BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

T-MOBILE USA, INC.,	)	
	)	
Complainant,	)	
	)	
vs.	)	Case No. TC-2006-0486
	)	
BPS TELEPHONE COMPANY, et al.,	)	
	)	
Respondents.	)	

T-MOBILE MEMORANDUM OF LAW IN SUPPORT OF ITS OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DETERMINATION

T-Mobile USA, Inc. ("T-Mobile"), pursuant to Commission Rule 240-2.117(C), submits this memorandum of law in support of its response in opposition to the Motion for Summary Determination that the Rural LECs filed on July 12, 2006.

I. INTRODUCTION AND SUMMARY

The Rural LECs make numerous, unsupported accusations against T-Mobile. For example, the Rural LECs assert that T-Mobile has pursued "a constant course of delay and litigation."[1] This assertion, however, cannot be squared with the facts:

- In 2002, the Rural LECs, as was their right, filed a complaint against T-Mobile for not paying rates specified in their wireless termination tariffs – rates that the recent arbitration confirmed are well above their costs.
- In 2005, the Commission sustained this complaint, summarily dismissing T-Mobile's arguments that the tariffs were unlawful and unenforceable under federal law

[1] Rural LEC Motion at 6; Rural LEC Answer at 15.

because, among other things, the Rural LECs refused to comply with their federal statutory obligation to provide for *reciprocal* compensation.

- Also in 2005, T-Mobile, as is its legal right, challenged this ruling in federal court, and this litigation remains pending.

Only last year, the Commission "encouraged" the nation's largest carrier, AT&T (fka SBC) to "avail itself of all rights granted to it under federal law."[2] The Rural LECs have already announced their intention to appeal in federal court the Commission's recent arbitration order involving the parties.[3] Yet, when T-Mobile exercises its federal rights, it is accused of pursuing "a constant course of delay and litigation."

If T-Mobile is engaged in a "transparent litigation strategy" in exercising rights guaranteed by federal law and relying on a FCC decision affirmed on appeal,[4] then necessarily the Rural LECs must equally be engaged in a "transparent litigation strategy" in appealing the Commission's recent arbitration order and in claiming that the order did not establish TELRIC-based rates.[5] How can the Rural LECs re-litigate issues in a federal court (*e.g.*, the intraMTA issue) but then accuse T-Mobile of engaging in a "transparent litigation strategy" because it is litigating a federal law issue never decided by any federal court (*i.e.*, lawfulness of the Rural LECs' wireless termination tariffs)?

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2 *ERE Rulemaking Order*, 30 Mo. Reg. 1373, 1378 (June 15, 2005).

3 *See* Rural LEC Answer at ¶ 8. In fact, the Rural LECs already filed a federal court complaint, but they withdrew it when it was pointed out to them that the appeal had been filed prematurely.

4 *See TSR Wireless* v. *U S WEST*, 15 FCC Rcd 11166 (2000), *aff'd Qwest* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001).

5 *See* Rural LEC Answer at ¶ 5.

The Rural LECs further accuse T-Mobile of "refusing to comply" with the Commission's January 27, 2005 *Complaint Order*.[6] But the Commission did not in this *Order* require T-Mobile to do anything. Under Missouri law, the Commission has no power to determine damages, award pecuniary relief or declare or enforce any principal of law or equity.[7] Only recently – over 14 months after the *Complaint Order* was issued – did some of the Rural LECs bring a collection action in the appropriate court.[8]

They further state repeatedly that T-Mobile is the "only wireless carrier" that has not yet settled with them for the exchange of traffic during the period their unlawful tariffs were in effect, suggesting that T-Mobile has been unreasonable.[9] Whether other wireless carriers have entered into settlement agreements is irrelevant to the issues in this case. Nor does T-Mobile believe it is appropriate for the Rural LECs to discuss settlement negotiations in briefs before the Commission. However, T-Mobile is compelled to set the record straight:

- That two parties have been unable to reach agreement does not mean that one of the parties has engaged in bad faith, as the Rural LECs suggest.
- The negotiations between the parties have not been productive *because the Rural LECs, to date, have refused to entertain any concessions from their opening position.*
- T-Mobile has accepted reasonable offers, as evidenced by the agreement it has reached with certain other Missouri rural LECs concerning the exchange of traffic prior to April 29, 2005.

