

No. SC86529

IN THE SUPREME COURT OF MISSOURI

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

Respondents,

v.

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

Appellants.

Appeal from the Cole County Circuit Court, Nineteenth Judicial District
Case No. 02CV324810 – Honorable Thomas J. Brown III

SUBSTITUTE BRIEF OF APPELLANT WIRELESS CARRIERS

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INTRODUCTION

Appellant Wireless Carriers¹ ask this Court to vacate the Opinion of the Western District Court of Appeals and reinstate the decision of the Missouri Public Service Commission (“PSC”) for three reasons: (1) Respondents’ proposed tariff revisions cannot now be approved by the PSC given the April 30, 2005 effective date of a new, controlling Federal Communications Commission Order; (2) by seeking to apply tariff revisions which have never been operative to telephone calls completed between 1998 and 2001, the Western District’s Opinion violates established Missouri law prohibiting the retroactive implementation of tariff charges; and (3) the Opinion ignores binding and preemptive federal law which prohibits the application of exchange access charges to local wireless telephone calls.

Respondents are six small rural incumbent local telephone companies, known as local exchange carriers or “LECs.” This proceeding involves Respondents’ attempt to amend their exchange access tariffs so that those tariffs apply to Respondents’ termination of local wireless telephone calls. As the Western District itself recognized in an earlier appeal, Respondents’ access rates are the rates “charge[d] a long-distance company” for “completing a long distance call.” *State ex rel. Sprint Spectrum L.P. v. Missouri PSC*, 112 S.W.3d 20, 23 n.3 (2003) (“*Sprint*”). The PSC rejected Respondents’ attempt to expand the coverage of their exchange access tariffs to local

¹ The “Wireless Carrier” Appellants filing this Substitute Brief are AT&T Wireless Services, Inc. and Southwestern Bell Wireless d/b/a Cingular Wireless LLC.

calls. App. A-34, L.F. 27.² In doing so, the Commission recognized that the FCC had expressly designated the traffic at issue here as local, and had rejected the claim that this traffic could be subject to access charges.

At the outset, an FCC Order issued after the Court of Appeals' decision prohibits the relief Respondents seek here. In *T-Mobile et al. Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, 2005 FCC LEXIS 1212 (rel. Feb. 24, 2005) (the "*T-Mobile* Order") – on which Respondents themselves rely – the FCC recently prohibited the use of state-law tariffs as a basis for seeking compensation for local wireless traffic on a prospective basis. *Reproduced in* App. A-51. Given that the *T-Mobile* Order became effective 30 days after publication in the FEDERAL REGISTER on March 30, 2005, *see* 70 FED. REG. 16,141, the PSC would now be barred from approving Respondents' tariff revisions on remand, *even if* Respondents' arguments otherwise had merit.

Even assuming Respondents could overcome this new federal-law prohibition, the backward-looking relief they seek plainly violates the established Missouri-law prohibition on retroactive ratemaking. As Respondents concede in the introduction to their Substitute Brief (at 10), they are seeking to use these new tariffs to obtain

² Appellants cite to Respondents' Appendix as "App. A-[page #]," and to the Legal File as "L.F. [page #]." Respondents cite to the Commission Case Papers filed in the Court of Appeals, consisting of the papers filed in the agency proceedings, as "C.P. [page # or exhibit #]."

compensation for the termination of wireless calls “during the three year period between February, 1998 and February, 2001” – more than four years ago. The Western District also recognized that the tariff revisions addressed only the 1998-2001 time period. App. A-4. This retrospective change to Respondents’ rate structure, upheld by the Western District, conflicts with established Missouri law prohibiting the retroactive implementation of tariff charges. § 392.220.2, RSMo; *see also, e.g., State ex rel. Utility Consumers Council of Mo., Inc. v. PSC*, 585 S.W.2d 41 (Mo. banc 1979); *Lightfoot v. City of Springfield*, 361 Mo. 659, 669-70, 236 S.W.2d 348, 353 (1951); *State ex rel. Midwest Gas Users Ass’n v. PSC*, 976 S.W.2d 470, 480 (Mo. App. W.D. 1998).

Respondents seek to mask the obvious unlawfulness of the Western District’s ruling by attempting to reshape this action. Respondents wrongly suggest that this case is about the “continued” interpretation of their pre-existing exchange access tariffs. In fact, this case is about *new and amended* exchange access tariffs which each of the Respondents filed, and which the PSC immediately suspended and eventually rejected. Respondents’ tariff revisions sought to expand the coverage of their existing exchange access tariffs, by applying those tariffs to local wireless calls. Respondents’ repeated claim that the new tariffs simply “clarified” their existing tariffs misstates the procedural posture of this action. Had Respondents truly believed their existing exchange access tariffs covered the termination of local wireless traffic, they could have sought such an interpretation from the PSC: They chose not to do so. The PSC plainly viewed Respondents’ proposed tariff revisions as an effort to expand the reach of Respondents’ access rates. Moreover, only the proposed tariff revisions included language that the

Western District held was critical to its (incorrect) conclusion that the new exchange access tariffs were lawful. Respondents' "clarification" argument cannot overcome Missouri's ban on retroactive ratemaking.

Denying Respondents the retroactive rate increases they seek here will not leave them uncompensated, or grant the Wireless Carriers a windfall. To the contrary, during the 1998-2001 time period at issue Respondents were compensated for terminating Wireless Carriers' calls by the Wireless Carriers' reciprocal performance of the same termination services for calls *originating* on Respondents' networks; further, Respondents profited by treating those local landline-to-wireless calls as long-distance traffic, allowing their customers to be charged accordingly.

Finally, the PSC properly found that the *substance* of Respondents' proposed tariff revisions violated federal law. Applicable federal law has long recognized that exchange access does not apply to local wireless traffic. The Western District's ruling that exchange access tariffs can be applied to local wireless calls is, to the Wireless Carriers' knowledge, unprecedented in the United States, and must be reversed.

Respondents present a misleading picture of existing federal law by claiming that the Western District's decision in this case is controlled by its earlier ruling in the *Sprint* appeal. While *Sprint* may have generally approved the use of the state tariff *procedure* to set default rates for local wireless calls, it did not give Respondents *carte blanche* to impose whatever rates they chose on that traffic, without regard to substantive federal law. In addition, Respondents' argument ignores the critical distinction between the "exchange access tariffs" at issue here and the "wireless termination tariffs" at issue in

Sprint. These two types of tariffs differ significantly. First, the exchange access tariffs that Respondents seek to apply here have a materially higher rate than the wireless termination tariffs at issue in *Sprint*. The two types of tariffs also differ in that the wireless termination tariffs approved by the Court of Appeals in *Sprint* charged only for the “transport and termination” of wireless calls. “Transport and termination” are the two rate elements allowed by § 251(b)(5) of the Federal Telecommunications Act of 1996 (the “federal Act” or the “1996 Act”), 47 U.S.C. § 251(b)(5), the very Section of the federal Act that requires LECs to provide reciprocal compensation for *local* traffic. By comparison, Respondents’ exchange access tariffs also include an element called a “carrier common line” charge, an additional rate element which is not provided for under § 251(b)(5) and which is unique to Respondents’ exchange access rates. *See In the Matter of Filing by Southwestern Bell Tel. Co.*, 26 Mo. P.S.C. (N.S.) 344, 355, 359 (Nov. 22, 1983). Because it involved materially different (and lower) rates, *Sprint* does not control the outcome of this case.

STATEMENT OF FACTS

This case arose out of the PSC’s rejection of amended tariffs filed by each of the six Respondents. The tariffs at issue attempted to extend exchange access charges to all wireless traffic, including local wireless traffic, terminated on Respondents’ networks. In *Sprint*, the Western District defined access tariffs as “the rates that local exchange companies (such as the rural carriers) charge *a long distance company* for access to their subscribers in completing *a long distance* call.” 112 S.W.3d at 23 n.3 (emphasis added). This is consistent with federal law, which defines “exchange access” as the “offering of

access to telephone exchange services or facilities for the purpose of origination or termination of telephone *toll* services.” 47 U.S.C. § 153(16) (emphasis added).³

The wireless-to-landline calls at issue here originate and terminate in the same Major Trading Area or “MTA.” These “intraMTA” calls are designated as local by the Federal Communications Commission. The FCC has designated MTAs as the proper scope of a wireless carrier’s local calling area, based on its “exclusive authority to define the authorized license areas of wireless carriers.” *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C. Rcd. 15299 (1996) (“*First Report and Order*”) ¶ 1036 (relevant excerpts reproduced in the Wireless Carriers’ Appendix).

