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 AT&T Missouri for a Waiver of Certain Requirements of 4 CSR 240-29.040(4).	))))	Case No. TE-2006-0053

LEGAL MEMORANDUM AND SUMMARY OF POSITION

On April 18, 2006, the Missouri Public Service Commission ("Commission") issued an "Order Extending Exemption and Requiring Filing" in this case in which it directed the parties to file a Memorandum of Law addressing five (5) questions. The Commission also stated that the parties could include a summary of their case in five (5) or fewer pages. The following is the Legal Memorandum and Summary of Position of the Small Telephone Company Group ("STCG") and the Missouri Independent Telephone Group ("MITG") filed in response to the Commission's directive.

Legal Memorandum

1. How controlling is a purpose clause?

Section 536.021.2(1), RSMo Supp. 2005, states that a proposed order of rulemaking shall contain, "An explanation of any proposed rule or any change in an existing rule, and the reasons therefor[.]" This explanation is commonly referred to as the "Purpose Clause." Ideally, this purpose clause will contain an intelligent summary of the rule's intended action and then give a cogent explanation of why it is needed.[1] Failure to state an explanation of and the reasons for the

[1]MoBar CLE "Administrative Law" Third Edition, Volume I, Chapter 2, § 4.9.

proposed change in the Notice of Proposed Rulemaking may render the resulting rule void.[2]

The reason for the notice procedure for a proposed rule and the Purpose Clause is to allow opportunity for comment by supporters or opponents of the measure. *State ex rel. City of Springfield v. Public Service Commission,* 812 S.W.2d 827, 833 (Mo. App. W.D. 1991),[3] citing *St. Louis Christian Home v. Missouri Commission on Human Rights,* 634 S.W.2d 508, 515 (Mo. App. 1982). A party challenging the rule because of an inadequate notice of proposed rulemaking must show that they have suffered a detriment in their ability to participate in or react to the rulemaking process. *Id.* Other than its use to provide an explanation of the general subject matters covered by the proposed rule, the Purpose Clause cannot be considered controlling.

2. How controlling is an order of rulemaking?

Section 536.021.5, RSMo Supp. 2005, states that within ninety (90) days after the expiration of the time for filing statements in support of or in opposition to the proposed rulemaking, or within ninety days after the hearing on the proposed rulemaking, the agency must file a final order of rulemaking either adopting or withdrawing the proposed rule. Section 536.021.6, RSMo Supp. 2005, sets out the requirements for a final order of rulemaking. Among other things, the final order of rulemaking must contain, "An explanation of any change between the text of the rule as contained in the notice of proposed rulemaking and the text of the rule as finally adopted, together with the reason for any such change[.]"[4] Subsection (4) of the statute

---

[2]Section 536.021.6, RSMo Supp. 2005.

[3]Overruled on other grounds by *Missouri Municipal League v. State,* 932 S.W.2d 400 (Mo. banc 1996).

[4]Section 536.021.6(2), RSMo Supp. 2005.

states that the final order of rulemaking must include:

> A brief summary of the general nature and extent of comments submitted in support of or in opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with said rulemaking, together with a concise summary of the state agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule[.]

When the Commission issues its final order of rulemaking in compliance with § 536.021(5) and (6), that order has the same force and effect as any other order issued by the Commission. Section 386.270, RSMo 2000, states that:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Thus, the final order of rulemaking as well as the regulation promulgated pursuant to that final order of rulemaking are both prima facie lawful and in force until found otherwise in a suit brought for that specific purpose. As was stated by the court in *State ex rel. Danforth v. Riley,* 499 S.W.2d 40, 44 (Mo. App. 1973),

> The rules adopted pursuant to statutory authority are properly denominated "legislative" rules and should be accorded the force and effect of law, unless and until they are invalidated by judicial decision or repealed or amended by legislative enactment. To reduce their impact below this status would be to render them inoperative and unenforceable.

