party LECs for termination in the same manner required of IXCs. The Commission held that nothing in the Act or the FCC's orders prohibits SWBT from requiring wireless carriers to make compensation agreements with third-party LECs. The Commission required SWBT to record traffic flowing from wireless carriers to third-party LECs, and to make these records available to the LECs, to allow the LECs "to bill for wireless traffic that terminates in their exchanges." In addition, the Commission required SWBT's tariff to include the language "wireless carriers shall not send calls to SWBT that terminate in [Respondents] network unless the wireless carrier has entered

[12] *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,* TT-97-524, *Report and Order*, December 23, 1997. ("*TT-97-524 Report and Order*").

into an agreement with such [Respondent] to directly compensate that carrier for the termination of such traffic."[13]

3. Procedural Background of Case No. TT-99-428, et al.

In 1997, the wireless carriers approached the Respondents to negotiate interconnection agreements to govern the terms of terminating traffic to each party's network.[14] The Respondents insisted upon a direct interconnection that physically linked the Respondents' facilities with the wireless carriers' facilities, whereas the wireless carriers wanted an indirect interconnection that did not require a physical connection of each carrier's facilities.[15] Unfortunately, negotiations ended after the parties were unable to agree upon the terms of interconnection. In 1999, the Respondents LECs sought to amend their tariffs to expand the application of access charges. The Respondents filed identical proposed tariff revisions to change the traditional application of access charges as follows:

> 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 another 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.

---

[13] *Id.*

[14] Transcript, Volume 2, pp. 38-39; Exhibit 11, Schedules 3-1 to 3-16.

[15] *Id.* Each telecommunications carrier's duty to interconnect under 251(a)(1) of the Act includes the duty to interconnect directly or indirectly.

The proposed tariff language sought to apply access charges to calls that originate on wireless carrier networks and terminate in the Respondents' exchanges. To reach that end, the tariff applies access charges to *all traffic regardless of type of origin*, without distinguishing between local calls and long distance calls.

The Commission suspended the tariffs to determine whether access charges could lawfully apply to all types of traffic. Several parties intervened to voice their opposition to the tariffs. The Commission held an evidentiary hearing on October 12 and 13, 1999 during which the parties presented two issues to the Commission for resolution. The first issue asked whether the proposed tariffs were lawful as applied to wireless traffic and local exchange traffic. The second issue asked the Commission whether the tariffs should be approved. No party objected to this jointly prepared issues list.

On January 27, 2000 the Commission issued its *Report and Order* rejecting the proposed tariffs. The Commission held that the proposed tariffs are not lawful and must be rejected because they would unlawfully allow Respondents to charge access rates for local traffic.[16]

The Respondents filed for review in the Circuit Court of Cole County. The Circuit Court reversed the Commission's decision on November 1, 2000, and remanded the case back to the Commission. The Commission and the wireless carriers appealed to the Missouri Court of Appeals for the Western District. On October 30, 2001, the Court of

[16] L.F., p. 25.

Appeals found that the Commission's findings of fact were insufficient, and remanded the case back with instructions directing the Commission to enter new findings of fact. [17]

On remand, the Commission issued its *Amended Report and Order* on April 9, 2002 that again rejected the Respondents' proposed tariff change on the grounds that the tariff revisions would unlawfully allow Respondents to charge access rates for local traffic. The Respondents again sought review in the Circuit Court of Cole County, and the Cole County Circuit Court reversed and remanded the Commission's decision. The Circuit Court concluded that access charges can apply to local wireless traffic in the absence of an approved interconnection agreement.

The Commission and the wireless carriers appealed. The Court of Appeals identified the decisive issue as "whether the switched access tariffs can be applied to intra-MTA wireless traffic terminated in the rural companies' networks from February 1998 through February 2001."[18] The Court of Appeals concluded:

> 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

[17] *AT&T Communications of the Southwest, Inc. v. Public Service Commission*, 62 S.W.3d 545 (Mo. App. W.D. 2001)

[18] *State of Missouri, ex re. Alma Telephone Company, et al. v. P.S.C.,* WD 62961, 2004 Mo. App. LEXIS 1450, October 5, 2004.

under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act.[19]

The Court of Appeals concluded that because the proposed tariffs would only apply access until an interconnection agreement was in place, the proposed tariffs avoided "any conflict with the federal Act."[20]

4. Procedural Background of Case No. TT-2001-139

The procedural background of Commission Case No. TT-2001-139, In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service, ("*Mark Twain*"), is significant to the issues of this appeal, to address the allegation made by the Respondents that the Commission failed to determine the compensation that could be applied to intra-MTA traffic delivered before the approval of a reciprocal compensation agreement, and to show that the Respondents had a lawful termination charge available prior to and following the Commission's *Amended Report and Order* in Case No. TT-99-428.