Prior to 1998, Southwestern Bell Telephone Company (“SWBT”) provided a tariff service to wireless carriers to transport and terminate intraMTA calls to Respondents and other rural carriers in the State of Missouri. App. A-5 to A-6. In 1998, the PSC allowed SWBT to withdraw that tariff in favor of an arrangement that allowed SWBT to provide transiting service only. App. A-6. Wireless carriers were directed to seek separate reciprocal compensation arrangements with rural carriers like Respondents for the termination of wireless traffic. *Id.* Despite efforts initiated by a number of wireless carriers to establish these reciprocal compensation arrangements with Respondents and

³ Within the industry, the terms “exchange access,” “switched access,” and “access” are used interchangeably. This Substitute Brief will endeavor to use solely the term “exchange access” to maintain consistency with the federal Act.

other rural carriers, few agreements were reached with rural carriers in Missouri and none with Respondents. C.P., Exh. 9 at 1-4, Exh. 12 at 2-4.

In March of 1999, each Respondent filed the following proposed amendment to its access tariff:

APPLICABILITY OF THIS TARIFF

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 47 U.S.C. 252, as may be amended.

App. A-44, L.F. 37 (quoting proposed tariff language).

On Wireless Carriers' motion, the PSC suspended the tariff revisions before they could become effective. App. A-40, L.F. 33. In a *Report and Order*, originally issued on January 27, 2000, the PSC rejected Respondents' proposed tariff revisions. App. A-47, L.F. 40. In rejecting the tariffs, the PSC found that under federal law "local" traffic is not subject to access charges. App. A-45 to A-46, L.F. 38-39. Respondents' contention to the PSC was that none of the wireless traffic at issue was local due to the manner in which it was delivered to Respondents – namely, through Southwestern Bell as an intermediate, transiting carrier. According to Respondents, the intraMTA calls were not "local", and therefore could properly be subject to access charges, because three carriers, not just two, were involved in completing the calls: the originating wireless carrier, Southwestern Bell providing a transiting function, and the rural LECs that terminated the call. Wireless Carriers, and the Commission Staff, argued that the calls were plainly

local under a geographical test: namely, because they originated and terminated within the boundaries of a single MTA.

Thus, in order to determine whether the wireless originated traffic was “local,” the PSC was called upon to weigh two competing interpretations of federal law, one posed by Respondents and one posed by the PSC Staff, the Wireless Carriers, and the larger incumbent LECs, such as Southwestern Bell Telephone and Sprint Missouri. The PSC found that, under applicable federal law, intraMTA traffic originated by wireless carriers was “local” traffic. App. A-45, L.F. 38. The PSC rejected Respondent’s “count the carriers” approach to determine whether the call was “local”, relying instead on a *geographical* analysis, focusing on whether the call originated and terminated within the same MTA. App. A-46, L.F. 39. As “local” traffic, wireless-originated intraMTA traffic was not subject to Respondents’ access tariffs. *Id.* Respondents appealed the PSC’s *Report and Order* to the Cole County Circuit Court and then to the Western District.

While their first appeal in this case was pending, a number of rural companies filed “wireless termination tariffs” that imposed rates for the termination of the self-same intraMTA wireless traffic, at lower rates. The PSC approved those tariffs in March of 2001, and the Western District affirmed the substance of the PSC’s approval in the *Sprint* case. 112 S.W.3d 20 (2003). In *Sprint*, the Western District rejected an assertion that the state tariff process for implementing the wireless termination tariffs was preempted by the federal Act, holding that the negotiation provisions of the federal Act were not implicated until a wireless carrier sought to implement the negotiation process.

Therefore, from March of 2001 through April of 2005, rural telephone companies in

Missouri were authorized to unilaterally impose wireless termination rates on wireless carriers by tariff in the absence of a negotiated reciprocal compensation agreement.

The Western District's Opinion in this appeal rejected the PSC's conclusion that federal law prohibited the imposition of access charges on local wireless calls. Although its earlier *Sprint* decision had merely held that the state tariff *procedure* was available despite federal law, in this case the Western District held that under the *Sprint* decision federal law was *completely irrelevant* to the charges Respondents could lawfully impose. App. A-12 to A-13. Thus, the Western District held that the federal-law prohibition on the application of access charges to local wireless traffic was inapplicable. *Id.*

Following the Court of Appeals' issuance of the decision under review, the FCC issued its *T-Mobile* Order in March of this year. *T-Mobile et al. Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, 2005 FCC LEXIS 1212 (rel. Feb. 24, 2005), *reproduced in* App. A-51. In the *T-Mobile* Order, the FCC reviewed the propriety of wireless termination tariffs approved by some state commissions, including the Missouri PSC. While the FCC condoned the action of Missouri and other states in establishing wireless termination tariffs, the FCC explicitly prohibited the use of tariffs of any kind on a prospective basis, while acknowledging yet again that neither interstate nor intrastate access charges were properly applicable to the termination of intraMTA wireless traffic. *T-Mobile Order* at ¶ 3, App. A-52.

Prospectively, the FCC resolved the concern of rural LECs like Respondents by giving them the explicit right to initiate negotiation and, if necessary, force arbitration with wireless carriers for reciprocal compensation for local wireless traffic, under the terms

and conditions specified in the Federal Telecommunications Act of 1996. *Id.* at ¶ 14, App. A-59.

ARGUMENT

This Court should vacate the Western District's October 5, 2004 Opinion and reinstate the PSC's *Report and Order*.

In its Opinion, the Appellate Court takes the needless, novel and inappropriate step of holding that exchange access rates may be applied to local wireless-originated traffic if the tariffs imposing such charges include language explicitly subordinating the tariff to negotiated agreements. In fact, Respondents' preexisting access tariffs did not include the required language; the necessary language is added solely by the tariff revisions the PSC rejected. Moreover, the FCC has now prohibited the use of *any* tariffs as a vehicle for seeking compensation for the termination of intraMTA wireless traffic, on and after April 30, 2005. Instead, the FCC has given companies like Respondents the right to initiate reciprocal compensation negotiations with wireless carriers to obtain compensation for the termination of local traffic.

Worse, the Court of Appeals suggested that the PSC was required to retroactively compensate Respondents by applying the amended access tariffs to a period ending more than four years ago. Even if the PSC, on remand, could lawfully approve amended access tariffs that included the language required by the Western District, those tariffs could not be applied retroactively to traffic terminated between 1998 and 2001. Any suggestion in the Opinion to the contrary disregards established Missouri law prohibiting retroactive ratemaking. While Respondents attempt to avoid this issue by repeatedly

suggesting that this case is about their preexisting access tariffs instead of their amended exchange access tariffs, the only issue properly before PSC and therefore before the Western District and this Court is the legality of Respondents' amended exchange access tariffs.

Even if Respondents could avoid the dispositive effect of *T-Mobile* or Missouri's prohibition on retroactive ratemaking, exchange access rates simply cannot lawfully be applied to local wireless traffic. The inapplicability of access charges to local wireless calls is a longstanding substantive and preemptive principle of federal law, which the Western District improperly ignored by incorrectly equating its decision in the *Sprint* case with the issue in this case. The FCC's prohibition on applying access charges to local wireless calls predates, and is independent of, the 1996 Telecommunications Act, and the PSC correctly enforced that prohibition in rejecting Respondents' tariff revisions.

I. The FCC's *T-Mobile* Order, Which Became Effective on April 30, 2005, Now Prevents the PSC from Approving Respondents' Proposed Tariff Revisions.

The Western District's Opinion orders the PSC, on remand, to approve Respondents' proposed tariff revisions. Subsequent to the Court of Appeals' decision, however, the FCC issued a binding order which expressly and unambiguously prohibits the approval of state-law tariffs imposing charges on intraMTA wireless calls. *T-Mobile et al. Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs*, CC Docket No. 01-92, 2005 FCC LEXIS 1212 (rel. Feb. 24, 2005), reproduced at App. A-51. Whatever the merits of the Court of Appeals' decision on the date it was issued,

the FCC's later *T-Mobile* Order now creates a separate, independent federal-law obstacle to the PSC's approval of Respondents' tariff revisions.