The order of rulemaking should be considered in concert with the rule it adopts, and both should be considered prima facie lawful until invalidated by a court or amended through the administrative rulemaking process.[5]

---

[5]Further support can be found in statements of appellate courts regarding rules to the effect that "absent any judicial interpretation of their meaning, it is permissible for the parties and the court to look for aid to the executive or administrative interpretations which have been placed

Additionally, the order of rulemaking can be considered as an agency interpretation of its regulation which is entitled to substantial deference. *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 931 (Mo. App. S.D. 1992). "The power to make rules includes the power to alter them and to determine any reasonable policy of interpretation and application of such rules." *State ex rel. City of Springfield v. Public Service Commission,* 812 S.W.2d 827, 833 (Mo. App. W.D. 1991). Administrative interpretations are persuasive as to the legal significance and effect of agency rules. *State ex rel. Danforth v. Riley,* 499 S.W.2d 40, 44 (Mo. App. 1973). Because of this deference to agency interpretation, the order of rulemaking can be said to control the interpretation of the rule it explains.

3. If the purpose of the rule can be accomplished through narrow construction, may the Agency construe it broadly?

First, it should be noted that the same principles of construction are used in interpreting regulations as in interpreting statutes. *Teague v. Missouri Gaming Commission,* 127 S.W.3d 679, 685 (Mo. App. W.D. 2004). "In the absence of a definition in the regulation, the words will be given their plain and ordinary meaning as derived from a dictionary." *Id.* at 686. The title of the rules at issue is the "Enhanced Record Exchange Rules." From this title it is clear that the intent of the Commission in promulgating these rules was to provide for the enhancement of records exchanged between telecommunications carriers. The particular provision of the rule at issue in this proceeding is 4 CSR 240-20.040(4). The "purpose" of 4 CSR 240-29.040 is stated as, "This rule establishes a proper means of identifying to transiting and terminating carriers all

---

upon them." *Danforth,* 499 S.W.2d at 44. The interpretations found in the Commission's final order of rulemaking in this case can be used to interpret the rules themselves and thus be considered "controlling."

carriers who originate traffic that is transmitted over the LEC-to-LEC network."

The primary rule of statutory construction is to ascertain the intent of the legislative body from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning. *State v. Grubb*, 120 S.W.3d 737, 739 (Mo. banc 2003). The intent of the Commission is clear from the statements set out above. There is no need for a broad construction of the purpose of the rule when it is clear from the language of the rule and the explanations of the need for the rule that it was promulgated for the purpose of enhancing the exchange of records between carriers in order to identify the carriers who originate traffic over the LEC-to-LEC network.

Before the promulgation of the ERE rule, terminating carriers received a summary report (the CTUSR) that identified the carrier to bill, so unless the Category 11-01-XX record mandated in the new rule also contained the CPN, there would have been no enhancement of the records received by the terminating carriers for wireless-originated calls. The Commission demonstrated its intent to promulgate a rule that truly enhanced the records exchange when it stated that the rule clearly required that the Calling Party Number ("CPN") be included in the Category 11-01-XX records provided to the terminating carriers by the transiting carriers. The purpose of the rule can be accomplished through a narrow construction of the plain language of the rule and the accompanying order of rulemaking, so there is no need to construe it broadly.

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?

As was stated above, once the Commission has issued its final order of rulemaking and the rule has been published in final form, the rule is a final order of the Commission that is prima

facie lawful and can only be changed through a suit brought for the purpose of declaring the order and rule unlawful and/or unreasonable pursuant to the provisions of Chapter 386.[6] "Rules of a state agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them." *Missouri National Education Association v. Missouri State Board of Mediation,* 695 S.W.2d 894, 897 (Mo. banc 1985), cited in *State ex rel. Martin-Erb v. Missouri Commission on Human Rights,* 77 S.W.3d 600, 607 (Mo. banc 2002). A court can compel an agency to follow procedures set out in agency regulations. *Martin-Erb*, 77 S.W.3d at 607. There is no provision in the Missouri statutes allowing a rule to be changed or altered after a final order of rulemaking has been issued because of a mistake of fact at the time of promulgation or a change of mind of the agency promulgating the rule. If the Commission believes the rule should be changed because of circumstances discovered after the rule was finally promulgated, its only recourse is to initiate a new proceeding to amend the rule.

Neither can the Commission "change its mind" regarding the effect of the rule because of later information. "An agency's contemporaneous interpretation of its own regulation is entitled to greater deference." *SSM Rehabilitation Institute v. Shalala,* 68 F.3d 266, 270 (8th Cir. 1995); 1995 U.S. App., LEXIS 29282. *Post hoc* comments do not render invalid the prior application of the regulation. *Id.* At 271. Thus, the Commission's later statements set out in a brief cannot have any effect on the rule as promulgated.

---

[6]Section 386.270, RSMo 2000.