While the first appeal of the present case was pending in the Court of Appeals, the Commission approved wireless termination tariffs on February 8, 2001 in *Mark Twain* allowing the Respondents to be compensated for terminating wireless originated calls. The wireless carriers appealed. On April 29, 2003, the Court of Appeals affirmed the

[19] *Id.*

[20] *Id.*

Commission's approval of the wireless termination service tariffs, but reversed with regard to the approval of one component of the wireless termination service charge.[21]

[21] *State of Missouri ex rel. Sprint Spectrum, L.P., d/b/a Sprint PCS, et al. v. Missouri Public Service Commission*, 112 S.W.3d 20 (Mo. App. W.D. 2003).

STANDARD OF REVIEW

The General Assembly has prescribed the method of review of Commission decisions in Sections 386.510 and 386.540 RSMo 2000. The courts review the Commission's decision for lawfulness and reasonableness. *State ex rel. GTE North, Inc. v. Public Serv. Comm'n*, 835 S.W.2d 356, 361 (Mo. App. 1992). A Commission order is lawful if it is statutorily authorized; it is reasonable if supported by competent and substantial evidence. *State ex rel. Marco Sales v. Public Serv. Comm'n*, 685 S.W.2d 216, 218 (Mo. App. 1984); *State ex rel. Continental Hotel v. Burton*, 334 S.W.2d 75, 78 (Mo. 1960). In reviewing the fact findings of the Commission, the court considers the evidence in the light most favorable to the agency, together with all reasonable supporting inferences. If the evidence permits either of two opposed findings, the court must defer to the findings of the Commission. *State ex rel. Connor v. Public Serv. Comm'n*, 703 S.W.2d 577, 582 (Mo. App. 1986). Only when a Commission order is clearly contrary to the overwhelming weight of the evidence may a court set it aside. *State ex rel. St. Louis-San Francisco Ry. Co. v. Public Serv. Comm'n*, 439 S.W.2d 556, 559 (Mo. App. 1969).

Missouri courts have long recognized that the Public Service Commission Law delegates great discretion to the Commission and "many of its decisions necessarily rest largely in the exercise of a sound judgment." *State ex rel. Dyer v. Public Service Commission*, 341 S.W. 2d 795, 802 (Mo. 1960), *cert. den.*, 366 U.S. 924, 81 S.Ct. 1351 (1961). Under these circumstances the reviewing court does not substitute its judgment

for that of the Commission on issues within the ambit of the agency's expertise. *State ex rel. Mo. Public Service Co. v. Pierce*, 604 S.W. 2d 623, 625 (Mo. App. 1980).

ARGUMENT

POINT I

THE COMMISSION'S DECISION TO REJECT THE PROPOSED TARIFFS WAS LAWFUL BECAUSE ACCESS CHARGES APPLY TO LONG DISTANCE CALLS AND DO NOT APPLY TO LOCAL WIRELESS CALLS. (Responds to Respondents' Point I).

The Respondents' principal argument is that in the absence of an approved interconnection agreement, access charges may apply to all types of traffic regardless of type or origin. This argument is based on the Respondents' belief that the FCC intended to prohibit access charges on local wireless calls only when the compensation mechanism between the wireless carrier and LEC is reciprocal. This interpretation of the FCC's *Local Competition Order* ignores the FCC's effort to keep local calls free from long distance access charges. The following history of FCC decisions will illustrate the FCC's conclusions that access is not an appropriate charge for intra-MTA calls.

A. The FCC's Pre-1996 Telecommunications Act Decisions Consistently Reject the Application of Access Charge on Local Wireless Traffic.

