BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Request of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, for a Waiver of Certain Requirements of 4 CSR 240-29.040(4)	)))))	**Case No. TE-2006-0053**

STAFF'S MEMORANDUM OF LAW
AND SUMMARY OF STAFF'S CASE

COMES NOW the Staff of the Missouri Public Service Commission and, for its Memorandum of Law and Summary of Staff's Case, states to the Missouri Public Service Commission as follows.

MEMORANDUM OF LAW

Introduction. Case law addressing rulemaking issues is rather sparse. Despite diligent efforts, counsel for the Staff has found virtually no case law that directly addressed the specific questions presented in this case. But the courts generally apply the same principles to the construction of rules as they apply to the construction of statutes. *Morton v. Missouri Air Conservation Com'n,* 944 S.W.2d 231 (Mo. App. S.D. 1997); *Woolridge v. Woolridge,* 915 S.W.2d 372 (Mo. App. W.D. 1996). This memo will therefore, to a large extent, rely on the rules of statutory construction. Even so, the cases cited herein are quite general in application, and not specific to the issues at hand.

Construction of statutes is purely a question of law. *Martinez v. State,* 24 S.W.3d 10 (Mo. App. E.D. 2000); *Delta Air Lines, Inc. v. Director of Revenue, State of Mo.,* 908 S.W.2d 353 (Mo. 1995). The legislature is presumed to have intended what the statute says by clear and unambiguous language. *Alford v. State,* 895 S.W.2d 143 (Mo. App. E.D. 1995). If the language

is clear and unambiguous, there is no room for construction, it is not necessary to examine further the legislative history, and extrinsic aids to construction cannot be used. *Farmers' and Laborers Co-op Ins. Ass'n v. Director of Revenue, State of Mo.,* 742 S.W.2d 141 (Mo. 1987); *Allen v. U.S.,* 250 F. Supp. 155 (E.D. Mo. 1965); *Brown v. Melahn,* 824 S.W.2d 930 (Mo. App. E.D. 1992). An unambiguous statute should be taken to mean what it says, for the General Assembly is presumed to have intended what the law states directly. *State ex rel. DeGraffenreid v. Keet,* 619 S.W.2d 873 (Mo. App. S.D. 1981). Only if there is ambiguity may the court (or agency) resort to other methods of interpreting the statute (or, in this case, the rule).

1. How controlling is the purpose clause? Staff was not able to find any cases that directly addressed the significance of the purpose clause, but there are countless cases that emphasize the importance of ascertaining the legislature's *intent* in enacting a statute. Statutes do not have a purpose clause, but they do have a title (as rules do) and also a preamble, which provide some insight into the intent.

Courts are impressed with the judicial obligation to ascertain legislative intent, and to ascertain the scope and operation of statutes in justiciable controversies, no matter how difficult it is to do so. *Tribune Publishing Co. v. Curators of University of Missouri,* 661 S.W.2d 575 (Mo. App. W.D. 1983). Statutory construction is a question of law, and the goal is to ascertain the intent of the legislature from the language used, and to give effect to that intent, if possible. *State ex rel. Division of Child Support Enforcement v. Gosney,* 928 S.W.2d 892 (Mo. App. E.D. 1996).

The purpose and object of a statute must always be considered, and the court must presume that the legislature intended a logical result. *Redpath v. Missouri Highway and Transportation Com'n,* 783 S.W.2d 429 (Mo. App. W.D. 1989). The law favors a construction

that harmonizes with reason, gives effect to the legislative *intent,* and tends to avoid absurd results. *State ex rel. Department of Revenue v. Scott,* 919 S.W.2d 296 (Mo. App., W.D. 1996). If a statute is susceptible of more than one construction, it must be given the construction that will best effect its *purpose,* rather than one which would defeat it, even though not within the strict literal interpretation. *Household Finance Corp. v. Robertson,* 364 S.W.2d 595 (Mo. 1963).

Preambles to statutes are somewhat akin to the purpose clause for a rule, in that they tell something about why the law was enacted. Courts hold that preambles must be viewed in their context as part of the overall legislative intendment. *Lett v. City of St. Louis,* 948 S.W.2d 614 (Mo. App. E.D. 1996). The title of a legislative act is considered as part of the act, and is weighed when construing the act. *Sisney v. Clay,* 829 S.W.2d 9 (Mo. App. W.D. 1992). It is considered that the true intent of a statute is found in the title, unless the title is plainly contradicted by the express terms of the body of the statute. *State v. Schwartzmann,* 40 S.W.2d 479, 225 Mo. App. 577 (Mo. App. 1931). Likewise, the title of a rule is part of the rule, and it is reasonable to conclude that it also indicates the intent of the agency that adopted the rule.