The FCC's *T-Mobile Order* addressed a claim by wireless carriers "that wireless termination tariffs were not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic." *T-Mobile Order* at ¶ 1, App. A-51. In *T-Mobile*, the FCC allowed that, "because the current rules do not explicitly preclude such arrangements," 70 FED. REG. at 16,144 col. 2,⁴ state-law tariffs may have been an appropriate mechanism *in the past* for setting "default" charges for the termination of local wireless calls.⁵

Without regard to past law or practice, however, the FCC stated in its *T-Mobile Order* that, "[g]oing forward, * * * we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations

⁴ The FCC formally published the rule amendments required by its *T-Mobile Order*, with a synopsis of its declaratory ruling, in the FEDERAL REGISTER. This FEDERAL REGISTER notice is reproduced in Wireless Carriers' Appendix.

⁵ Despite the FCC's begrudging acceptance of the *past* use of the state-law tariff *procedure*, however, as discussed *infra* § III.A, *T-Mobile* clearly recognizes that such tariffs could not impose *access* rates on this traffic, as Respondents seek to do here. Indeed, the use of the term "non-access CMRS traffic" to describe intraMTA wireless calls throughout the Order clearly signals that access rates cannot lawfully applied to such calls.

for non-access CMRS traffic pursuant to tariff.” *T-Mobile* Order at ¶ 9, App. A-56. The FCC went so far as to nullify any *previously-approved* state-law tariffs as of April 30, 2005:

We find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act. Accordingly, we amend § 20.11 of the Commission's rules [47 C.F.R. § 20.11] to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff. Therefore, any existing wireless termination tariffs shall no longer apply upon the effective date of these amendments to our rules. After that date, in the absence of a request for an interconnection agreement, no compensation will be owed for termination of non-access traffic. We take this action pursuant to our plenary authority under sections 201 and 332 of the Act.

70 FED. REG. at 16,141 col. 3.

The FCC explained that it had chosen to prospectively outlaw all tariffs, despite any hardships this might impose on rural LECs:

The Commission considered and rejected the possibility of permitting wireless termination tariffs on a prospective basis. Although establishing contractual arrangements may impose burdens on CMRS providers and LECs, including some small entities, that do not have these arrangements in place, we find that our approach in the Order best balances the needs of incumbent LECs to obtain terminating compensation for

wireless traffic and the pro-competitive process and policies reflected in the 1996 Act.

70 FED. REG. at 16,144 col.3

In short, the FCC clearly held that, after the April 30, 2005 effective date of its *T-Mobile* Order, intraMTA wireless traffic cannot be subject to *any* tariff arrangement. Therefore, the FCC has now explicitly ruled – and without regard to whether the Western District's ruling was otherwise correct – that tariffs simply cannot be applied to intraMTA wireless calls henceforth. Therefore, under *T-Mobile* the PSC simply could not, on remand, comply with the Court of Appeals' direction to approve Respondents' tariffs, and the Court of Appeals' decision should be vacated for that reason alone.

II. The Western District Erroneously Approved a Retroactive Revision to Respondents' Rates for Calls Completed Between 1998 and 2001.

Even in the absence of the *T-Mobile* Order, Respondents' tariff revisions could not lawfully operate. In its Opinion, the Western District acknowledged that its own prior order in *Sprint* approved wireless termination tariffs as a means for Missouri carriers to unilaterally obtain compensation for terminating intraMTA wireless traffic in the absence of negotiated reciprocal compensation agreement. In an apparent attempt to reconcile the fact that it had already addressed the Respondents' concern about compensation through the wireless termination tariffs approved in the *Sprint* decision, the Western District stated:

The primary issue now in dispute is whether the switched access tariffs can be applied to intraMTA traffic terminated in the rural companies' networks

*from February 1998 through February 2001, the three-year period prior to the implementation of the termination tariffs approved in **Sprint**.*

App. A-10 (emphasis added.)

By its own admission, the Western District was directing its Opinion only to the period of time -- ending more than four years ago -- between the change in SWBT's tariff and the approval of the first wireless termination tariffs. *See also* Respondents' Substitute Br. at 13 n.1 ("the instant case involves application of state access tariffs for calls delivered during the three year period . . . (between February of 1998 and February of 2001)"); *id.* at 36-37 ("the narrow question that remains in this case is whether [Respondents'] state access tariffs applied to intraMTA wireless traffic that was delivered in the absence of an approved agreement between February of 1998 and January of 2001").

In approving Respondents' proposed tariff revisions, however, the Western District ignored that those proposed tariffs *have never been in force*. Respondents did not even *file* their proposed tariff revisions until March 1999, App. A-39 to A-40, L.F. 32-33, and the Western District offered no justification for applying the tariff revisions beginning in February 1998, even before their filing. Moreover, when the proposed access tariffs were filed in March of 1999, they were suspended by order of the PSC before they went into effect. App. A-40, L.F. 33. Following that suspension, the Commission rejected a procedural schedule offered by Respondents, "on the grounds that the dates in the motion would fall after the statutory deadlines placed on the Commission." App. A-41, L.F. 34. In response, Respondents suggested as one

alternative that the Commission “extend the tariff date so that the first procedural schedule would be acceptable.” *Id.* The Commission adopted this proposal, and “[o]n August 10, 1999, * * * entered its order * * * acknowledging the extension of the effective dates of the tariffs *until December 15, 1999.*” App. A-42, L.F. 35 (emphasis added).

Thus, although the Court of Appeals’ disposition suggests that the PSC might apply the tariffs retroactively to February 1998, Respondents agreed before the PSC to delay the effectiveness of those tariffs *until mid-December 1999*. Ultimately, the Commission rejected the tariff revisions in a January 2000 *Report and Order*. Respondents’ Substitute Br. at 29-30. While the Western District remanded that determination for further factual findings in 2001, 62 S.W.3d 545, the Commission re-affirmed its rejection of the tariffs in the *Report and Order* under review.

A. Missouri’s Ban on Retroactive Ratemaking Bars the Application of Respondents’ Proposed Tariff Revisions to Telephone Calls Completed More than Four Years Ago.

As explained above, no tariff revisions extending Respondents’ access rates to intraMTA wireless calls have ever been in effect; in particular, no such tariff revisions were in effect between February 1998 and February 2001, the only period to which the Western District’s Opinion applies them. Because they were not in effect at that time, any attempt to apply Respondents’ tariff revisions to traffic delivered during that time would violate a well-established principle of Missouri public utilities law: tariffs cannot

be applied retroactively to services performed prior to the tariff's approval. The statute governing telecommunications rates makes this plain:

No telecommunications company shall charge, demand, collect or receive a different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect *at that time*.

§ 392.220.2, RSMo (emphasis added).

State ex rel. Utility Consumers Council of Mo., Inc. v. PSC, 585 S.W.2d 41 (Mo. banc 1979) explains that, under Missouri's statutes, neither the PSC, nor a reviewing court, may order that a rate be retroactively applied to services previously performed:

The commission has the authority to determine the rate to be charged. * * *

It may not, however, re-determine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process.

* * *

* * * To permit [utilities] to collect additional amounts simply because they had additional past expenses not covered by [their existing approved tariffs] is retroactive rate making * * *. * * * [U]nder the prospective language of the statutes, [past expenses] cannot be used to set future rates to recover for past losses due to imperfect matching of rates with expenses.

585 S.W.2d at 58, 59 (citations omitted); *accord Lightfoot v. City of Springfield*, 361 Mo.

659, 669-70, 236 S.W.2d 348, 353 (1951) ("The Commission fixes rates prospectively

and not retroactively. * * * Our court cannot make the Commission do retroactively and our courts cannot retroactively do that which the Commission, or other rate-making body, only does prospectively. * * * [P]roperty rights devolve upon effective lawful rate-fixing orders.”); *State ex rel. Midwest Gas Users Ass’n v. PSC*, 976 S.W.2d 470, 480 (Mo. App. W.D. 1998) (finding Purchase Gas Adjustment clause did not violate retroactive ratemaking doctrine where the adjustment “applied only to future customers on future bills. The companies are not allowed to adjust the amount charged to past customers either up or down.”).

Respondents’ amended access tariffs cannot be applied retroactively. But the Court of Appeals’ Opinion attempts to address only a time period that is wholly in the past. That cannot be done through a current tariff amendment without violating the prohibition against retroactive ratemaking.

The Western District addressed a similar situation in *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882 (Mo. App. W.D. 1981). In *Fraas*, the PSC Order under review, dated July 19, 1979, allowed a utility only part of the rate increase it had requested. While the utility sought judicial review of that PSC Order, it also filed two subsequent tariffs specifying rates and terms for the same service.