In the FCC's 1981 order authorizing cellular communications systems on a commercial basis, the FCC acknowledged that the terms and conditions of interconnection between wireless providers and LECs had not been previously examined

by the FCC.[22] Addressing the issue for the first time, the FCC concluded that "[t]he particular arrangements involved in interconnection of a given cellular system should be negotiated among the carriers involved and be made the subject of an intercarrier agreement."[23]

In 1986, the FCC issued policy statements regarding LEC-CMRS interconnection and determined what compensation arrangements should be used. After stating that LEC-CMRS compensation arrangements "are largely a matter of state, not federal, concern," the FCC concluded that compensation may "be paid under contract or tariff provided that the tariff is not an "access tariff" treating cellular carriers as interexchange carriers…"[24] A year later, the FCC issued a Declaratory Ruling further explaining that

[22] *In the Matter of an Inquiry into the Use of the Bands 8250845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems,* CC Docket No. 79-318, 86 F.C.C.2d 469, 495 (1981).

[23] *Id*. at 496.

[24] *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services,* FCC 86-85, 1986 FCC LEXIS 3878; 59 Rad. Reg. 2d (P&F) 1275, *Memorandum Opinion and Order,* Released March 5, 1986, Appendix B.

access charges are only to be assessed on interexchange carriers under 47 C.F.R. § 69.5, and CMRS providers are not interexchange carriers.[25]

The FCC continued its examination of LEC-CMRS interconnection issues in January 1996 and adopted an interim "bill and keep" mechanism, in which both LECs and CMRS providers apply a zero rate for terminating the other carriers' originated traffic.[26] The FCC concluded that "a bill and keep requirement would not deprive either LECs or CMRS providers of a reasonable opportunity to recover costs they incurred to terminate traffic from the other's network, because these costs could be recovered from their own subscribers."[27] In this same order, the FCC sought comment on a number of alternative approaches to LEC-CMRS interconnection. One such alternative was to base interconnection rates on a "subset of access charges."[28] The FCC explained that the

---

[25] *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, FCC 87-163, 2 FCC Rcd 2910, 2916; 1987 FCC LEXIS 3885; 63 Rad. Reg. 2d (P&F) 7, *Declaratory Ruling*, Released May 18, 1987.

[26] *In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, CC Docket No. 94-54, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, 5030 (1996).

[27] *Id.* at 11 FCC Rcd 5020, 5049.

[28] *Id.* at 11 FCC Rcd 5020, 5051-5052.

purpose of allowing only a subset of access charges is to account for the fact that current access charges include charges not appropriate for CMRS providers:

> To the extent that LEC-CMRS interconnection arrangements are similar to the interconnection arrangements between LECs and IXCs or other access customers, the rates for LEC-CMRS interconnection could be based on a subset of the LEC's existing interstate access charges (or comparable rates from their intrastate state tariffs). As noted above, LECs could charge existing local transport rates for the transmission facilities that they provide to link LEC and CMRS networks. Similarly, LECs could charge CMRS providers existing local switching rate for minutes of use originating on CMRS networks and terminating on LEC networks. We do not envision that the LECs would charge CMRS providers the carrier common line (CCL) charge. The CCL charge, in essence, represents a subsidy from LECs' interstate access customers to reduce the subscriber line charges (SLC) paid by end-user subscribers for loop facilities that are dedicated to their use. We do not believe that such a subsidy should be imposed on CMRS providers. Under this alternative, we are also inclined not to permit LECs to charge CMRS providers the transport interconnection charge (TIC), given that the extent to which the TIC recovers transport-related costs is unclear.[29]

[29] *Id.*

The FCC's discussion of these alternative approaches suggests that access charges include subsidies that are appropriate if collected from interexchange carriers, but are not appropriate if collected from CMRS providers.

B. The Telecommunications Act of 1996 and the FCC's 1996 Local Competition Order

i. The FCC Concluded Transport and Termination Charges are Appropriate for Local Calls and Access Charges are Appropriate for Long Distance Calls

The Telecommunications Act of 1996 placed new obligations on telecommunications companies. Section 251 obligates all telecommunications companies to interconnect with other telecommunications carriers. It also places certain interconnection duties on LECs, including the duty under Section 251(b)(5) to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Section 252, on the other hand, provides procedures for carriers to agree to the terms and conditions of interconnection, either through voluntary negotiation or through arbitration before a state commission.