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6 Rural LEC Answer at 2 and ¶ 8.

7 *See State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980). Since the Commission is not authorized to enforce complaint orders, there is no basis to the Rural LECs' assertion that "[u]ltimately, the question presented by T-Mobile's complaint is whether the Commission is going to enforce its final orders and rules, or not." Rural LEC Brief at 22; Rural LEC Motion at 5; Answer at 15.

8 Several Rural LECs filed on June 14, 2006 a collection action against T-Mobile in Cole County Circuit Court (Case No. 06AC-CC00478).

9 Rural LEC Motion at 1 and 6; Rural LEC Brief at 14; Rural LEC Answer at 1 and 9.

- T-Mobile has taken legal positions that this Commission has accepted, and these decisions have been affirmed by federal courts.[10]
- The Rural LECs here have rejected proposals to mediate the dispute.
- The Rural LECs here have refused to produce to T-Mobile their agreements with other wireless carriers pertaining to pre-April 29, 2005 traffic, thereby depriving T-Mobile its federal statutory right to opt-into such agreements and depriving T-Mobile of learning whether the Rural LECs made concessions to T-Mobile's competitors.

As shown by the above, the Rural LECs certainly cannot credibly claim that T-Mobile has engaged in bad faith.[11]

The Rural LEC's sweeping and unsupported accusations are not limited to T-Mobile. They make similar sweeping – and incorrect – statements of law.[12] If T-Mobile is engaged in a "transparent litigation strategy" in exercising rights guaranteed by federal law and relying on a FCC decision affirmed on appeal,[13] then necessarily the Rural LECs must equally be engaged in a "transparent litigation strategy" in appealing the Commission's recent arbitration order and in claiming that the order did not establish TELRIC-based rates.[14] How can the Rural LECs re-

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[10] *See, e.g., Alma Communications* v. *Missouri PSC,* 2006 U.S. Dist. LEXIS 31339 (W.D. Mo., May 19, 2006).

[11] The Rural LECs remarkably suggest that T-Mobile engaged in bad faith in arguing that pre-April 29, 2005 traffic was not an appropriate subject of arbitration – even though they readily acknowledge that the Commission (consistent with decisions in other jurisdictions) *agreed* with T-Mobile's position. *See* Brief at 22. In contrast, the Commission does possess the authority to mediate the controversy.

[12] For example, the Rural LECs deny that "federal courts have jurisdiction over this matter" (Brief at 19; Motion at 3) – even though the Supreme Court has held that federal courts can entertain appeals of State commission orders applying federal law. *See Verizon* v. *Maryland PSC*, 535 U.S. 632 (2002); *Iowa Network Services* v. *Qwest*, 363 F.3d 683, 692 (8th Cir. 2004)("Federal courts have the ultimate power to interpret the provisions of the 1996 Act, including whether § 251(b)(5)'s reciprocal compensation requirement applies to the wireless traffic at issue here, even though this case is not brought within the context of a § 252(e)(6) proceeding.").

[13] *See TSR Wireless* v. *U S WEST*, 15 FCC Rcd 11166 (2000), *aff'd Qwest* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001).

[14] *See* Rural LEC Answer at ¶ 5.

litigate issues in a federal court (*e.g.,* the intraMTA issue) but then accuse T-Mobile of engaging in a "transparent litigation strategy" because it is litigating a federal law issue never decided by any federal court (*i.e.,* lawfulness of the Rural LECs' wireless termination tariffs)?