Conclusion as to Issue No. 1: Courts must ascertain the intent of the legislature in enacting a statute or of an agency in adopting a rule. This is found in the clear language of the statute or rule, if possible. If, but only if, the statute or rule is ambiguous, the court may look to other indicators of intent. The Staff submits that the best indication of the intent behind a rulemaking is found in the language of the purpose clause.

2. How controlling is an order of rulemaking? The final order of rulemaking is required by § 536.021, RSMo, and is essential. Without it, there is simply no rule. A notice of proposed rulemaking, alone, is not sufficient to comply with the requirements of § 536.021, which requires that there must be, first a notice of proposed rulemaking, followed by the

opportunity for public comment on the proposed rule, and then the publication of the order of rulemaking. However, the Staff understands the Commission's inquiry in this Issue No. 2 to be directed to the effect that is to be given to the comments on the notice of proposed rulemaking and the Commission's responses thereto, both of which are included in the order of rulemaking that is ultimately published in the *Missouri Register*. These comments and the responses thereto are not part of the rule itself, but may be likened to the legislative history, and they may therefore provide insight into the intent of the rulemaking, and they may be helpful in resolving ambiguities, if any exist. But it is important to note that the responses, alone, cannot *change* the requirements of the rule.

In *State ex rel. City of Springfield v. Public Service Commission of the State of Missouri,*812 S.W.2d 827 (Mo. App. W.D. 1991), the appellants argued that the Commission acted unlawfully, because its order of rulemaking contained "interpretations of law or policy as to certain provisions within the Order which interpretations are invalid." The Western District rejected this argument, saying:

> The interpretations were provided in response to questions and concerns raised pursuant to the Commission's Notice of Proposed Rulemaking. The interpretations act as guidance to interested parties. The interpretations were not incorporated into the rules and do not constitute rules themselves.

City of Springfield, supra, at 833.

It is appropriate for the court to construe a statute with reference to its accompanying comments. *State v. Moriarty,* 914 S.W.2d 416 (Mo. App. W.D. 1996). But the courts must not *add* provisions under the guise of construction, if they are not plainly written or necessarily implied. *Coastal Mart, Inc. v. Department of Natural Resources of State of Mo.,* 933 S.W.2d 947 (Mo. App. W.D. 1996); *Pollock v. Wetterau Food Distribution Group,* 11 S.W.3d 754 (Mo. App. E.D. 1999).

Conclusion as to Issue No. 2: The *rule* that is adopted in the Order of Rulemaking is controlling. But the Commission's *responses to comments* on the proposed rulemaking – which are also included in the Order of Rulemaking – are not controlling. They provide guidance regarding the agency's interpretation of the rule, but they cannot change the requirements of the rule itself.

3. If the purpose of the rule can be accomplished through narrow construction, may the Agency construe it broadly? If the statute (or rule) is unambiguous, it must be construed as written, and there is no need to resort to the principles of statutory construction. There is no need to determine whether the statute should be construed "strictly" or "liberally."

Penal statutes and statutes that are in derogation of the common law are to be construed strictly. Statutes that are remedial in nature should be construed liberally. A remedial statute is one "enacted for the protection of life and property." *Eastern Missouri Laborers' District Council v. City of St. Louis*, 5 S.W.3d 600 (Mo. App. E.D. 1999); *State ex rel. Ford v. Wenskay,* 824 S.W.2d 99 (Mo. App. E.D. 1992). According to this definition, the rule at issue in this case is not remedial in nature. Staff has not been able to find any cases that provide guidance indicating that 4 CSR 240-29.040 (4) should be construed either strictly or liberally.

Missouri courts "are not wedded to the doctrine of 'strict' or 'liberal' construction of statutes. They seek to arrive at the intention of the Legislature as disclosed, in part at least, by the objectives of the legislation." *In Re Duren,* 200 S.W.2d 343, 352 (Mo. banc 1947). Simply put, the Commission should construe the rule so as to achieve the purpose of the rule.

Conclusion as to Issue No.3: The Staff has found no authority that would justify a broad construction of Rule 4 CSR 240-29.040 (4).