The rates currently being collected by the Company are governed by the order of May 27, 1981, and the new tariffs filed thereunder. The Commission says the order of July 19, 1979, and the tariffs filed under it, which are the subject of the present appeal, have been superseded, have ceased to have any present effect, and any error therein no longer is of any

consequence because there is no action which can now be taken by way of correction.

The Commission's argument correctly states the general rule. Any error which may have been made against the Company by reason of the order dated July 19, 1979, cannot now be corrected retroactively to give relief for the period of time that the old tariffs here questioned were in effect. Nor can those old tariffs now be amended prospectively, because the 1979 tariffs have been superseded by subsequent tariffs filed and approved. It is because of this inability by the reviewing court to give any relief, that issues under old, superseded tariffs are generally considered moot and therefore not subject to consideration.

Id. at 884-85 (citations omitted); *see also State ex rel. Southwestern Bell Tel. Co. v. PSC*, 645 S.W.2d 44, 51 (Mo. App. W.D. 1982) ("Under a considerable line of cases decided by this court, * * * the fact that new tariffs have gone into effect renders most questions concerning the former tariff moot.").⁶

⁶ Although *Fraas* and *Southwestern Bell* ultimately found certain issues reviewable, under an exception to mootness for issues which are "of a recurring nature," *Fraas*, 627 S.W.2d at 885, Respondents can make no such showing here. Since *T-Mobile* now prohibits the use of any tariff, no issue concerning the propriety of imposing exchange access rates on intraMTA wireless calls by tariff will ever recur.

The chronology of this case is identical to *Fraas*: after the Commission's disapproval of the tariff revisions at issue here, Respondents filed -- and the PSC and the Western District approved -- *another* tariff to govern the same service, the wireless termination tariff. The Court of Appeals' Opinion acknowledges that the issue is now settled by those later tariffs. App. A-10. In these circumstances, and given the ban on retroactive ratemaking, *Fraas* teaches that issues concerning Respondents' tariff revisions are moot and non-justiciable.

B. Respondents Cannot Evade Missouri's Well-Established Prohibition on Retroactive Ratemaking by Claiming that their Tariff Revisions Merely "Clarified" the Scope of their Pre-Existing Tariffs.

Respondents attempt to finesse the clearly retroactive effect of the Court of Appeals' ruling by virtually ignoring the amended tariffs that were the basis of this case (and which the PSC rejected), and instead claiming that what they sought in this proceeding was merely to "clarify" the applicability of their preexisting access tariffs to the Wireless Carriers' local calls. For example, Respondents' repeatedly suggest that this case is about the interpretation and "continued" application of their pre-existing access tariffs. *E.g.*, Substitute Br. at 12 (statement of the question presented for review), *id.* at 20 (characterizing amendments as "designed to clarify that their existing access tariffs and rates would continue to be applied"); *id.* at 37 (arguing that "proposed revision" did

not change Respondents' exchange access rates).⁷ Respondents' preexisting tariffs, however, were not the subject of the PSC's action, and were not the subject of the Western District's Order. The dispute before the PSC was not whether Respondents' *existing* access tariffs could be applied to local calls, but whether the tariff *amendments* Respondents proffered were lawful and should be approved.

The PSC's *Report and Order* plainly rejects any contention that Respondents' tariff revisions merely "clarified" the *status quo*. Instead, the PSC clearly saw Respondents' tariff revisions for what they were – an effort to *expand the scope* of Respondents' existing exchange access tariffs, to apply those tariffs for the first time to intraMTA wireless calls. Thus, in describing the effect of the tariff revisions, the PSC cited to Respondents' own testimony to show the *changes* the tariff revisions would wreak:

Alma testified that its current tariff applies access rates to traffic which, for example, originates from a CLEC, transits SWBT's network and terminates in an Alma exchange [*i.e.*, *inter-exchange* or long-distance traffic]. The proposed tariff language, however, *would enable* Alma to

⁷ Alternatively, Respondents suggest through their explanation of the Missouri MTAs (Substitute Br. at 21-22) that much of the traffic at issue is *interMTA*. There is no dispute, however, that access applies to interMTA traffic. The only dispute is whether it can be applied to *intraMTA* traffic. Respondents' discussion of the Missouri MTA boundaries is little more than a red herring.

charge access rates to wireless carriers, as well as CLECs, that originate calls that ultimately terminate in an Alma exchange.

App. A-44, L.F. 37 (emphasis added). The PSC's *Report and Order* also repeatedly states that the application of access rates to the calls at issue would *only* be allowed if the tariff revisions were approved:

In the present case, *if its tariffs were approved*, Alma 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 [FCC's] First Report and Order.

App. A-45 to A-46, L.F. 38-39 (emphasis added); *see also* App. A-43, L.F. 36 (stating issue: "whether the local telephone companies involved are allowed to amend their tariffs *so that they can apply* their switched access rates to traffic originating on a commercial mobile radio service (CMRS) that terminates in their territory"; emphasis added); App. A-48, L.F. 41 ("*If approved*, this tariff revision would mandate application of access charges to all traffic exchanged between the [Respondents] and the wireless carriers in Missouri, unless superseded by an agreement."; emphasis added).

The entire approach taken by the PSC in its *Report and Order* – considering, and deciding, the lawfulness of the proposed tariff revisions standing alone – shows that the PSC recognized that these tariff revisions do something *new* and *different*: apply access charges to *local* telephone calls.

The PSC is the agency statutorily charged with regulating public utilities – including local telephone companies – in Missouri, and reviewing courts defer to the

Commission's resolution of issues within its particular expertise. *See, e.g., Friendship Village of South County v. PSC*, 907 S.W.2d 339, 345 (Mo. App. W.D. 1995). One such issue is the interpretation of existing tariff language: unless "arbitrary, capricious or unreasonable," an abuse of discretion, or unsupported by substantial competent evidence, Missouri courts will not overturn the PSC's interpretation of a utility's existing tariffs. *Id.* at 349 (challenge to PSC's interpretation of tariff in resolving which of various provisions applied to particular customer); *State ex rel. Inter-City Bev. Co. v. Missouri PSC*, 972 S.W.2d 397, 401 (Mo. App. W.D. 1998) (same).

The PSC's operative interpretation here – that Respondents' existing access tariffs would not apply to local wireless calls without the tariff revisions Respondents proposed – clearly satisfies this deferential standard of review. Respondents' pre-existing tariffs themselves state that "[a]ccess services * * * are offered by the Company to *intrastate interexchange customers (ICs) * * **." *See* Alma's First Revised Tariff Sheet No. 40.1, Tariff PSC Mo. No. 3 (eff. Jan. 1, 1987; emphasis added) (reproduced in Wireless Carriers' Appendix). As explained *infra* § III.A, under at least 20 years of FCC decisions intraMTA wireless calls simply are not designated as "interexchange" traffic, since they begin and end within a single MTA, the wireless carriers' federally defined local calling area.

The substance of the Court of Appeals' ruling is itself inconsistent with Respondents' present "clarification" claim. In ruling that Respondents' new tariff revisions could be applied to intraMTA wireless traffic, the Western District's Opinion required that those tariffs be "*expressly* subordinate to the [federal] Act's requirements."

App. A-11 (citing *Sprint*, 112 S.W.3d at 25-26; emphasis added).⁸ Such express subordination language did not exist, however, in Respondents' pre-existing tariffs. The lack of this express subordination language in Respondents' pre-existing access tariffs provides an additional reason those pre-existing tariffs could not have been applied to the traffic at issue here without modification, even on the Western District's reasoning.

Although Respondents repeatedly complain (*e.g.*, Substitute Br. at 27) that the PSC "did not address the legal question of what compensation would be applied to intraMTA wireless calls delivered before the approval of a reciprocal compensation agreement," the fact is that Respondents did not put that question before the PSC. The PSC did not have a "roving commission" to establish an appropriate compensation level for Respondents. What Respondents put before the PSC were proposed amended tariffs, and the PSC's only lawful responses to those revisions was to approve or reject them. Thus, the only question before the PSC was -- and the only question now before this Court is -- the validity of the proposed amended tariffs. This Court should reject any suggestion by Respondents that this case is about the interpretation of their preexisting

⁸ Significantly, in *T-Mobile* even the FCC cited the presence of explicit subordination language in condoning the prior use of wireless termination tariffs. *T-Mobile* Order at ¶ 13, App. A-58. The FCC specifically noted that, in a submission to the *T-Mobile* docket, Respondents' counsel had emphasized that the wireless termination tariffs approved in *Sprint* "are expressly subordinate to approved agreements under the Act." *T-Mobile* Order at n.53, App. A-58 n.53.

exchange access tariffs, or some sort of generalized inquiry to determine appropriate compensation for services performed years ago.