A motion for summary determination may be granted only if (1) there is no genuine issue of fact, (2) the movant demonstrates it is entitled to the requested relief as a matter of law, and (3) the Commission determines that summary determination is in the public interest.[15] Here, the Rural LECs, as the movants, have the burden of proof on all three elements.[16] T-Mobile demonstrates below that the Rural LECs have not met this burden on any of these elements and that as a result, the Commission must deny their motion for summary determination. In Section II below, T-Mobile illustrates how the RLECs failed to meet their burden of demonstrating that there are not any genuine issues of material fact. There are many material facts remaining including the fact that the recently approved traffic termination agreements do not permit the blocking requested by the RLECs. In Sections III and IV, T-Mobile demonstrates that the Commission does not have the authority to order the blocking of T-Mobile traffic either under the ERE rules or federal or state law. Finally, in Section V, T-Mobile demonstrates that the RLECs failed to demonstrate that the public interest would be served by the blocking of T-Mobile traffic.

II. THE RURAL LECS HAVE NOT YET MET THEIR BURDEN OF DEMONSTRATING THE ABSENCE OF DISPUTED MATERIAL FACTS

Commission Rule 240-2.117(E) specifies that the Commission may grant a motion for summary determination only if there is "no genuine issue as to any material fact." As the

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15 *See* 4 CSR 240-2.117(E).

16 *See, e.g., Aquila,* EF-2003-0465 (Oct. 9. 2003).

movants, it is the Rural LECs that have the burden of showing that no material facts are in dispute.[17]

T-Mobile has identified in its response in opposition 30 additional material facts. If the Rural LECs dispute any of these material facts, then the Commission would be required to deny their motion for summary determination.[18]

III. THE RURAL LECS HAVE NOT DEMONSTRATED THEY POSSESS THE LEGAL AUTHORITY TO BLOCK T-MOBILE'S MOBILE-TO-LAND TRAFFIC

Commission Rule 240-2.177(E) specifies that a movant, to secure a summary determination, must demonstrate that it is "entitled to relief as a matter of law." The Rural LECs have not demonstrated that they possess the legal authority to block T-Mobile's mobile-to-land traffic.

A. THE ERE RULES DO NOT EMPOWER THE RURAL LECS TO BLOCK MOBILE-TO-LAND TRAFFIC

The Enhanced Record Exchange ("ERE") rules permit terminating carriers to block originating carrier traffic under the circumstances specified in the rules,[19] and the Rural LECs solely relied on these rules to justify their call blocking proposal.[20] However, the ERE rules do

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17 *See, e.g., id.*

18 *See, e.g., T-Mobile/Rural LEC Arbitration,* TO-2006-0147, Order Denying Motion for Summary Determination, at 2 (Dec. 29, 2005)(The Commission denies T-Mobile's motion because it is "not clear" there are "no genuine issues of material fact.").

19 *See, e.g.,* 4 CSR 240-29.130.

20 *See, e.g.,* Rural LEC Motion at 5 ("Respondents are entitled to block T-Mobile's traffic pursuant to the PSC's ERE Rules.").

not apply to T-Mobile because as a federally licensed wireless carrier, it is not an "originating carrier" within the scope of those rules.[21] Staff agrees with T-Mobile on this issue:

> Since T-Mobile is not a telecommunications company, it cannot be an originating carrier, as defined by 4 CSR 240-29.090(20).[22]

Indeed, the Commission itself explicitly "deleted wireless carriers from the definition of a telecommunications company as stated in 4 CSR 240-29.020(34)" of its ERE rules.[23]

Notably, the Rural LECs have never attempted – including in their summary determination filing – to demonstrate any flaw in Staff's and T-Mobile's legal analysis. Since the Rural LECs have not challenged this analysis, it necessarily follows that the Commission cannot, under its own rules, grant summary determination when the Rural LECs have utterly failed to demonstrate that the ERE rules authorize their proposed call blocking.[24]

B. THE ADDITIONAL LEGAL AUTHORITIES THE RURAL LECS CITE DO NOT SUPPORT THEIR POSITION

The Rural LECs further assert that their proposal to block T-Mobile traffic is "expressly authorized" by "longstanding state and federal law allowing Respondents to block or discontinue

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21 *See, e.g.,* T-Mobile's First Amended Complaint at ¶¶ 24-26. *See also* T-Mobile's Response to Commission Order, TC-2006-0558, at 3-4 (July 7, 2006).