4. If the Agency operated under a mistake of fact at the time of promulgation, but later learns of the mistake, can it lawfully alter its construction? The Staff understands this question to be directed to the possibility that the Commission may have incorrectly believed that Category 11 records must include the calling party number (CPN), or that the Commission may have believed that CPN is contained in the AMA recordings. The Staff has not been able to find any Missouri case law that addresses the effect of the legislature (or agency) operating under a mistaken belief about the relevant underlying facts. The subject was discussed, however, at 73 Am Jur 2d *Statutes,* § 201, as follows: "Courts will not undertake correction of legislative mistakes in statutes notwithstanding the fact that the court may be convinced by extraneous circumstances that the legislature intended to enact something very different from that which it did enact. However, there is authority for the rule that clerical mistakes should be disregarded or corrected, and that manifest or obvious mistakes may be corrected."

The Court of Appeals has held, though, that the power to make rules includes the power to alter them, and to determine any reasonable policy of interpretation and application of said rules. *State ex rel. Dail v. Public Service Commission,* 203 S.W.2d 1947 (Mo. App., Kansas City District, 1947). The court said the Commission was vested with the power of exercising discretion in the adoption of rules and in declaring its policies in reference to the interpretation and application of those rules in the future.

Conclusion as to Issue No. 4: Courts will not correct errors in rulemaking that result from an agency's mistaken beliefs about the underlying facts, but the agency may amend the rules or reasonably interpret them. The Staff submits that this does not, however, permit the agency to *change* the existing rules through the way it interprets them.

5. What is the standard for vagueness – what parameters apply when construction rises to the level of substantive interpretation? Case law regarding "vagueness" in statutes or agency rules generally pertains to the question of whether the statute or rule is unconstitutionally vague. If so, the statute is said to be "void for vagueness." In the present case, no party has complained about the vagueness of the rule that is at issue, and no party has suggested that the rule is void for vagueness. It would be more accurate to say the parties have claimed that the rule is ambiguous. The Staff will therefore respond to this question by addressing the issue of ambiguity, and the parameters that should be applied when construction rises to the level of substantive interpretation.

Black's Law Dictionary, Seventh Edition, defines "ambiguity" as: "An uncertainty of meaning or intention, as in a contractual term or statutory interpretation." Black's then quotes from a treatise on *Statutory Interpretation* by Rupert Cross, as follows:

> In the context of statutory interpretation the word most frequently used to indicate the doubt which a judge must entertain before he can search for and, if possible, apply a secondary meaning is "ambiguity." … [I]n relation to statutory interpretation, judicial usage sanctions the application of the word "ambiguity" to describe any kind of doubtful meaning of words, phrases or longer statutory provisions.

When statutory language is ambiguous, a court looks to extrinsic evidence to determine its meaning. *Russell v. Missouri State Employees' Retirement System,* 4 S.W.3d 554 (Mo. App. W.D. 1999). It is then proper to consider the history of the legislation, the surrounding circumstances, and the ends sought. *Kieffer v. Kieffer,* 590 S.W.2d 915 (Mo. 1979).

In construing ambiguous statutes, courts have placed great emphasis on the purpose of the statute. When construing a statute, the court must consider the *purpose* or goal of the statute and relevant conditions that existed at the time the statute was enacted. *State v. Withrow,* 8 S.W.3d 75 (Mo. 1999). Statutes must be construed by considering their manifest purpose,

historical considered, as well as the language used. *Ross v. Conco Quarry, Inc.,* 543 S.W.2d 568 (Mo. App. 1976).

In construing a statute consistent with legislative intent, it is appropriate to consider its history, the presumption that the legislature had knowledge of the law, the surrounding circumstances, and the purpose and object to be accomplished. *State ex rel. County of St. Charles v. Mehan,* 854 S.W.2d 531 (Mo. App. E.D. 1993). Courts must gather the intent from the ordinary meaning of the words used, considering the whole act and legislative history and, if necessary, the circumstances and usages of the time, and the courts must seek to promote the purpose and objects of the statute. *St. Louis Southwestern Ry. Co. v. Loeb,* 318 S.W.2d 246 (Mo. 1958).

The interpretation and construction of a statute by an agency charged with its administration is entitled to great weight. *Linton v. Missouri Veterinary Medical Bd.,* 988 S.W.2d 513 (Mo. 1999). But this is true only if the statute itself is ambiguous or uncertain. *Consolidated Freightways Corp. of Delaware v. State,* 503 S.W.2d 1 (Mo. 1972). The agency's interpretation is not conclusive when it is opposed to the clear meaning of the act. *State ex rel. Board of Fund Com'rs v. Smith,* 96 S.W.2d 348, 339 Mo. 204 (Mo. 1936). The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in the clear and unambiguous language of the statute. *Blue Springs Bowl v. Spradling,* 551 S.W.2d 596 (Mo. 1977).