In August 1996 the FCC issued its *Local Competition Order* implementing the new provisions of the Act. The *Local Competition Order* addresses the LEC-CMRS interconnection issues raised in this appeal, including the relevance of 47 U.S.C. § 251 and § 252 to the interconnection between LECs and CMRS providers. The *Local Competition Order* obligates LECs "to enter into reciprocal compensation arrangements

with all CMRS providers."[30] The FCC concluded that as a *legal matter*, transport and termination of local traffic are different services than access service for long distance telecommunications.[31] The FCC also concluded that the Act preserved the legal distinction between these two services.[32] The FCC explained that access charges apply where an interexchange carrier handles the call and compensates the LECs for originating and terminating the call.[33] By contrast, reciprocal compensation is for the transport and termination of local calls that do not pass through an interexchange carrier.[34]

The Respondents' argument that the FCC intended access charges to apply to all types of traffic when compensation is not reciprocal ignores the FCC's conclusion that access for terminating long distance calls is a different service than the service employed to terminate local calls.[35] Nowhere does the FCC state that there is an exception to the lawful application of access charges when the compensation mechanism is not reciprocal. If the FCC intended to allow access charges on local calls in the absence of an agreement between the parties, such an important allowance should have been clearly established in the *Local Competition Order* or in subsequent orders since it would be a significant

---

[30] *Local Competition Order*, at 1008.

[31] *Id.* at 1033.

[32] *Id.*

[33] *Id.* at 1034.

[34] *Id.*

[35] *Id.* at 1033.

departure from the current industry-wide practice of applying access charges only to long distance calls.

This distinction between charges appropriate for local calls and charges appropriate for long distance calls is important because the FCC later determined, as further explained below, what constitutes a local call on wireless networks.

ii. The FCC concluded that intra-MTA calls are local, and therefore not subject to access charges.

The *Local Competition Order* also concluded that the reciprocal compensation obligations for handling local traffic "should apply only to traffic that originates and terminates within local areas."[36] Local areas for CMRS providers were determined by the FCC as the wireless provider's Major Trading Area ("MTA").[37] The FCC concluded that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under Section 251(b)(5), rather than interstate and intrastate access charges."[38] The FCC reiterated this finding at Paragraph 1043:

> As noted above, CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local

[36] *Id.*

[37] *Id.* at 1036. See also 47 C.F.R. § 51.701(b)(2).

[38] *Id.*

> service areas. We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.

Here the FCC is again stating that intrastate access charges are not appropriate for intra-MTA traffic.

The Commission clearly explained in its *Amended Report and Order* the FCC's conclusions from the *Local Competition Order* when the Commission stated:

> The FCC explicitly determined that the LEC's reciprocal compensation obligations under Section 251(b)(5) of the Act apply to all local traffic transmitted between LECs and CMRS providers. The FCC's largest authorized CMRS provider territory is a Major Trading Area (MTA). Clarifying what traffic is considered "local," the FCC decided that the MTA serves as the most appropriate definition for a local service area for CMRS traffic when calculating reciprocal compensation under the Act.
>
> …
>
> In the First Report and Order, the FCC made it abundantly clear that access charges do not apply to local traffic exchange between the LECs and CMRS providers. Traffic to or from a CMRS provider's network, the FCC held, that originates and terminates in the same MTA is subject to transport and termination rates under the Act but is not subject to interstate or

> intrastate access charges. In the present case, if its tariffs were approved, [Respondent] would be allowed to apply access charges to traffic exchanged with CMRS providers within the same MTA. Such an action would clearly violate both the Act and the First Report and Order.[39]

This is a lawful conclusion based upon the FCC's restrictions on access charges as confirmed by the FCC's *Local Competition Order,* and for this reason the Commission's *Amended Report and Order* should be affirmed.

C. The FCC's 2001 Notice of Proposed Rulemaking

In 2001, the FCC issued a *Notice of Proposed Rulemaking* (*"NPRM"*) to once again address intercarrier compensation issues.[40] The FCC began the *NPRM* by identifying two intercarrier compensation regimes: "(1) access charges for long-distance traffic; and (2) reciprocal compensation."[41] The purpose of the *NPRM*, according to the FCC, was to identify a unified approach to intercarrier compensation. In a background discussion of access charges, the FCC stated:

> The access charge rules can be further broken down into *interstate* access charge rules that are set by this Commission, and *intrastate* access charge rules that are set by state public utility commissions. Both the interstate

[39] *Amended Report and Order,* at pp. 12-13.