C. Denying Respondents the Retroactive Rate Increase they Seek Does not Leave them Without Compensation.

Respondents complain that applying their access tariffs was (and is) the only way they could obtain compensation for telephone calls terminated from the wireless carriers between 1998 and 2001. To the contrary, as the Western District's own earlier decision in the *Sprint* case shows, Respondents in fact *had* a remedy under Missouri law to recover any costs of terminating the Wireless Carriers' local calls: the wireless termination tariff mechanism upheld in *Sprint*. And, under the FCC's recent *T-Mobile* Order, Respondents also have a remedy going forward: the ability to initiate negotiations for interconnection agreements under the federal Act.

To the extent Respondents now have no available means to recover their purported termination costs for the period from February 1998 through February 2001, that is the product of their own actions: namely, filing tariffs that sought to impose unreasonable, and indeed unlawful, access rates on their termination of local wireless calls. As *Sprint* demonstrates, if they had instead filed wireless termination tariffs seeking to recover only the lawful costs of transport and termination, those tariffs may well have been approved. Respondents' attempt to go back and "fix" their earlier failure to file just and reasonable tariff rates directly contradicts the rule against retroactive ratemaking. See *State ex rel. Utility Consumers Council of Mo., Inc.*, 585 S.W.2d at 58-59.

Moreover, Respondents' claim that they were not being compensated for terminating wireless calls between 1998 and 2001 is inaccurate. While Respondents may not have been collecting cash revenues for calls that the Wireless Carriers originated, they were also not paying for calls their own customers originated for termination on the networks of the Wireless Carriers. C.P., Exh. 7, at pp. 2-3. The fact that both Respondents and the Wireless Carriers were terminating local traffic to each others' networks – without compensation in either direction – essentially created a *de facto* "bill and keep" arrangement between them, whereby each party retained the compensation it received from its own customers, and made no payment to the other carrier involved in completing the call. As explained by AT&T Wireless witness Kurt C. Maass:

[I]t must be kept in mind that the Mid-Missouri Group Companies as well as similarly situated incumbent local exchange companies do not pay [AT&T Wireless] for the termination of the traffic they deliver to [AT&T Wireless] either. Moreover, it is important to recognize that for relatively de minimis traffic (in most cases, less than 5,000 minutes of use per month) that it is common practice for carriers simply to exchange traffic on a bill and keep basis.

C.P., Exhibit 7, at 3.

Respondents actually added an additional wrinkle to this *de facto* "bill-and-keep" arrangement. Beyond paying the Wireless Carriers no termination fee, Respondents engaged in a practice which enriched them at the expense of their own customers. They accomplished this by treating the intraMTA calls they sent to the Wireless Carriers as

long-distance calls, requiring their customers to dial "1+" to make those calls, and routing the calls to an inter-exchange (or long-distance) carrier (an "IXC"). C.P. Exh., D. Stowell Sur-Rebuttal Testimony at 22. As with all other long-distance or "toll" calls, the IXC directly charged Respondents' customers a per-minute charge for making this *local* call (as opposed to including the cost in the flat monthly local phone charge the customer had already paid Respondents). And, as with all other long-distance calls, *the IXC then paid Respondents a per-minute "originating access" fee*, which was the self same exchange access charge Respondents seek to impose here on the Wireless Carriers. Therefore, Respondents *were* receiving compensation under the then-existing arrangement.

Significantly, the Iowa Utilities Board rejected Iowa ILECs' use of just this scheme. In *In re Exchange of Transit Traffic*, 2002 WL 535299 (Iowa Utils. Bd. March 18, 2002) (reproduced in Wireless Carriers' Appendix), the Board held that ILECs could not avoid treating their own customers' intraMTA calls as local by choosing – like Respondents – to route this traffic through an IXC.

INS [an ILEC] also argues that the Proposed Decision and Order failed to recognize that the customers of the independent LECs have the right to dial 0+ or 1+ to reach wireless customers with an intra-MTA wireless number, thereby using their preferred interexchange carrier (IXC) to complete the call.

* * *

INS's argument assumes that customers should pay toll charges in order to make local calls to wireless customers. However, it is obvious that

if the customers were given the choice between making a local call to a wireless customer or making a toll call to the same wireless customer, most customers would likely waive their "right" to make a toll call using their preferred interexchange carrier in favor of making the same call as a local one, with no additional charges. The Board will affirm the Proposed Decision and Order on this issue and *direct the independent LECs to allow their customers to dial these local calls as local calls.*

Id. at *9-*10 (emphasis added; record citations omitted); *see also In re Exchange of Transit Traffic*, 2002 WL 1277812, at *5 (Iowa Utils. Bd. May 3, 2002) (re-affirming decision on rehearing) (reproduced in Wireless Carriers' Appendix).

Thus, far from being victimized, Respondents profited from the prior arrangement. To the extent they desired to collect reasonable wireless termination rates from the Wireless Carriers, the *Sprint* decision shows that they could have done so. There is no reasonable basis for Respondents to demand the contravention of the long-standing state law principle forbidding retroactive rate-setting, in order for Respondents to be further compensated for this traffic, and to "rescue" them from a situation largely of their own making.

III. Under Governing Federal Law, Respondents' Exchange Access Tariffs Cannot Lawfully Be Applied To Local Wireless Calls. (Response to Respondents' Point I)

Even if neither *T-Mobile* nor Missouri's ban on retroactive ratemaking barred approval of Respondents' proposed tariff revisions, the PSC correctly held that those

revisions are contrary to established and preemptive federal law. As the Court of Appeals in *Sprint* recognized, switched access tariffs are “the rates that local exchange companies (such as [Respondents]) charge a long distance company for access to their subscribers in completing *a long distance call*.” 112 S.W.3d at 23 n.3 (emphasis added). Consistent with longstanding principles of telecommunications law and with *Sprint*, the PSC in this case specifically found that wireless calls that “originate and terminate in a single major trading area *are local calls*” (App. A-48, L.F. 41; emphasis added) and that “[l]ocal traffic is not subject to switched access charges.” App. A-49, L.F. 42.

A. Long-Standing Federal Substantive Law Bars Treating Local Wireless Calls as Interexchange or Toll Traffic. (Respondents’ Points I.2, I.6)

The Court of Appeals’ Opinion is flatly inconsistent with the FCC’s long-standing and preemptive policy of treating wireless-originated intraMTA calls as local and specifically not as “interexchange.” *See, e.g., In re MTS and WATS Market Structure*, 97 F.C.C.2d 834 ¶ 149, 1984 WL 251063 (Feb. 15, 1984) (“we have consistently treated the mobile radio services provided by [wireless carriers] . . . as local in nature”; wireless carriers “are not and should not be treated as interexchange carriers”); *In re the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 1986 FCC LEXIS 3878 ¶ 3 (March 5, 1986) (local exchange carriers cannot treat wireless carriers as “end users or interexchange carriers” subject to “unilaterally imposed access charges”); *Policy Statement on Interconnection of Cellular Systems*, 51 Fed. Reg. 10838, 10838 n.1 (F.C.C. March 31, 1986) (recognizing the agency’s long-standing position “that radio common carriers and cellular carriers [a]re not ‘interexchange carriers’ subject

to the imposition of access charges for exchange access”). (Each of the foregoing FCC decisions is reproduced in Wireless Carriers’ Appendix.)

Under its long-standing policy, the FCC has explicitly refused to allow LECs to impose tariffs against wireless carriers without first negotiating agreements. *See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, Declaratory Ruling, 2 FCC Rcd 2910, 2916, ¶ 56 (1987) (FCC “expect[s] that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection”); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Report No. CL-379, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2370-71, ¶¶ 13-14 (1989).

The FCC’s *First Report and Order*, issued in 1996, also makes emphatically clear that wireless calls which originate and terminate in the same Major Trading Area (“MTA”) are “local” calls, to which access charges cannot apply.

Because wireless license territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, *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.

¶ 1036 (emphasis added); *see also* 47 C.F.R. § 51.701(b)(2).

The FCC reiterated this same point later in its Order:

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' location 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.

¶ 1043 (emphasis added; footnote omitted).