22 Staff Response to Order Directing Responses Regarding Obligation to Cease Blocking Preparations, TC-2006-0558, at 3 (July 7, 2006). Staff suggests that since the ERE rules do not apply to wireless traffic, the Rural LECs need not cease their blocking preparations. *Id.* But Staff neglects to consider that Rural LECs must then possess other legal authority to block another carrier's traffic, and neither the Rural LECs nor Staff have identified such authority.

23 *ERE Rulemaking Order*, 30 Mo. Reg. at 1382.

24 Blocking would not be permitted even if the ERE rules did apply. ERE Rule 240.29.130(1) specifies several "alternative methods of delivering blocked traffic to terminating carriers," including interconnection agreements for transiting traffic. The parties have such agreements that permit T-Mobile to send its traffic over the "LEC-to-LEC" network. Thus, if the Rural LECs were to begin to block this traffic, they would be in violation of Rule 240.29.130(1), in addition to the Traffic Agreements (as discussed below).

service for failure to pay tariffed rates."[25] In support, they cite and discuss several State court, FCC and federal court decisions.[26] None of these decisions is relevant to this proceeding, nor do they support the Rural LECs' position.[27]

In all the cases that the Rural LECs cite, a carrier was proposing to block traffic pursuant to the terms of its authorized tariffs (whether State or federal) then in effect. The courts in these cases did not, as the Rural LECs suggest, "expressly authorize" the involved carriers to block traffic. Rather, the courts held that lawful tariffs then in effect authorized the proposed call blocking.

Here, however, the Rural LECs have no valid tariffs governing the termination of intraMTA mobile-to-land traffic; their tariffs became void as a matter of federal law over a year ago when FCC Rule 20.11(d) took effect.[28] Because the Rural LECs currently have no tariffs in effect that govern intraMTA wireless traffic, cases authorizing call blocking based on valid tariffs have no relevance here.

C. THE PARTIES' TRAFFIC TERMINATION AGREEMENTS PROHIBIT THE PROPOSED CALL BLOCKING

Not only do the Rural LECs lack the authority to block T-Mobile's traffic, but the Traffic Termination Agreements they recently executed with T-Mobile preclude them from

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25 Rural LEC Brief at 23.

26 *See id.* at 6-10.

27 The Rural LECs relied solely on the provisions of the ERE rules to justify its blocking of T-Mobile's traffic. "This request to block traffic is being made pursuant to the Missouri Public Service Commission Enhanced Record Exchange Rule, 4 CSR 240-29.130 of Missouri's Code of State Regulations." See Exhibit A, p. 6 of T-Mobile's Amended Complaint.

28 47 C.F.R. § 20.11(d)("Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio services providers pursuant to tariffs."). If LECs cannot impose compensation obligations *via* tariffs, is necessarily follows they cannot impose *via* tariffs blocking provisions for an alleged failure to pay compensation.

implementing their call blocking plans. These Agreements govern the relationships between the parties for all traffic that they have exchanged or will exchange since April 29, 2005 – including the T-Mobile traffic the Rural LECs want to block.[29] While these Agreements permit call blocking, such blocking is permitted in one circumstance only – specifically, when a "party fails to pay when due any *undisputed* charges billed to [it] *under this Agreement.*" The Rural LECs do not allege – and cannot allege – that T-Mobile has failed to pay timely "undisputed charges" billed to it for the traffic covered by the Agreements.