[40] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Notice of Proposed Rulemaking,* FCC 01-132, Released April 27, 2001.

[41] *Id.* at 1.

> and intrastate access charge rules establish charges that IXCs must pay to LECs when the LEC originates or terminates a call for an IXC, or transports a call to, or from, the IXC's point of presence ("POP"). CMRS carriers also pay access charges to LECs for CMRS-to-LEC traffic that is not considered local and hence not covered by the reciprocal compensation rules.[42]

Again, the FCC is stating that access charges are not assessed on CMRS carriers if the traffic is considered local.

The FCC sought comment in the *NPRM* regarding the relationship of the FCC's authority and state authority over LEC-CMRS interconnection issues. Specifically, the FCC sought comment on whether it had the authority "to replace the existing reciprocal compensation mechanism for LEC-CMRS interconnection with a bill-and-keep regime."[43] The FCC also sought comment "on whether access charges, when they apply to interexchange traffic under sections 201, 251(g) and 251(i), should also apply to CMRS carriers."[44]

At the time of the Commission's *Amended Report and Order,* the *Local Competition Order* and the *NPRM* were the latest FCC orders to guide the Commission in determining whether a tariff could lawfully apply access charges to terminate local

[42] *Id.* at 7.

[43] *Id.* at 85.

[44] *Id.* at 94.

wireless traffic. Recently, however, several new FCC orders address the same issues and attempt to clarify the FCC's policy.

D. The FCC's 2005 Wireless Termination Order

In February 2005, the FCC released its *Wireless Termination Order* to address a petition by several CMRS providers that asked the FCC to affirm "that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic."[45] The FCC further explained the dispute that lead to the petition:

> Although section 251(b)(5) and the Commission's reciprocal compensation rules reference an "arrangement" between LECs and other telecommunications carriers, including CMRS providers, they do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other. As a result, carrier disputes exist as to whether and how reciprocal compensation payment obligations arise in the absence of an

[45] *In the Matter of Developing a Unified Intercarrier Compensation Regime; In the Matter of T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, FCC 05-42, Released February 24, 2005.

> agreement or other arrangement between originating and terminating carriers.[46]
>
> The practice of exchanging traffic in the absence of an interconnection agreement or other compensation arrangement has led to numerous disputes between LECs and CMRS providers as to the applicable intercarrier compensation regime. For instance, many CMRS providers argue that intra-MTA traffic routed from a CMRS provider through a BOC tandem to another LEC is subject to the reciprocal compensation regime because it originates and terminates in the same MTA. Some LECs, however, contend that this traffic is more properly subject to access charges because it originates outside the local calling area of the LEC, is being carried by a toll provider, *i.e.*, the BOC, and is routed to the LEC via access facilities. When a LEC seeks payment of access charges from a BOC in these circumstances, the BOC often refuses to pay such charges on the basis that (1) it is merely transiting traffic subject to reciprocal compensation, and (2) the originating carrier is responsible for the reciprocal compensation due.[47]

This explanation defines the very dispute that caused the Respondent companies to propose the amended tariff that was rejected by the Commission. In the absence of an

[46] *Id.* at 4.

[47] *Id.* at 6.

agreement or arrangement between the Respondent companies and the CMRS providers, the question to be answered is how reciprocal compensation can be accomplished.

The FCC concluded in the *Wireless Termination* Order that "incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs."[48] The distinction between what the FCC held in the *Wireless Termination Order* and what the Respondent companies have attempted to accomplish through the proposed tariff is critical to understanding the differences between assessing transport and termination charges based on a state tariff, and assessing access charges based on an access tariff. Although the issue identified by the FCC in the *Wireless Termination Order* involves a LEC attempting to impose access charges to terminate intra-MTA traffic, the FCC's findings only apply to state termination tariffs rather than state access tariffs. The FCC clearly held that "it would not have been unlawful for incumbent LECs to assess transport and termination charges based on a state tariff."[49] An FCC conclusion that state *wireless termination* tariffs on intra-MTA traffic are lawful is clearly not the same as a finding that state *access* tariffs on intra-MTA traffic are lawful. Transport and termination, as the FCC held in the *Local Competition Order,* is a different service than an access service in which the traffic is handled by an interexchange carrier.[50] In the *Wireless Termination Order,* the FCC only

[48] *Id.* at 9.