Conclusion as to Issue No. 5: When courts are required to construe an ambiguous statute or rule, they look for any indicators that will help them ascertain the legislature's or agency's intent. These indicators include the purpose and object that is to be accomplished, the history of

the statute or rule, the presumption that the legislature or agency knew the law, and the surrounding circumstances. The way that an agency construes a rule is entitled to great weight, but only if the rule is ambiguous; the plain language of a rule may not be rendered ambiguous through administrative interpretation.

SUMMARY OF STAFF'S CASE

The Rulemaking Procedure. In this case, the Commission is required to construe Section (4) of Rule 4 CSR 240-29.040. The Commission published its Notice of Proposed Rulemaking for this rule on January 3, 2005. As proposed, the rule provided:

> (4) When transiting traffic for any carrier other than an incumbent local exchange carrier, originating tandem carriers shall, for each compensable call, create and make the following available upon request by a terminating carrier, at no charge to the terminating carrier:
>
> (A) A category 11-01-XX record or, if no Carrier Identification Code is available, a Missouri-specific category 11-01-XX record.

The Commission solicited public comment on the proposed rule in writing and at a public hearing. On June 15, the Commission published its Order of Rulemaking. In this order, the Commission discussed all the comments it had received and provided responses to them. In its responses to the comments on 4 CSR 240-29.040(4), the Commission stated:

> However, we find nothing in the record before us to indicate that CPN is not a part of AMA records.
>
> …
>
> We thus determine that transiting carriers shall include the CPN as part of the Category 11-01-XX records created for wireless-originated traffic occurring over the LEC-to-LEC network.

The Commission adopted the proposed rule without change.

Although the Commission's responses to comments discussed the "calling party number" or "CPN," the rule itself neither mentioned CPN, nor explicitly said CPN must be included in the

billing record. But the response to the public comments seemed to say that CPN must be included – apparently because the Commission believed CPN was a part of the AMA records.

Commission Comments Cannot Change the Meaning of the Rule. The question then arises whether the Commission's response to comments can change the meaning of the rule.

The Staff submits that it cannot. The responses to comments might serve as guidance as to how the rule should be interpreted, but they cannot be used to change the meaning of the rule. As the Court of Appeals noted in the *City of Springfield* case, *supra*:

> The interpretations act as guidance to interested parties. The interpretations were not incorporated into the rules and do not constitute rules themselves.

The Rule Is Not Ambiguous. If the rule itself is clear and unambiguous, there is no room for construction. That is, if the rule unambiguously requires an originating tandem carrier to provide CPN in the billing record – or if it unambiguously makes no such requirement – the Commission or a court may not resort to extrinsic aids to construe the rule.

The Staff contends that the rule in this case is clear and unambiguous. It requires an originating tandem carrier to provide a Category 11-01-XX record. But perhaps that begs another question: must the *Category 11-01-XX billing record* for a wireless-originated call include the telephone number of the end user that initiated the call?

The parties agree about what a Category 11-01-XX billing record looks like and that it contains a "From Number field" in bit positions 15-24. They also agree AT&T must populate this field with some data. The only argument is over what these numbers must represent.

So the issue in the case may be more specifically stated: Must the "From Number field" contain the CPN? STCG and MITG say that it must; AT&T says that it does not have to.

The answer to this question depends upon industry standards, specifically the Telcordia document GR-1504 and the EMI document.

The Telcordia document tells what data must be captured in the AMA recording that is prepared at the originating tandem switch. The EMI document tells what information must be included in the Category 11 billing record. The AMA recording is the only source of data that can be used to capture the CPN for inclusion in the Category 11 billing record. If CPN data is not included in the AMA recording, it cannot be incorporated into the Category 11 billing record.

Bob Schoonmaker, the witness for STCG and MITG, testified that by construing together several provisions of the Telcordia document, one must conclude that the Telcordia document requires that CPN be included in an AMA record. This reasoning is somewhat difficult for a person of ordinary intelligence to follow. It is certain that the Telcordia document does not "clearly and unambiguously" require that CPN be included in the AMA record. And AT&T witness Jason Constable testified that, as a matter of practice, it is *not* included in the AMA recordings created by either the Lucent switches or the Nortel switches AT&T uses. He also testified that it would be very costly to modify the Lucent switches to include the CPN in the AMA recordings. The evidence clearly shows that it is not standard industry practice to include CPN in the AMA recordings. And since CPN is not included in the AMA recordings, it cannot be included in the Category 11 billing records that depend on the AMA recordings for their data.