The Rural LECs' proposal to block T-Mobile traffic is not authorized by the Agreements they have executed. First, the amounts at issue are not "undisputed," as T-Mobile has disputed and maintains that the tariffed rates are incompatible with governing federal law (as confirmed by the Commission's recent arbitration order), and litigation involving this issue remains pending. Second, the amounts at issue were not billed to T-Mobile "under this Agreement," but were rather billed under tariffs that are now void. Because the Traffic Agreements specify only one limited circumstance where call blocking may be employed, and because the Rural LECs' blocking proposal does not fit within this one circumstance, it necessarily follows that the Traffic Termination Agreements prohibit the Rural LECs from blocking traffic subject to the Agreements.[30]

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[29] *See, e.g.,* BPS/T-Mobile Traffic Termination Agreement at § 1.1 ("This Agreement shall cover traffic originated by one of the Party's networks and delivered to the other Party for termination without the direct interconnection of the Parties' networks.").

[30] If, however, the Commission disagrees with T-Mobile and determines that the blocking provision in the Agreements applies to the exchange of pre-Agreement traffic, then the Commission must apply the Agreements in full for pre-Agreement traffic – including the rates specified in the Agreement for intraMTA traffic.

In summary, the Rural LECs have made no attempt to demonstrate that the ERE rules authorize them to block mobile-to-land traffic. They also have no tariffs in effect governing intraMTA mobile-to-land traffic – meaning they cannot justify their blocking proposal by reference to tariffs (much less by court decisions applying tariffs filed by *other* carriers). In fact, the Rural LECs' blocking plans are prohibited by the Traffic Termination Agreements that they recently executed with T-Mobile. Accordingly, the Rural LECs do *not* possess the legal authority to block T-Mobile's traffic, and without such authority, they may not block T-Mobile's traffic as a matter of law.

IV. THE RURAL LECS HAVE NOT DEMONSTRATED THAT THE COMMISSION POSSESSES THE LEGAL AUTHORITY TO AUTHORIZE THEM TO BLOCK T-MOBILE'S TRAFFIC

The Rural LECs may contend that it does not matter whether they independently possess the legal authority to block T-Mobile's traffic because the Commission could by order give them such authority. T-Mobile must disagree. The parties have recently executed Traffic Termination Agreements that specify the circumstances that the Rural LECs may block T-Mobile traffic. As discussed above, these Agreements do not permit the Rural LECs to block existing or future traffic for non-payment of traffic that predates the Agreements. T-Mobile respectfully submits that the Commission cannot enter an order disregarding the explicit provisions of such Agreements – especially when the ink on the Agreements is barely dry.

The Commission does not possess the authority to block T-Mobile's existing or future traffic for non-payment of traffic that predates the Agreement.

A. THE COMMISSION LACKS THE AUTHORITY TO AUTHORIZE THE RURAL LECS TO BLOCK T-MOBILE'S INTERSTATE TRAFFIC

The Rural LECs propose to block all T-Mobile mobile-to-land traffic over the "LEC-to-LEC" network – including interstate traffic – that T-Mobile sends directly to AT&T-Missouri and Embarq-Missouri.[31] The Commission cannot authorize this proposed call blocking unless it finds that its "blocking authority" extends to interstate wireless traffic. In fact, the Commission has no such authority.

T-Mobile has previously demonstrated that other than in limited exceptions not relevant here, State commissions possess no authority over interstate traffic, including the authority to authorize one carrier to block another carrier's interstate traffic.[32] The Rural LECs have never attempted to challenge this demonstration.[33] Instead, they rely on one paragraph of the *ERE Rulemaking Order*, where the Commission stated based on one federal district court decision rendered over 60 years ago:

> We also reject the apparent notion of some commentators that the jurisdiction of the FCC is exclusive in matters pertaining to calls that begin in one state and end in another. We cite *Southwestern Bell Telephone Co.* v. *United States et al.*, 45 F. Supp. 403 (W.D. Mo. 1942). There, the FCC attempted to exert jurisdiction of interzone calls traversing between Missouri and Kansas. The court ruled that the [FCC] was without jurisdiction to regulate such interstate activity. Hence, we find that our local interconnection rules that include intraLATA and intraMTA calls do not infringe on interstate matters, even though LATA and MTA boundaries extend slightly into other states.[34]