[49] *Id.* at 10.

[50] *Local Competition Order,* at 1033.

stated that state tariffs had been a proper mechanism for LECs to receive compensation for transport and termination of CMRS originated traffic. This finding is a far cry from a finding that concludes that access charges are an appropriate compensation mechanism for transport and termination. The state tariffs at issue in the *Wireless Termination Order* were similar to the state tariffs approved by the Commission in the *Mark Twain* decision discussed earlier and upheld by the Western District. Those tariffs were wireless termination tariffs, not access tariffs. In the present case, the parties have not proposed to adopt a wireless termination tariff; rather, they have proposed to apply access charges to intra-MTA termination.

On a going forward basis, the *Wireless Termination Order* amended the FCC's rules "to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff."[51] "Non-access traffic" is defined as "traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act."[52] This includes intra-MTA traffic, which under the proposed tariffs, would subject non-access traffic to compensation pursuant to tariff. Therefore, if the earlier FCC orders were unclear on whether access could apply to intra-MTA traffic, the FCC has clarified that compensation for intra-MTA traffic cannot be accomplished through a state tariff.

[51] 47 C.F.R. § 20.11(e).

[52] *Wireless Termination Order*, at fn. 6.

To assist the LECs in negotiating reciprocal compensation under Section 251(b)(5), the FCC clarified in its *Wireless Termination Order* that LECs have the ability to compel negotiations and arbitrations from CMRS providers.[53]

E. Case Law Confirms the Commission's Conclusions of Law

Recent case law addressing the very issues presented in this case supports the Commission's *Amended Report and Order*. The first such decision is from the United States District Court for the District of Montana, Great Falls Division. In *3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications,* CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871, U.S. West Communications ("Qwest") argued that the access charges of a group of rural LECs were unlawful in that they charged access on intra-MTA calls. The District Court agreed and held that the Act and the *Local Competition Order* preempt the LEC tariffs. The District Court concluded that Qwest was "not liable to Plaintiffs for terminating access charges on CMRS (wireless) traffic that both originates and terminates in the same MTA."[54]

In *Atlas Telephone Company, et al. v. Oklahoma Corporation Commission*, et al, 400 F.3d 1256 (10th Cir. 2005) ("*Atlas*"), the United States Court of Appeals for the Tenth Circuit also addressed this issue. The Oklahoma Corporation Commission ("OCC") arbitrated an interconnection agreement under Section 252 of the Act between

[53] *Id.* at 16.

[54] *3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications,* CV 99-80-GF-CSO, 2003 U.S. Dist. LEXIS 24871.

several LECs and CMRS providers. The OCC determined that reciprocal compensation obligations applied to all intra-MTA calls.

Upon review, the Tenth Circuit provides a detailed analysis of the Act and the FCC's *Local Competition Order*. The Tenth Circuit identified the FCC's rules codifying the applicable *Local Competition Order* provisions regarding reciprocal compensation between LECs and CMRS providers, and held that "the mandate expressed in these provisions is clear, unambiguous, and on its face admits of no exceptions."[55] Responding to the LECs' contention that reciprocal compensation does not apply when traffic is transported on an IXC network, the Tenth Circuit held "[n]othing in the text of these provisions [*Local Competition Order* provisions] provides support for the [LECs'] contention." The Tenth Circuit further explained:

> Our reading of the plain language of the relevant statutory and regulatory provisions is further supported by the FCC's definition of "telecommunications traffic" in the context of landline-to-landline exchange in the same regulations. See *47 C.F.R. § 51.703(b)(1)*. *Regulation 51.701(b)(1)* specifically excludes from reciprocal compensation requirements landline traffic exchanged between a LEC and a non-CMRS carrier "that is *interstate or intrastate exchange access"* in nature. Id. *§ 51.701(b)(1)* (emphasis added). Significantly, the Commission

[55] *Atlas Telephone Company, et al. v. Oklahoma Corporation Commission*, et al, 400 F.3d 1256, 1264 (10th Cir. 2005). See also 47 C.F.R. § 51.701(b)(2).