The FCC recently reiterated that position in its *T-Mobile* Order. In laying a foundation for its decision, the FCC delineated the very different treatment accorded to local wireless traffic and non-local wireless traffic. For example, in the first paragraph of its decision, the FCC identified the traffic subject to its decision as “non-access CMRS traffic,” and then defined the term “non-access traffic” as “traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to Section 251(b)(5) of the [federal] Act. . . .” *Id.* at ¶ 1 & n.6, App. A-51 to A-52. Moreover, in reciting the bedrock principles of its *First Report and Order*, the FCC noted:

The Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) *is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges.* The Commission

reasoned that, because wireless license territories are federally authorized and vary in size, the largest FCC-authorized wireless license territory, *i.e.*, the MTA, would be the most appropriate local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5).

T-Mobile Order at ¶ 3, App. A-52 (footnotes omitted; emphasis added).

Significantly, in its *T-Mobile Order*, the FCC justified the prior application of wireless termination tariffs to local wireless calls on the basis that “it would not have been unlawful for incumbent LECs to assess *transport and termination* charges based on a state tariff.” *Id.* at ¶ 10, App. A-56 (emphasis added). Not coincidentally, transport and termination charges are the rate elements -- the only rate elements -- included in the definition of reciprocal compensation under Section 251(b)(5). By comparison, exchange access tariffs, including Respondents’ exchange access tariffs include an additional rate element, referred to as a “carrier common line” charge. That rate element is *not* included in Section 251(b)(5), and is not within the FCC's acceptance of *prior* wireless termination tariffs in *T-Mobile*.⁹

In its *T-Mobile Order*, then, the FCC drew a bright-line distinction between exchange access tariffs (which apply *only* to long-distance or toll traffic) and wireless termination tariffs (which it found could, in the past, lawfully be applied to “non-access”

⁹ A \$0.02/minute rate element included in the wireless termination tariffs, as a substitute for the carrier common line charge element of access rates, was rejected by the Western District in *Sprint* as arbitrary. 112 S.W.3d at 27-28.

local wireless traffic). The *T-Mobile* Order belies Respondents' studied attempt to flatten the careful distinction between access (non-local) wireless traffic and non-access (local) wireless traffic, through Respondents' rhetorical suggestion that all tariffs are the same. *E.g.*, Substitute Br. at 38-40. Respondents' attempt to ignore, blur or bury this critical distinction undermines their entire position.

Putting aside Respondents' obfuscations, the lesson of the *T-Mobile* Order can be summarized as follows:

- intraMTA wireless traffic is local traffic;
- Section 251(b)(5) applies to local traffic; and
- Section 251(b)(5) local traffic is "non-access."

Thus, the FCC clearly restated its fundamental premise that intraMTA wireless traffic is not subject to exchange access charges.

Although the FCC explained in the *T-Mobile* Order (at ¶ 11, App. A-57) that its prior orders did not flatly prohibit the use of the state-law tariff device to set rates, the FCC did not in any way suggest that its orders would have allowed the imposition of exchange access charges in such tariffs. Moreover, the FCC confirmed that, before the 1996 federal Act, tariffs could "be filed only after carriers [had] negotiated agreements." *Id.* Again, the FCC made clear that the unilateral application of exchange access to local wireless traffic was contrary to federal law.

Because federal law clearly forbids the application of access charges to local traffic, all parties before the PSC in this case focused on the determination whether the wireless-originated intraMTA traffic was local or long distance, an issue clearly

controlled by the federal Act and FCC orders. The dispute between the parties was whether the definition of long distance traffic under the controlling federal authority was properly based on the number of carriers involved in the call (the position of Respondents) or based on the geographical location of the parties involved in the call (the position of Staff, the Wireless Carriers, and the large Missouri LECs). *See* App. A-44 to A-46, L.F. 37-39. The PSC correctly concluded that the nature of the call was determined by the geographical location of the parties, not by the number of carriers involved, thus leading to its findings of fact and conclusions of law that wireless-originated intraMTA traffic was local, a controlling finding which the Western District's Opinion does not question or disturb.

The PSC's conclusion is not only correct, it is consistent with the later decision in *Atlas Telephone Co. v. Oklahoma Corporation Commission*, 400 F.3d 1256 (10th Cir. 2005), which rejects another LEC's identical argument that intraMTA wireless traffic "qualifies as exchange access traffic because it transits the IXC network" of an intermediate carrier. *Id.* at 1266. Citing the FCC's *First Report and Order*, ¶ 1035, the Tenth Circuit held that federal law prohibited the application of access charges to intraMTA wireless calls, no matter how many carriers were involved in a call's completion.

Consistent with the Missouri PSC's conclusion in this case, the Iowa Utilities Board ("IUB") found that application of switched access charges to wireless-originated intraMTA traffic is prohibited by federal law. *See In re Exchange of Transit Traffic*, 2001 WL 1672368, at *6, *8 (Iowa Utils. Bd. Nov. 26, 2001) (Proposed Decision), *aff'd*,

2002 WL 535299 (March 18, 2002) (reproduced in Wireless Carriers' Appendix).

Notably, this reasoning is also consistent with the Western District's observation in *Sprint* that switched access refers to "the rates that local exchange companies (such as the rural carriers) charge a long distance company for access to their subscribers in completing a *long distance call*." 112 S.W.3d at 23 n.3 (emphasis added).

Repeatedly, Respondents fail to acknowledge the difference between exchange access tariffs and other types of tariffs, particularly wireless termination tariffs. For example, in an attempt to avoid clear federal law prohibiting the application of exchange access to local wireless calls, Respondents argue that that the FCC has held that tariffs remain "a viable compensation method." Substitute Br. at 39 (citing *In the Matter of the Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192; 2002 FCC LEXIS 3262, Declaratory Ruling, rel. July 3, 2002, App. A-91). That case, however, was between a wireless carrier and an *interexchange carrier*, and discussed the circumstances under which a wireless carrier might be entitled to access charges. The FCC's approval of one kind of tariff cannot be reasonably be read as a general approval of any type of tariff in any circumstance.

Similarly, Respondents argue (Substitute Br. at 37-38) that the Western District in *Sprint* recognized prior approval of access rates. While access rates may have been approved as lawful and reasonable for *long-distance* traffic, however, the traffic at issue in this case is not toll traffic. The Court of Appeals in *Sprint* was never asked to pass on whether access rates could lawfully be applied to intraMTA traffic.

Ultimately, and as explained above, *Sprint* and the *T-Mobile* Order considered the validity of “wireless termination tariffs,” not “exchange access tariffs.” Neither the *Sprint* case nor the *T-Mobile* Order support the very different conclusion that much higher exchange access rates can be applied to the termination of local wireless traffic.

B. *Sprint* Does Not Dictate the Outcome of this Case. (Respondents’ Points I.1, I.5)

The Western District’s Opinion erroneously equated *Sprint* with this case. The starting point in both cases was the application of the federal law, but the relevance of federal law was very different. While *Sprint* addressed the preemptive scope of the 1996 Act's *procedures*, here the PSC relied on the *substance* of federal law. Ultimately, *Sprint* concluded that federal *procedures* did not preempt state tariffing procedures, until those federal procedures were invoked by wireless carriers, 112 S.W.3d at 24-25, an outcome the FCC begrudgingly condoned retrospectively in the *T-Mobile* Order. Here, however, the PSC relied on -- and the Western District ignored -- the long-standing *substantive* principle that intraMTA wireless-originated calls are local, and the bedrock principle that local calls are not subject to exchange access charges.

Unlike the *Sprint* case, no party to this case argued that federal law did not apply. Respondents’ own argument as to why switched access could be applied was itself based on the federal Act and the FCC’s *First Report and Order*. Therefore, unlike the decision in the *Sprint* case, which turned on whether the federal Act’s procedures came into play before the invocation of Section 251(c) negotiations, the PSC’s decision in this case relied solely on competing interpretations of the federal Act. By holding that the federal

Act need not be applied, the Court of Appeals' Opinion reached a conclusion that was outside of the tariff approval that the PSC addressed, a conclusion that is in clear violation of federal law, *i.e.*, *that an access tariff can be expanded to apply to purely local traffic*. This Court should vacate that conclusion.

The Court of Appeals went beyond the application of federal *procedures* at issue in *Sprint*, and drastically expanded *Sprint's* rationale to hold that federal *substantive* law is irrelevant to the validity of Respondents' proposed access tariffs. Missouri law, however, specifically excludes the regulation of wireless carriers, recognizing the primacy of federal law in this area. § 386.020(53)(c), RSMo. Conversely, § 332 of the federal Act has provided, since long before the 1996 amendments, that “no State or local government shall have any authority to regulate the entry of or the rates charged by any [wireless carrier].” 47 U.S.C. § 332(c)(3)(A). Federal law, most clearly through the FCC's *First Report and Order*, unequivocally identifies intraMTA wireless-originated traffic as local and prohibits the application of exchange access. *See First Report and Order* at ¶ 1033. As explained in § III.A above, the FCC repeated and affirmed that premise in the *T-Mobile Order*.