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31 T-Mobile has previously demonstrated that given the mobility inherent in wireless traffic, neither the Rural LECs nor transit carriers can segregate interstate traffic from intrastate traffic (*i.e.*, block the latter but not former). *See, e.g.*, T-Mobile's First Amended Complaint at n.7. In this regard, the Commission has specifically precluded LECs from using wireless customer telephone numbers in attempting to determine "the proper jurisdiction of wireless telephone calls on the LEC-to-LEC network." *ERE Rulemaking Order*, 30 Mo. Reg. at 1377-78.

32 *See, e.g.*, T-Mobile's First Amended Complaint at ¶ 13.

33 *See* Rural LEC Answer at ¶ 13.

34 Rural LEC Brief at 12, *quoting ERE Rulemaking Order*, 30 Mo. Reg. 1373, 1379 (June 15, 2005).

Not surprisingly, perhaps, the Rural LECs neglect to cite another portion of this same *Order*: "Section 386.030 precludes the commission's authority over interstate commerce unless specifically authorized by the Congress, and section 386.250(2) limits the commission's jurisdiction to telecommunications between one point and another point within Missouri."[35]

The 1942 *Southwestern Bell* case that the Commission cited involved Section 221(b) of the Communications Act, which is one of the exceptions to the FCC's exclusive jurisdiction over interstate traffic. Section 221(b) explicitly gives to State commissions, rather than the FCC, regulatory authority over telephone exchange service – even when the exchange service extends into two States (as is the case with the Kansas City exchange).[36] Federal appellate courts have recognized that this Section 221(b) exception to the FCC's exclusive jurisdiction over interstate services is narrow and limited in scope to multi-state local exchange service:

> [T]he legislative history of section 221(b) leaves no doubt that the purpose of section 221(b) is to enable state commission to regulate local exchange service in metropolitan areas, such as New York, Washington or Kansas City, which extend across state boundaries.[37]

As few, if any, of the Rural LECs operate multi-state exchanges and as the issue here involves the interconnection of two networks (vs. their provision of local exchange service to consumers), Section 221(b) has no relevance to this proceeding.

Section 221(b) and the 1942 *Southwestern Bell* case are irrelevant for a second, independent reason. As the Eighth Circuit Court of Appeals has recognized, the Section 221(b)

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35 *ERE Rulemaking Order*, 30 Mo. Reg. at 1377.

36 *See* 47 U.S.C. § 221(b).

37 *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036, 1045 (D.C. Cir. 1977)(supporting citations omitted).

exception does not apply to State commission regulation over entry and rates of mobile-to-land traffic:

> However, Congress expressly exempted the states' authority concerning local exchange service with respect to mobile services: "notwithstanding . . . § 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service.[38]

In summary, this Commission has no authority over interstate mobile-to-land traffic that would be blocked by the Rural LECs' blocking proposal. If this Commission lacks regulatory authority over this interstate traffic, it necessarily follows that it cannot authorize the Rural LECs to block this interstate traffic. Neither the Rural LECs nor transit carriers are capable of blocking T-Mobile's intrastate traffic without also blocking its interstate traffic. The Commission certainly cannot enter an order that would result in the Rural LECs taking action that would be unlawful under federal law. Accordingly, T-Mobile respectfully submits that the Commission cannot enter any blocking order in this case.[39]

B. SECTION 332(C)(3) ALSO PROHIBITS THE COMMISSION FROM AUTHORIZING THE RURAL LECS TO BLOCK ANY OF T-MOBILE'S TRAFFIC, INCLUDING ITS INTRASTATE TRAFFIC

The Commission also lacks the authority to permit the Rural LECs to block T-Mobile's intrastate traffic. Section 332(c)(3) of the Communications Act states unequivocally and expansively: "Notwithstanding sections 152(b) and 221 (b) of this title, no State . . . shall have *any authority to regulate* the entry of . . . any commercial mobile service."[40] The word 'regulate'

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38 *Iowa Network Services* v. *Qwest*, 363 F.3d 683, 691 (8th Cir. 2004).