> did not carry forward that same exception into *regulation 51.701(b)(2)*, the operative definition in this case. We agree with the district court's conclusion that the FCC was undoubtedly aware of issues arising when access calls are exchanged, yet chose not to extend a similar exception to LEC-CMRS traffic. *Atlas I, 309 F. Supp. 2d at 1310*. When in exercising its quasi-legislative authority an agency includes a specific term or exception in one provision of a regulation, but excludes it in another, we will not presume that such term or exception applies to provisions from which it is omitted. Cf. *Russello v. United States, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)* (noting that when Congress so acts, courts will presume that the exclusion was intentional).[56]

Responding to arguments by the LECs that various statements in the *Local Competition Order* limit the scope of reciprocal compensation agreements under the Act, the Court concluded:

> In the First Report and Order, the FCC limited application of reciprocal compensation requirements to traffic originating and terminating within a local area. First Report and Order P 1034. In so doing, the Commission determined that reciprocal compensation obligations "do not apply to the transport or termination of interstate or intrastate interexchange traffic." Id. While this statement might be read to preclude reciprocal compensation in

[56] *Id.*

> the instant case, we conclude that the FCC did not intend such a bar to apply in the context of LEC-CMRS traffic. First, in describing the interexchange traffic at issue, it is clear that the FCC had in mind the traditional setting of landline-to-landline calls. The Commission illustrated the traffic at issue by pointing to an LEC-IXC-LEC exchange, this after previously declining to treat CMRS providers as LECs. While this distinction is not dispositive, we note it as relevant. Second, and most significant, the FCC subsequently determined that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under *section 251(b)(5), rather than interstate and intrastate access charges*." Id. § 1036. Although in a preceding paragraph, Id. P 1035, the FCC noted the continuing application of interstate and intrastate access charges in the context of landline communications, it omitted such language when referring to the CMRS communications. We will not ignore the clear distinction drawn by the agency.[57]

The Commission's decision to reject the proposed tariffs is consistent with the decisions of the few courts that have considered these issues. Accordingly, the Commission's *Amended Report and Order* should be affirmed.

[57] *Id.*

F. The Commission's Amended Report and Order is Consistent with the Past Commission Decisions cited by Respondents.

The Commission's earlier attempts to resolve this compensation dispute are consistent with the *Amended Report and Order*. The Respondents' contention that the Commission has also considered this issue in previous cases is incorrect. This is the first case before the Commission to specifically consider the lawfulness of applying an access tariff to local wireless traffic in light of the FCC's *Local Competition Order*.

In the previous Commission decisions cited by the Respondents, the Commission does not make the specific finding that local wireless calls are subject to access charges. In Case Nos. TC-96-112, TC-98-251 and TC-98-340, the Commission did not address the issue of terminating intra-MTA calls.[58] The Commission addressed only the specific allegations raised in the complaints regarding termination of cellular calls, which did not make a distinction between local and long distance calls.

[58] *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,* TC-96-112, *Report and Order,* 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 No. TC-98-251 and TC-98-340, *Report and Order,* June 10, 1999.

Case No. TT-97-524 undoubtedly shows that the Commission understands the prohibition that the FCC placed on charging access for intra-MTA traffic:

> 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 and intrastate access charges.[59]

The Commission's application of the FCC's *Local Competition Order* in the previous cases cited by the Respondents is not an issue in the present case. The lawfulness of the application of those tariffs is also not an issue in this case.

G. Access Charges are Not Allowed on Local Traffic Under the 251(g) Safe Harbor

The Respondents argue that Section 251(g) of the Telecommunications Act is a "safe harbor" that continued "existing compensation structures in existence at the time of enactment of the Act."[60] However, prior to the Act and following the Act, the FCC has consistently held that access charges are applicable to interexchange calls only, and do not apply to terminating local wireless calls. To the extent the Act preserves the "same

[59] *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise its Wireless Carrier Interconnection Service Tariff, PSC MO. NO. 40,* Case No. TT-97-524, *Report and Order,* December 23, 1997.

[60] Respondents' Substitute Brief, p. 41-42.

equal access and nondiscriminatory interconnection restrictions and obligations," it preserves the prohibition of access on local charges.

H. The Constitutional Takings Claim is Baseless

The Respondents ask this Court to find that the Commission's rejection of the tariffs was an unconstitutional taking of property because the Respondents have not been compensated for traffic terminated from wireless providers between February 1998 and February 2001. The Respondents' takings claim also attempts to shift the party responsible for proposing a lawful tariff from the Respondents to the Commission. The Commission should not be held accountable for the Respondents' inability to properly present the issue to the Commission in a lawful manner.