5. What is the standard for vagueness - what parameters apply when construction rises to the level of substantive interpretation?

As stated above, courts interpret agency rules under the same principles used to interpret statutes. *Teague*, 127 S.W.3d at 685. Courts do not look beyond the plain and ordinary meaning of the words used by the agency unless their meaning is ambiguous or would lead to an illogical result defeating the purpose of the rule. *Stewart v. Civil Service Commission,* 120 S.W.3d 279, 287 (Mo. App. E.D. 2003). If the agency's rule is unambiguous on its face, no interpretation is necessary and the court must give effect to the agency's intention as clearly expressed. *Stewart,* 120 S.W.3d at 287-88.

It is a basic principle of constitutional due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *State v. Mahan*, 971 S.W.2d 307, 312 (Mo. banc 1998). The void for vagueness doctrine ensures that laws give fair and adequate notice of proscribed conduct and protects against arbitrary and discriminatory enforcement. *Id.* In order to find that a rule is void for vagueness, courts ask "whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Atmos Energy Corp. v. Public Service Commission,* 103 S.W.3d 753, 765 (Mo. banc 2003), citing *Cocktail Fortune, Inc. v. Supervisor of Liquor Control,* 994 S.W.2d 955, 957 (Mo. banc 1999). In *Atmos*, the Missouri Supreme Court found that the terms and provisions cited by the appellants, when read in context, were clear and sufficiently placed the appellants and others within the public utility industry on notice of the proscribed conduct. *Id.* The Court stated that one of the allegedly vague terms was not vague at

all because it was defined in another section of the rules.

In this case there has been no allegation that the rule at issue is unconstitutionally void for vagueness. Commission Rule 4 CSR 240-29.040 is entitled, "Identification of Originating Carrier for Traffic Transmitted over the LEC-to-LEC Network." Subsection (4) of 4 CSR 240-29.040 states:

> 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.
>
> A Category 11-01-XX record is defined at 4 CSR 240-29.020(5) as:
>
> a mechanized individual call detail record developed in compliance with the Ordering and Billing Forum (OBF) exchange message interface (EMI) industry guidelines. The first two (2) digits in this record are "11." A Missouri-specific category 11-01-XX record is a mechanized individual call detail record for feature group C (FGC) traffic developed by the incumbent local exchange carriers in Missouri for intercompany settlements pursuant to the Missouri Public Service Commission (MoPSC) Report and Order in Case No. TO-99-254. This record contains data transferred from a 92-01-XX mechanized call detail record. The first two (2) digits in this record are "11." This type of call record is identical to a category 11-01-XX record except that it contains an originating operating company number (OCN) in positions 167 through 170 instead of a CIC in positions 46 though 49.

Although there was conflicting testimony at the hearing as to whether the Category 11-01-XX billing record for wireless originated calls should contain the CPN, there can be no doubt that the Commission's final order of rulemaking clearly contemplated that CPN was to be included in the records. The Order stated, "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."[7] The Commission further stated:

> We find that SBC has shown no credible evidence that the Category 11-01-XX billing records it creates for wireless-originated calls traversing the LEC-to-LEC network should be different from the Category 11-01-XX billing records it creates for wireline *and wireless*-originated calls traversing the interexchange carrier network.[8]
>
> 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. If any carrier determines that it cannot or should not include the originating CPN of wireless callers in the Category 11-01-XX billing record, it is free to petition the Commission to be excluded from that aspect of the rule.[9]

Thus, the rule as promulgated is not subject to a void for vagueness argument. There is no need for construction of the regulation because the language is sufficiently clear for carriers affected by the rule to understand that the transiting carrier must provide a Category 11-01-XX record to the terminating carrier for wireless-originated calls. A Category 11-01-XX record is a defined term. The only ambiguity in this case is the later introduction by AT&T Missouri of the concept that Category 11-01-XX records for wireless-originated calls are somehow different from the industry standard Category 11-01-XX records that are exchanged for interexchange ("IXC") calls. There was no ambiguity or vagueness in the rule as promulgated by the Commission (as is clearly demonstrated by the order of rulemaking) such that it is necessary to apply the principles of statutory construction or attempt to alter the substantive interpretation of the rule.

---

[7]Order or Rulemaking published in the Missouri Register, Vol. 30, No. 12, (June 15, 2005), p. 1389.

[8]*Id.* Emphasis in original.