39 Based on the FCC decision, *Bell Telephone of Pennsylvania*, 66 F.C.C.2d 227 (1977) that the Rural LECs cite in their brief, T-Mobile hereby withdraws paragraphs 14 and 15 of its First Amended Complaint.

40 47 U.S.C. § 332(c)(3)(A)(emphasis added).

is defined as "to govern or direct according to rule or to bring under control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists."[41]

A Commission order authorizing the Rural LECs to block T-Mobile's traffic would constitute the very entry regulation that Section 332(c) flatly forbids. Such an order would have the practical effect of limiting the type of telecommunications services that T-Mobile may provide to its customers (because unless T-Mobile implements counter-measures, T-Mobile customers would no longer be able to call customers served by the Rural LECs).

It also does not matter that the Rural LECs propose to block only the traffic that T-Mobile sends to AT&T-Missouri and Embarq-Missouri directly and not the traffic it sends to AT&T-Missouri and Embarq-Missouri indirectly (*via* an "IXC" like AT&T). At the outset, the Commission should consider the absurdity of the Rural LECs' proposal: According to the Rural LECs, T-Mobile may *not* send traffic destined to them by connecting directly to AT&T-Missouri's network, but it *may* send traffic to them *via* an "IXC," which, in turn, will forward the calls to AT&T-Missouri that, in turn, will send the calls to the Rural LECs.[42]

This proposal also constitutes entry regulation prohibited by Section 332(c)(3), because the Commission effectively would be telling T-Mobile how it must route its traffic – namely, it must use two intermediary carriers (AT&T and AT&T-Missouri) rather than one intermediary carrier (AT&T-Missouri) in reaching the Rural LECs' networks.

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41 BLACK'S LAW DICTIONARY at 1156 (5th ed. 1979). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY at 1193, def. 3 (1976)(Regulate means "to fix the time, amount, degree or rate of (as by adjusting, rectifying.").

42 As T-Mobile explains below, when it sends mobile-to-land traffic to AT&T, MCI or Sprint, they act as transit carriers – not "interexchange carriers."

In fact, the FCC has already preempted States from telling wireless carriers how they must route their traffic and interconnect with LEC networks. Specifically, the FCC has declared that "separate interconnection arrangements for interstate and intrastate commercial mobile radio services are not feasible (*i.e.,* intrastate and interstate interconnection in this context is inseverable) and that state regulation of the right and type of interconnection would negate the important federal purpose of ensuring CMRS interconnection to the interstate network":

> Therefore, we preempt state and local regulations of the kind of interconnection to which CMRS providers are entitled.[43]

Accordingly, this Commission has no authority to regulate (which includes authorization of call blocking) of any of T-Mobile's traffic, whether intrastate or interstate.

The Rural LECs contend that the Commission has already rejected T-Mobile's legal position in its *ERE Rulemaking Order*. Specifically, they quote from the following statements in that *Order*:

> [T]he Enhanced Record Exchange Rules do not regulate wireless carriers . . . . Rather, what the rules would regulate is use of the LEC-to-LEC network – not wireless carriers. * * * [W]e do not believe our rules conflict with federal law, because they have nothing to do with their relationship between a wireless carrier and its customers. . . . Our rules are not targeted to the practices of wireless carriers.[44]

There are four flaws with this position.

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43 *Second CMRS Order,* 9 FCC Rcd 1411, 1498 ¶ 230 (1994).

44 Rural LECs' Brief at 15-17, *quoting ERE Rulemaking Order*, 30 Mo. Reg. at 1377. *See also id.* at 1376 ("[O]ur modified rules do not seek to regulate the business practices . . . of nonregulated entities, such as wireless carriers.").