The Respondents' cite to *Smith et al. v. Illinois Bell Telephone Co.,* 270 U.S. 587; 46 S.Ct. 408 (1926).[61] In the present case, a tariff was proposed and rejected. The Commission held a hearing in a timely manner and issued a timely decision. In *Illinois Bell Telephone Co.,* "the commission, for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter."[62] The Commission in the present case timely resolved the matter before it, which was to rule upon the lawfulness of a tariff. The Respondents presented two issues to the Commission: 1) Are the proposed tariffs lawful, and 2) If lawful, should they be approved? The Respondents did not ask the Commission to

[61] Respondents' Substitute Brief, pp. 54-56.

[62] 270 U.S. 587, 591.

establish a rate for the wireless termination service. Instead, they simply petitioned the Commission to review and rule upon the single compensation solution sought by Respondents that applied access charges to all types of traffic.

While the Respondents base their takings argument on their claim that they have not been compensated for wireless traffic terminated to them from February 1998 to February 2001, the Commission notes that neither party has been compensated for terminating the traffic of the other party. Testimony before the Commission suggested that the parties have been operating under a de facto bill and keep compensation arrangement.[63] Under a bill and keep arrangement, the compensation is reciprocal in that neither party collects termination charges from the other party, nor does either party pay termination charges to the other party.

The Commission is responsible for ensuring that "all charges made and demanded by any telecommunications company for any service rendered or to be rendered in connection therewith shall be just and reasonable and not more than allowed by law." See section 392.200.1 RSMo 2000. The rates proposed by the Respondents are unlawful, and under Section 392.200.1 RSMo 2000 and the FCC's *Local Competition Order*, the Commission was required to reject the tariffs.

[63] Rebuttal Testimony of R. Matthew Kohly, Exhibit 6,

CONCLUSION

The Commission approved the wireless termination tariffs in the *Mark Twain* decision to compensate the LECs for terminating wireless traffic. Unlike *Mark Twain,* the Commission was not presented with a lawful tariff in this case. The FCC's *Local Competition Order* creates a legal distinction between terminating local calls and terminating interexchange calls, and prohibits LECs from applying access charges to local calls. Fortunately for the Respondents, the Respondents filed tariffs in *Mark Twain* that were consistent with the FCC's *Local Competition Order* by applying transport and termination and not access charges to the termination of local wireless calls. The *Mark Twain* resolution to the Respondents' compensation problem corrected the mistakes found in the tariffs proposed in this case. Although this does not resolve the compensation issue for the three years between the tariff filing and the *Mark Twain* decision, the resolution of that dispute is not properly before the Court and should not be decided in this case. This case concerns a proposed tariff and its prospective application, and does not appropriately address the issue of what compensation should apply retroactively to traffic terminated in years past.

The Respondents bear the burden of proof in demonstrating, by clear and satisfactory evidence, that the challenged order is unlawful or unreasonable.[64] The Respondents failed to show that the Commission committed any error. The Commission

[64] See Section 386.430 RSMo 2000.

therefore requests that the *Amended Report and Order* it entered in Case No. TT-99-428, and in the cases that were consolidated with it, be affirmed.

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ Marc Poston_____
Marc Poston
Senior Counsel
Missouri Bar No. 45722

Attorney for the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-8701 (Telephone)
(573) 751-9285 (Fax)
e-mail: marc.poston@psc.mo.gov

CERTIFICATE

I hereby certify that the foregoing brief of Respondent Missouri Public Service Commission complies with the limitations contained in Rule 84.06 and that:

(1) The signature block above contains the information required by Rule 55.03;

(2) The brief complies with the limitations contained in Rule 84.06(b);

(3) The brief contains 6,959 words, as determined by the word count feature of Microsoft Word;

(4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format; and

(5) That the attached computer disk has been scanned for viruses and that it is virus free.

(6) There are no lines of monospaced type in the brief itself other than the cover, certificate of service and signature page.

/s/ Marc Poston

CERTIFICATE OF SERVICE

I hereby certify that one copy of Respondents-Appellants' Reply Brief and one diskette containing Respondents-Appellants' Reply Brief have been mailed, postage prepaid, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record this 1st day of June, 2005.