[9]*Id.* Emphasis added.

Summary of Position

The STCG and the MITG believe that both the language of the Enhanced Records Exchange ("ERE") rule and the statements of the Commission found in its final Order of Rulemaking clearly demonstrate that the rule requires CPN to be included in the billing records for wireless-originated calls provided to the terminating carriers by the transiting carriers. The evidence adduced at the hearing supports this conclusion. Mr. Schoonmaker demonstrated that CPN is clearly required in the "From Number" field of the industry standard Category 11 records for wireless-originated calls, and Mr. Voight testified that at the time the Order of Rulemaking was issued it was the Staff's and the Commission's belief and position that CPN would be provided in the Category 11 records.[10] Since the only issue to be determined in this first part of the bifurcated proceeding is whether 4 CSR 240-29.040(4) as promulgated requires the originating tandem carrier to include the CPN as part of the Category 11-01-XX record that it provides for wireless-originated calls that transit the LEC-to-LEC network and terminate to other LECs, neither AT&T Missouri's interpretation of industry standard Category 11 records nor Staff's change of position regarding the requirement is relevant to this determination.

At hearing, the technical witnesses focused their analyses on the Telcordia document AT&T Missouri has said constitutes an "industry standard" for Category 11-01-XX records. But that document itself recognizes that state commissions have the authority to impose additional or different requirements. The witnesses agreed that in Missouri the ERE consitutes the "industry

[10]The transcript of the proceeding has not yet been completed, so citations cannot be provided.

standard."

Commission Rule 4 CSR 240-29.040 is entitled, "Identification of Originating Carrier for Traffic Transmitted over the LEC-to-LEC Network." Subsection (4) of 4 CSR 240-29.040 states:

> 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.

Subsection (6) of 4 CSR 240-29.040 states:

> The originating telephone number shall be the telephone number of the end user responsible for originating the telephone call. Under no circumstances in sections (1), (2), (3), (4) and (5) above shall any carrier substitute an originating telephone number other than the telephone number of the end user responsible for originating the telephone call.

Subsection (6) is not limited to the provision of "Caller ID," but is a broad prohibition that applies to all sections of 4 CSR 240-29.040 including subsection (4) requiring the provision of Category 11-01-XX billing records. When these sections of the rule are read together, it is clear that the rule requires that CPN not only be passed as the call is completed, but that it be provided in the billing records as well.

In addition to the plain language of the rule set out above, the intent of the Commission was clearly stated in the Order of Rulemaking, "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."[11]

After considering the evidence presented by AT&T Missouri regarding the removal of CPN from the Automatic Message Accounting ("AMA") records when creating the Category 11-01-XX billing records for terminating carriers, the Commission stated:

> We find that SBC has shown no credible evidence that the Category 11-01-XX billing records it creates for wireless-originated calls traversing the LEC-to-LEC network should be different from the Category 11-01-XX billing records it creates for wireline *and wireless*-originated calls traversing the interexchange carrier network.[12]
>
> 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. If any carrier determines that it cannot or should not include the originating CPN of wireless callers in the Category 11-01-XX billing record, it is free to petition the Commission to be excluded from that aspect of the rule.[13]

The Commission's statements in the Order of Rulemaking could not be more clear that the Commission's intent was for the CPN to be included in the Category 11-01-XX billing records for wireless-originated calls.

In his Direct testimony, Staff witness Voight stated that the Staff agreed that the ERE required CPN in wireless billing records when the Order of Rulemaking was issued, but came to have a different opinion later.[14] Staff's change of opinion after the final Order of Rulemaking is not relevant to the intent of the Commission at the time the rule was promulgated, and the Staff's

---

[11]Order or Rulemaking published in the Missouri Register, Vol. 30, No. 12, (June 15, 2005), p. 1389.

[12]*Id.* Emphasis in original.

[13]*Id.* Emphasis added.