First, the Commission statements that the Rural LECs quote are *dicta*. The ERE rules do not, as demonstrated above, apply to wireless carriers. To the contrary, the Commission specifically excluded wireless carriers from the final ERE rules.[45]

Second, a Commission order authorizing the Rural LECs to block T-Mobile traffic, or limiting the way that T-Mobile may route its own traffic, would "conflict with federal law," as demonstrated above.

Third, a Commission order authorizing the Rural LECs to block T-Mobile traffic would, in fact, effect the "relationship between a wireless carrier and its customers," since T-Mobile may no longer offer the services and capabilities it is currently providing to customers. Similarly, a Commission order that has the effect of requiring T-Mobile to use two intermediary carriers rather than one would also negatively impact the carrier-customer relationship. Requiring a carrier to use two intermediary networks rather than one increases a carrier's operational expense, which ultimately can negatively affect the prices consumers pay for service and can also affect service quality.

Finally, the Commission possess no regulatory authority over wireless carriers – whether or not the regulation affects the carrier-customer "relationship."[46] If the Commission lacks authority over wireless carriers, it necessarily follows that it also lacks authority over the services they provide and the manner in which they route wireless traffic – including when the wireless traffic is transported over a "LEC-to-LEC" network.

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45 *See, e.g.,* T-Mobile's Response to Commission Order, TC-2006-0558, at 4 (July 7, 2005).

46 *See, e.g.,* RSMo. §§ 386.020(53)(c), 386.030, 386.250(2).

In summary, under both State and federal law, the Commission lacks the authority to authorize LECs to block wireless traffic or to enter an order that has the effect of requiring a wireless carrier to route its traffic in a non-preferred manner.

V. THE RURAL LECS HAVE FAILED TO DEMONSTRATE THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE BLOCKING OF T-MOBILE TRAFFIC

Commission Rule 4 CSR 240-2.117(E) specifies that a motion for summary determination may not be granted unless "the commission determines that it is in the public interest" to grant the motion. The Rural LECs' Motion does not address this public interest factor. The reason for this omission is understandable. In fact, no public interest consideration would be promoted by the Rural LECs' proposal – as the only effect of the proposed call blocking would be to increase the costs of service for all involved parties without any corresponding public benefit.

What would the Rural LECs gain by implementing their call blocking proposal? The Rural LECs emphasize repeatedly that traffic flows would continue so long as T-Mobile connects to AT&T-Missouri or Embarq-Missouri indirectly rather than directly – action that would impose new costs on T-Mobile in implementing and operating this re-routing scheme. But imposing new costs on wireless carriers – costs that are completely unnecessary since T-Mobile-to-Rural LEC traffic would continue to flow – can hardly be considered a legitimate public interest objective that this Commission could endorse.

The Rural LECs would not generate any additional revenue by their proposed re-routing scheme, as federal law prohibits use of access charges for such re-routed intraMTA traffic.[47] In

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47 *See* T-Mobile's First Amended Complaint at ¶ 28.

addition, the Traffic Termination Agreements the Rural LECs have executed requires them to charge the rates in Appendix 1 for all intraMTA traffic.[48] Thus, the only apparent consequence to the Rural LECs of implementing their call blocking proposal would be that they would incur new costs (AT&T-Missouri's blocking fees) in attempting to prohibit T-Mobile from interconnecting directly with AT&T Missouri. The Rural LECs' customers do not benefit when their service provider incurs new costs that provide no benefit to them.

In the end, the Rural LECs have failed to identify a single public interest benefit from their call blocking proposal.

VI. CONCLUSION

For the foregoing reasons, T-Mobile respectfully asks the Commission to deny the Rural LECs' Motion for Summary Determination. It further asks the Commission to hold that the Rural LECs cannot block T-Mobile's traffic because they have no authority in law to do so and because such call blocking is incompatible with the terms of the Parties' recently executed Traffic Termination Agreements.

Respectfully submitted,

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ATTORNEYS FOR T-MOBILE USA, INC.

[48] Under the Agreements, intraMTA traffic is defined as "Local Traffic."

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been mailed electronically this 1st day of August, 2006, to:

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