Federal law establishing the local calling scope of wireless calls and prohibiting their treatment as toll calls or interexchange calls is clearly preemptive as Congress has clearly empowered the FCC to occupy this area fully and the FCC has done so. 47 U.S.C. § 332(c)(3)(A). Until the action of the Western District, the State of Missouri has not even attempted to regulate this area.

Because the prohibition on imposing exchange access tariffs for local wireless calls is substantive, Respondents' argument (Substitute Br. at 48-51) that § 251(b)(5) is not “self executing” adds nothing. The background over which the procedures of the 1996 Act were laid provided no basis for imposing exchange access on local wireless traffic. The option before 1996 was to negotiate a compensation arrangement.

According to *Sprint* and the recent *T-Mobile* Order, the option after the 1996 Act, and until the *T-Mobile* Order became effective in April 2005, was to establish a wireless termination tariff, charging solely for transport and termination, until such time as a wireless carrier initiated reciprocal compensation negotiations. Beginning with the implementation of the *T-Mobile* Order, the option is, again, for the Respondents to initiate reciprocal compensation negotiations. Until that time, in the absence of invocation of the negotiation procedures of the federal Act, there is no compensation.

The PSC correctly concluded that federal law was *the only law* applicable to determining when a wireless-originated call was “local” (and therefore *not* subject to access) or “long distance” (and therefore subject to access). Indeed, before the PSC, both Respondents and the wireless carriers argued the issue of what constitutes a “local” call in the wireless regime as a question of federal law. App. A-44 to A-46, L.F. 37-39 (noting *Respondents'* reliance on the FCC's *First Report and Order* to support their right to collect access charges). By rejecting the PSC's decision, the Court of Appeals ignored the impact of substantive federal law and reached the unsupportable conclusion that access charges may be applied to local wireless traffic. Had Missouri attempted to

impose the Court of Appeals' outcome by statute or regulation, that statute or regulation would be preempted by substantive federal law.

C. Prior PSC Actions Do Not Provide a Basis to Assess Exchange Access Charges Against Local Wireless Traffic. (Respondents' Point I.4)

Respondents repeat (Substitute Br. at 43-45) a claim by the Western District (App. A-13 to A-14) that three prior PSC decisions purportedly support the application of switched access to intraMTA wireless-originated traffic.

As an initial matter, Respondents cannot support reversal of the PSC's decision in this Court based on a claimed inconsistency between the PSC's decision in this and prior cases. This Court recently rejected an appellant's identical attempt to overturn a PSC decision based on its purported inconsistency with "several prior PSC decisions," curtly observing that "an administrative agency is not bound by *stare decisis*, nor are PSC decisions binding precedent on this Court." *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. 2003).

"Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable." The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.

McKnight Place Extended Care, L.L.C. v. Missouri Health Facils. Rev. Comm., 142 S.W.3d 228, 235 (Mo. App. W.D. 2004) (citation omitted).

Even if Respondents could properly rely on prior Commission decisions, the earlier PSC decisions they cite do not support their claim that the agency has changed course. The first two, *In the Matter of United Telephone Co.*, 6 Mo. P.S.C.3d 224 (1997), App. A-70, and *In the Matter of Chariton Valley Telephone Corp.*, 8 Mo. P.S.C. 3d 205 (June 20, 1999), App. A-75, addressed charges for traffic terminated by Southwestern Bell, itself a LEC, to other LECs beginning in 1990 or 1991. The PSC's Orders in both cases *assume* that the traffic at issue consisted of “*long distance* telephone calls,” or “cellular-originated *toll* calls,” (emphasis added) without addressing the issue whether the calls were intra- or interMTA, whether such calls were properly characterized as local or long distance, or whether federal law was relevant to the application of exchange access today. *See Chariton Valley*, App. A-75, A-76; *United Telephone*, App. A-71.

Respondents misleadingly suggest (*e.g.*, Substitute Br. at 18, 23) that the PSC's decision in those cases was somehow a decision that exchange access should be applied to local wireless traffic. As shown by the underlying orders, however, there is nothing to suggest that the inclusion of local wireless traffic within the overall composition of traffic being terminated by Southwestern Bell had any bearing on the PSC's action, or was even considered by the Commission.

The third case cited by the Western District, *In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Arbitration*, Case No. TO-97-40,

Arbitration Order (Mo. P.S.C. Dec. 11, 1996), App. A-101, dealt with landline traffic, as acknowledged in the Court of Appeals' own decision. App. A-13.¹⁰

The best that can be said for the PSC record prior to the passage of the 1996 Act is that the PSC never focused on the issue of whether local wireless calls might be included in traffic transited by a third party like Southwestern Bell. These orders can hardly be said to constitute contrary PSC "precedent."

Respondents also suggest (Substitute Br. at 15-17) that wireless traffic meets the Missouri statutory definition of "exchange access." Specifically, Respondents refer to § 368.020(17) RSMo., which defines "exchange access" under Missouri law 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 and terminate interexchange telecommunications service." Respondents also reference the state definition of

¹⁰ Later in their Substitute Brief (at 45-46), Respondents quote *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Case No. TT-2001-139, Report & Order (iss'd February 8, 2001), App. A-124, to suggest that the PSC has applied access in other instances where reciprocal compensation had not been negotiated. That instance, however, involved competitive LECs MCI and AT&T, not wireless carriers. As landline local exchange carriers, MCI and AT&T are subject to an entirely different balance of state and federal regulation and control.

exchange (Substitute Br. at 16. & n.5) and interexchange (*id.* at 17 & n.7) to argue that even local wireless calls are “interexchange” calls under Missouri law and thus subject to exchange access in Missouri.

As explained in § III.A above, however, federal law explicitly prohibits treating local wireless calls as “interexchange.” Moreover, as explained in § III.B above, Missouri statutory law does not regulate wireless carriers. The point of the binding FCC rulings is that wireless carriers do not have “exchanges”; on the contrary, their local calling scope is defined by an MTA, and using the MTA as the relevant “exchange”, the traffic here is *intra*-exchange or local. The Missouri statutory definitions of “inter-exchange” traffic simply have no bearing on this wireless traffic.

D. The Safe Harbor Provision of Section 251(g) Further Prohibits the Extension of Access to Local Wireless Traffic. (Respondents’ Point I.3)

Even though Respondents argue (Substitute Br. at 40-43) that § 251(g), the so-called “safe harbor” provision of the 1996 Act, preserves the application of access to local wireless traffic, § 251(g) actually has the opposite effect. Section 251(g) preserves the *substance* of the FCC position, predating the passage of the 1996 Act, prohibiting the application of exchange access rates to local wireless calls. 47 U.S.C. § 251(g).

Consistent with this reasoning -- and directly contrary to Respondents’ -- the FCC’s *First Report and Order* invoked § 251(g) in explaining that local traffic and long-distance traffic are subject to radically different statutory regimes, and that local calls are not subject to access charges: “The Act *preserves* the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate [access] charges for

terminating long-distance traffic.” *First Report and Order*, ¶ 1033 (emphasis added). In this context the FCC concluded that wireless-originated intraMTA calls are local and, therefore, “*not subject* to interstate and *intrastate access charges.*” *Id.* at ¶ 1036 (emphasis added).

The PSC properly recognized that, as a matter of federal law, intraMTA wireless telephone traffic cannot be subject to access charges, whether carried under an interconnection agreement providing for reciprocal compensation, under a tariff, or otherwise. For this reason, the Court should reinstate the PSC’s *Report and Order* and vacate the Western District’s contrary holding.

IV. The PSC's *Report and Order* Is not Confiscatory. (Respondents’ Point I.7)

Respondents’ Brief closes by claiming that the PSC’s refusal to approve the unlawful application of access charges to intraMTA wireless calls “is clearly confiscatory,” and effects an unconstitutional taking of Respondents’ property. Substitute Br. at 53-56. This argument is meritless, and provides no basis for rejecting the PSC’s well-reasoned decision.

First, Respondents’ takings claim cannot succeed because, as shown by the *Sprint* case on which they so heavily rely and as discussed in § II.C above, they *had* an available mechanism to obtain compensation (if any were constitutionally required) for terminating intraMTA wireless calls: filing reasonable wireless termination tariffs. The fact that Respondents failed to do so, but instead sought the imposition of unreasonable and unlawful access rates to this traffic, cannot create a takings claim. *Second*, Respondents do not even attempt to meet the relevant substantive standard for establishing a regulatory

taking – namely, that the PSC’s rejection of their tariff revisions threatens Respondents’ financial integrity, on a company-wide basis.