The Staff submits that Rule 4 CSR 240-29.040 (4) unambiguously *contains no requirement* that originating tandem companies include CPN in the billing records they create.

Even if the Rule is Ambiguous, It Does Not Require Provision of CPN. If the Commission nonetheless concludes that the rule is ambiguous, and that the rule is susceptible of more than one interpretation, the rule must be given the interpretation that will best effect its purpose. The Commission's purpose and intent are best expressed in the "Purpose" clause that was published in the Notice of Proposed Rulemaking. It reads as follows:

PURPOSE: This rule establishes a proper means of identifying to transiting and terminating carriers all carriers who originate traffic that is transmitted over the LEC-to-LEC network.

The title of the rule also provides insight into the Commission's purpose and intent. The title is: "Identification of Originating Carrier for Traffic Transmitted over the LEC-to-LEC Network."

Clearly, the stated purpose was to identify *carriers* who originate traffic, not to identify the end users who originate calls, nor to require CPN be provided. In fact, CPN isn't mentioned in the "Purpose" clause, nor in the title of the rule, nor anywhere in the text of the rule.

As Staff witness Bill Voight testified, at the time it published the Order of Rulemaking the Commission did intend to require that CPN be included in the Category 11 record that is provided.[1] But, as noted above, it also appears that the Commission then believed that CPN was part of the AMA recordings. And it also appears that the Commission did not expect that AT&T or any other transiting companies would have to incur significant costs in order to provide CPN in the billing records, and did not intend to require them to incur significant costs. This is clearly shown by the private entity fiscal note to Rule 4 CSR 240-29.040 (4), which reads as follows:

PRIVATE COST: This proposed rule will not cost private entities more than five hundred dollars ($500) in the aggregate.

In response to a question from Commissioner Clayton, AT&T witness Jason Constable said AT&T would have to invest about one million dollars to enable its Lucent switches to capture CPN in the AMA recordings. This conflicts with the Commission's private entity fiscal note.

The Cost of Requiring CPN Exceeds the Benefits. The Staff believes the provision of CPN in the billing records would be beneficial. But CPN does not have to be provided to

[1] Near the end of the evidentiary hearing, there was a brief colloquy in which Commissioner Clayton questioned Staff counsel about the Commission's intent at the time the rule was adopted. The Staff's counsel may have misunderstood the second question that Commissioner Clayton posed. Staff has attempted, unsuccessfully, to obtain a transcript of this exchange. In any event, Mr. Voight accurately described the Staff's understanding of the Commission's intent.

accomplish the Commission's stated purpose of identifying the originating carrier. The evidence shows that Category 11 billing records – without the CPN – are sufficient to enable a terminating carrier to identify the responsible wireless carrier, because they include the "originating carrier number" of the carrier that delivered the message to the originating tandem.

CPN does not enable terminating carriers to identify the responsible wireless carrier. Even the STCG and MITG agree with that. But they complain that without the CPN they cannot properly "jurisdictionalize" a call.

AT&T witnesses said the CPN is "never" reliable in determining jurisdiction, primarily because of roaming. STCG's counsel, William R. England, suggested several times that the CPN is at least sometimes reliable, because sometimes the CPN will indicate the proper jurisdiction. This confuses the issue of whether the use of CPN is reliable in determining jurisdiction with the issue of whether it is correct. The CPN will sometimes produce the correct result; but it is not something one can ever *rely on* to produce the correct result.

A broken clock is right twice a day. But even when it is right, it is not reliable; it is *never* reliable. Similarly, the CPN is never reliable in determining jurisdiction, even if it is sometimes accurate.

In a Memorandum it filed in this case on August 11, 2005, the Staff said that "absent compelling reasons otherwise, the Commission should require SBC and other transiting carriers to include the CPN in all category 11-01-XX billing records, including those for wireless-originated traffic." The Staff still believes providing CPN would be desirable, for various reasons, but recognizes CPN is not necessary to accomplish the Commission's stated objective in adopting Rule 4 CSR 240-29.040 (4). And the Staff believes that the cost that AT&T would

incur in modifying its Lucent switches is a "compelling reason" to not require the inclusion of CPN in the Category 11 billing records.

WHEREFORE, the Staff submits its Memorandum of Law and Summary of Case for the Commission's consideration in this case.

Respectfully submitted,

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I hereby certify that copies of the foregoing have been mailed or hand-delivered, transmitted by facsimile or e-mailed to all counsel of record on this 28th day of April 2006.

/s/ Keith R. Krueger