[14]Voight Direct Testimony, p. 12.

change of opinion can have no effect on the issue of whether the rule requires that CPN be included in the Category 11-01-XX billing records for wireless-originated calls.[15]

In his Direct and Rebuttal testimony filed in this case, Mr. Schoonmaker has shown that CPN is part of the industry-standard Category 11 billing records. Mr. Schoonmaker reviewed the industry group standards for billing records exchanged between industry members. Those standards are contained in a publication of the Ordering and Billing Forum ("OBF") of the Alliance for Telecommunications Industry Solutions ("ATIS"). Specifically, these record formats are contained in the Electronic Message Interface ("EMI") document which sets out the structure of various types of records and the individual fields within those records.[16] Mr. Schoonmaker demonstrated that the industry standard Category 11-01-XX billing record requires that the "From Number" section of the Category 11-01-XX record include the originating caller's number.[17] Staff witness Voight states in his Rebuttal Testimony that, "The 'From Number' is exactly the same as 'CPN' for wireless-originated calls."[18] The ERE rule clearly requires the transiting carrier to make a Category 11-01-XX record available to the terminating carrier, and Mr. Schoonmaker's testimony demonstrates that the Category 11-01-XX record should include the CPN. AT&T Missouri witness Constable acknowledges that CPN is available for the majority of calls in their network. The Automatic Message Accounting ("AMA") recording

---

[15]"An agency's contemporaneous interpretation of its own regulation is entitled to greater deference." *SSM Rehabilitation Institute v. Shalala,* 68 F. 3d 266, 270 (8th Cir. 1995).

[16]Schoonmaker Direct Testimony, p. 8.

[17]Schoonmaker Direct Testimony, p. 12.

[18]Voight Rebuttal Testimony, pp. 3-4.

requirements as evidenced by Constable Schedule 2(P), as shown by Mr. Schoonmaker's rebuttal testimony, require this information to be recorded in the AMA record. Thus, under the standards document CPN should be available to AT&T Missouri's billing system to include in the Category 11-01-XX records required by 4 CSR 240-29.040(4).[19]

The documents that Mr. Schoonmaker reviewed demonstrate that the From Number field can only be populated by the CPN. Yet, AT&T Missouri chose to populate the field with something it calls the Billing Telephone Number ("BTN"). The use of the BTN in the From Number field is not consistent with EMI standards, nor is BTN (as defined by AT&T) defined anywhere in those documents. Testimony at the hearing demonstrated that there is no practical difference between the Originating Carrier Number or OCN and the BTN. The Category 11-01-XX records already contain the OCN. Thus, the BTN as used by AT&T Missouri does not "enhance" the billing records that it is required to provide.

Finally, it is clear that AT&T Missouri believed that the rule, as promulgated, required the inclusion of CPN in the Category 11-01-XX billing records, because it specifically requested a waiver of the provision.[20] In this first part of the bifurcated proceeding whether or not AT&T Missouri should be granted such a waiver is not being considered. The only issue before the Commission is whether or not the rule as written and as approved by the Commission requires that CPN be included in the Category 11-01-XX billing records for wireless-originated calls

---

[19]Schoonmaker Rebuttal Testimony, p. 8.

[20]Sprint Missouri, Inc. ("Sprint") filed a "Motion to be Dismissed" from this proceeding stating that it had "made the necessary system modifications to be fully compliant with a request for industry-standard records" and was not requesting a waiver of the rule. Sprint notified Kingdom Telephone Company that the records it provided beginning March 31 would include the CPN. See, Schoonmaker Rebuttal Testimony, p. 19.

terminated to the LECs. The STCG and MITG believe that the only conclusion to be drawn from the plain language of the rule, the Commission's Order of Rulemaking and the written standards for the Category 11-01-XX records is that the rule requires that CPN be included in the Category 11-01-XX records.

Respectfully submitted,

Sondra B. Morgan

W.R. England, III Mo. Bar 23975
Sondra B. Morgan Mo. Bar 35482
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
(573) 635-7166
(573) 634-7431 (fax)
smorgan@brydonlaw.com (E-mail)

Attorneys for The Small Telephone Company Group

Craig S. Johnson by SBM

Craig S. Johnson Mo. Bar 28179
1649-A East Elm
Jefferson City, MO
573 632-1900
573 634-6018 (fax)
craig@csjohnsonlaw.com

Attorney for the Missouri Independent Telephone Group

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic submission, hand-delivered or sent by U.S. Mail, postage prepaid, this 1st day of May, 2006 to:

Mr. Mike Dandino
Senior Counsel
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Mr. Keith R. Krueger
Deputy General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Mr. Leo Bub
AT&T Missouri
One SBC Center, Room 4300
St. Louis, MO 663101

Mr. Larry Dority
CenturyTel of Missouri, LLC
101 Madison, Suite 400
Jefferson City, MO 65102

Sondra Morgan
Sondra B. Morgan