A. Respondents Had an Available Means To Receive Compensation for their Termination of IntraMTA Wireless Calls, but Failed To Exercise It.

As discussed in § II.C above, the *Sprint* case demonstrates that Respondents had an opportunity to obtain compensation through the filing of wireless termination tariffs. Respondents’ failure to avail themselves of this opportunity to obtain compensation defeats any takings argument.

The Supreme Court has repeatedly held that a takings claim is not ripe for review until the plaintiff has shown that it has attempted to obtain just compensation through the procedures provided by the state. “[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (citation omitted); *see also, e.g., Littlefield v. City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986) (takings claim premature where, although issue unsettled, inverse condemnation remedy "may be available" under Minnesota law); *D&R Pipeline Construc. Co. v. Greene County*, 630 S.W.2d 236, 238 (Mo. App. S.D. 1982) (rejecting

inverse condemnation action challenging zoning ordinance where “[t]here are remedies available to plaintiff” to seek relief from ordinance).¹¹

Courts have applied this principle in telecommunications rate-setting cases: no confiscation claim can be asserted unless and until the regulated carrier has exhausted available avenues for obtaining compensation. *See, e.g., U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1126 (9th Cir. 1999) (rejecting an ILEC’s takings claim where it had failed to pursue state remedies before bringing an action in federal court); *Texas Office of Public Util. Counsel v. FCC*, 183 F.3d 393, 428-29 (5th Cir. 1999) (same); *U S WEST Communications, Inc. v. Minnesota Pub. Utils. Comm’n*, 55 F. Supp.2d 968, 990 (D. Minn. 1999) (“Because Minnesota offers an opportunity to U.S. West to have its rates readjusted, U.S. West has not yet exhausted its state remedies and its takings claim is [not] ripe for review.”).¹²

¹¹ Federal takings cases are relevant. “Missouri considers the same factors the Supreme Court has considered in making a determining whether a taking has occurred under Article I, § 26 of the Missouri Constitution.” *Clay County v. Harley & Suzie Bogue, Inc.*, 988 S.W.2d 102, 107 (Mo. App. W.D. 1999).

¹² Besides failing to seek to recover their costs through appropriate wireless termination tariffs, a mechanism specifically endorsed in *Sprint*, Respondents arguably could also have petitioned the PSC for an increase in their end-user rates to allow recovery of any additional costs they incurred to terminate intraMTA wireless calls.

Under the takings clause, “all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist at the time of the taking.” *Williamson County*, 473 U.S. at 194. Because such a mechanism existed in 1998, Respondents’ “confiscation” argument must fail.

B. Respondents Presented no Evidence To Show that the Denial of Access Charges Threatens their Overall Financial Integrity, and Is thus Confiscatory.

Respondents’ “confiscation” argument rests on the assumption that the PSC cannot prevent them from obtaining full compensation for the cost of terminating intraMTA wireless calls. But that is not the law.

Under the modern takings cases, a regulatory taking occurs only when the "total effect" of a regulation is so unjust as to be "*confiscatory*." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (emphasis added); *see also, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) ("So long as the rates set [by the agency] are not confiscatory, the Fifth Amendment does not bar their imposition.").

A regulation is "confiscatory" only if it "jeopardize[s] the financial integrity of the compan[y], either by leaving [it] insufficient operating capital or by impeding [its] ability to raise future capital." *Duquesne*, 488 U.S. at 312. "[O]nly the most egregiously confiscatory rate structure would have difficulty meeting" the "total effects" standard. Lawrence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 9-3, at 593 n.3 (2d ed. 1988).

The fact that Respondents may not be receiving direct, cash compensation for the specific task of terminating intraMTA wireless calls does not establish a taking. The

issue is not whether Respondents are separately compensated for each discrete task they perform; rather, the "total effects" test is applied *to the company as a whole*. See, e.g., *Duquesne*, 488 U.S. at 312 (question is whether the regulation "jeopardize[s] the financial integrity of the compan[y]"; emphasis added); see also, e.g., *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 605 (1944) ("[r]ates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid"); *State ex rel. Office of Pub. Counsel v. PSC*, 938 S.W.2d 339, 344 (Mo. App. W.D. 1997) (applying "total effects" test under Missouri law).

Because Respondents have failed to allege, much less demonstrate, that the PSC's refusal of their tariff revisions will threaten their overall financial integrity, their perfunctory takings claim should be summarily rejected. See *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993) (rejecting takings challenge to FCC's methodology for calculating rates applicable to subsidiaries' provision of interstate services because "[t]here simply has been no demonstration that the FCC's rate base policy threatens the financial integrity of the [Regional Holding Companies] or otherwise impedes their ability to attract capital"); *Texas Office of Public Utility Counsel*, 183 F.3d at 437 (rejecting takings claim brought by GTE, an incumbent LEC, because "GTE has failed to meet the requirements of *Duquesne*, because it cannot show that it will lose any revenue at all, much less enough to constitute a taking under more recent precedent"); *U S WEST Communics., Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp.2d 968, 990 (D. Minn. 1999) (in ILECs' challenge to rate-setting for competitors' access to ILECs'

network, “the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather, the query must be whether any [of the regulations] negatively affect[s] the *overall* operation of the incumbent LEC to such a degree that it can no longer receive a fair rate of return from its investment.”) (emphasis original).

The Court of Appeals rejected a similarly unsupported “confiscation” argument in *State ex rel. Associated Natural Gas Co. v. PSC*, 706 S.W.2d 870 (Mo. App. W.D. 1985). Much of what the Court said in *Associated Natural Gas* applies equally here:

As to whether the resultant rate [approved by the PSC] is confiscatory, the utility has the burden of proof. The Commission’s order will not be set aside unless confiscation is clearly established. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry is precluded. That the method employed to reach the result may contain infirmities is not important.

* * *

The Company’s confiscation argument is unsupported by evidence and is merely a recitation of the Company’s conclusion. Other than abstractly concluding the 14% rate of return is confiscatory, the Company has not come close to carrying the burden of showing the rate fell outside the “zone of reasonableness.” As such, the Company has not supplied sufficient proof of the confiscatory effect of the Commission’s order. There is no basis in the record for this court to hold that the Commission’s

order results in a confiscation, or that no new purchasers of the utility's common stock will come forward.

Id. at 881-82 (citations omitted); *see also In re Request for Service in Qwest's Tofte Exch.*, 666 N.W.2d 391, 397 (Minn. App. 2003) (citing *Duquesne*; "To show that a rate is confiscatory, a utility [there, an ILEC] must show with specific information that reduced rates jeopardize the financial integrity of the company, either by leaving it with insufficient operating capital or by impeding its ability to raise future capital.").

Respondents have not even claimed, much less proven, that the PSC's rejection of their proposed tariff revisions threatens the financial integrity of the Respondent companies as a whole. Moreover, as discussed in § II.C *supra*, what evidence there is in this record suggests that Respondents received revenues offsetting their cost of termination, insofar as they were receiving originating access for calls terminated on the networks of the Wireless Carriers, and were themselves paying Wireless Carriers no fee for terminating Respondents' calls. Their "confiscation" argument must accordingly be rejected.

CONCLUSION

Exchange access rates have always been limited to the origination and termination of long-distance or toll calls. From the beginnings of wireless service, the FCC has made clear time and time again that intraMTA wireless calls are local and that access cannot be applied to the termination of such local wireless calls. The Missouri PSC properly applied this law when Respondents filed amended access tariffs that sought to include the termination of local wireless calls within their access tariffs and the PSC correctly

suspended and then rejected those tariffs, which, consequently, have never been in affect. The FCC affirmed this law in its *T-Mobile* Order and went on to bar the application of *any* tariffs to the termination of local wireless traffic. Thus, the suggestion of the Western District that the PSC could apply the amended access tariffs to traffic terminated between 1998 and 2001 is barred by controlling federal law, now reiterated by this new FCC order. Application of the amended tariffs is also barred by Missouri's prohibition on retroactive ratemaking.

For all of the foregoing reasons, this Court should vacate the Opinion of the Western District Court of Appeals and reinstate the PSC's *Report and Order*.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing, together with a copy of the brief on diskette, were sent by U.S. Mail, postage prepaid, on this 31st day of May, 2005 to the following parties:

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