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 29.040(4).	))))	Case No. TE-2006-0053

AT&T MISSOURI'S POST-HEARING
MEMORANDUM OF LAW

AT&T Missouri[1] respectfully submits this Memorandum of Law, which summarizes its position in the case and addresses the five questions set out in the Commission's Order Extending Exemption and Requiring Filing.

EXECUTIVE SUMMARY OF AT&T MISSOURI'S CASE

The Commission's position before the Court that there is no requirement to include CPN in the wireless billing record[2] is absolutely correct and should be maintained.

1. Neither the proposed nor the final rule contains any requirement to put CPN in a wireless billing record. While the rules specifically direct inclusion of the Carrier Identification Code ("CIC") or the Operating Company Number ("OCN") and where in the record to place them, the rules say nothing about inclusion of CPN in a wireless billing record. The only sections of the proposed and final rules that mention CPN pertain to the transmission of CPN in

[1] Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, will be referred to in this pleading as "AT&T Missouri." It previously conducted business as "SBC Missouri."

[2] Specifically, the Commission in its Brief filed December 9, 2005, in Cole County Circuit Court Case No. 05AC-CC00732, at p. 6 stated:

> The Commission concedes that the single sentence of which SBC Missouri complains is an incorrect statement of what Rule 4 CSR 240-29.040(4) requires. This is so because the Commission now believes that neither a "category 11-01-XX record" nor a "Missouri-specific category 11-01-XX record" must include the CPN for wireless-originated calls.

the signaling that is sent with the call in real time, which is significantly different than including this information in billing records that are exchanged many weeks later.[3]

Rule 29.040(6) -- which MITG and STCG point to as showing an intent to require CPN in the wireless billing record -- does not apply here. Its purpose is to prevent the fraudulent substitution of one "originating telephone number" with another "originating telephone number" to make a long distance call appear local in order to avoid paying higher access charges.[4] AT&T Missouri's placing the trunk group number BTN[5] in the "From Number" field of the wireless billing record does not violate Rule 29.0240(6)'s prohibition. Not only is the BTN not a substituted "originating telephone number" (it is not a telephone number at all), but it also helps identify the financially responsible wireless carrier and tells terminating carriers which of AT&T Missouri's tandems a particular wireless call used to enter the LEC-to-LEC network.

2. The Commission's Court position is fully supported by applicable industry standards. AT&T Missouri witness Chris Read, who has been an active and supervisory member of the OBF[6] since 1997 and was the only witness in the proceeding who had served on the OBF, testified that the OBF EMI guidelines do not require CPN to be included in the wireless billing record. He explained that while the "From Number" field in the Category 11 EMI billing record for wireless calls is a "mandatory" field, that description in the guidelines is not to be equated as a requirement to include CPN in the billing record. Rather, the "From Number" field is a generic field that may be populated with a number of different values, as long as they are placed in an NPA-NXX-LLLL format. He testified that use of the trunk group billing number (which AT&T

[3] See Rules 29.040(1) and (2). AT&T Missouri continues to comply with these rules by providing CPN in signaling on all calls that transit its network and firmly supports this requirement, both at the state and federal levels. Ex. 4NP, Constable Direct, pp. 13-15; and Ex. 10NP, Schoonmaker Rebuttal, Schedule RCS-6.
[4] Order of Rulemaking Adopting 4 CSR 240-29.010, Mo. Reg. Vol. 30, No. 12 (June 15, 2005) p. 1389.
[5] AT&T uses the term "Billing Telephone Number" or "BTN" for the number assigned to specific trunk groups coming into a tandem switching office.
[6] The "Ordering and Billing Forum" or "OBF" is the industry organization responsible for creating and maintaining the industry standards for the content of Exchange Message Interface ("EMI") billing records.

Missouri calls "BTN") is perfectly acceptable and is the predominant practice across the country. The only evidence of a carrier including CPN in the wireless billing record was that of Sprint, which only recently began doing this, and only for Missouri. Sprint's producing a wireless billing record in all its other operating states similar to AT&T Missouri's -- as do BellSouth, Verizon and CenturyTel -- fully supports Mr. Read's interpretation of the OBF EMI guidelines.

Similarly, AT&T Missouri network witness Jason Constable testified that the Telcordia industry standards for network switching equipment require the trunk group billing number to be included in the Automatic Message Accounting ("AMA") data recorded by the switch, which is the source for the creation of EMI billing records.[7] STCG and MITG's claim that CPN must be included in "Module Code 164 of the AMA Record"[8] is demonstrably incorrect as there was no evidence of any carrier (except recently as to Sprint and only in Missouri) ever including CPN in wireless billing records. It is also contradicted by how the manufacturers have applied this standard. Lucent, the leading American telephone switch manufacturer, has not even designed this technical capability into its 5ESS tandem switches and it would take a major software development project, costing over $1 million and taking upwards of a year, for Lucent to incorporate such a feature in its tandem switches.[9] And even if it were to do so, it would not be consistent with industry practice, under which the wireless carrier's trunk group billing number (required by GR-1504 to be recorded as the originating number in AMA) is placed in the "From Number" field in the Category 11 billing record.

[7] Specifically, Telcordia GR-1504 states that for wireless originated calls, "the 'Originated Number' fields (Tables 13 and 14) in Structure Code 0625 shall contain the per-trunk-group billing number of the WSP [wireless service provider] as assigned by the LEC to the interface directly connected to the WSP." Telcordia GR-1504 (Generic Requirements for Wireless Service Provider (WSP) Automatic Message Accounting (AMA), R3-85, Page 3-22. A copy of this document is attached to Mr. Constable's Direct Testimony as Schedule 2(P), p. 44 of 66.
[8] Schoonmaker Rebuttal, pp. 7-8.
[9] Constable Direct, p. 12; Read Rebuttal, p. 10.

Although MITG/STCG witness Robert Schoonmaker offered a different interpretation of the OBF EMI guidelines and the Telcordia document, his level of expertise is substantially below that of AT&T Missouri witnesses. Mr. Schoonmaker readily acknowledged that he was merely reading these documents. Unlike Mr. Read, Mr. Schoonmaker has never participated in the creation or the maintenance of any of the standards for wireless billing records in the OBF EMI guidelines. And unlike Mr. Constable, Mr. Schoonmaker has no network engineering background, training or work experience and could not explain how data such as CPN was technically captured by a switch from the SS7 signaling or how it was technically inserted in the AMA switch recording. Mr. Schoonmaker candidly acknowledged that he was not holding himself out in this case as a network engineer. Mr. Schoonmaker's lack of expertise in these areas should be considered in weighing the conflict of his testimony with that of AT&T Missouri's witnesses, whose credentials as expert witnesses were not questioned.

3. The evidence shows that there is little need for CPN to be included in the wireless billing record. The evidence has unequivocally established that the small carriers are able to use, and are using, AT&T Missouri's existing wireless Category 11 record to bill wireless carriers for terminating their wireless traffic. The information in these records is the same information that AT&T Missouri itself uses to bill the wireless carriers.

Even if CPN was included in the wireless billing record, the small carriers readily admitted that they would not use it to bill terminating charges to wireless carriers. They indicated that they would use OCN (as they do today), which accurately and reliably identifies the proper wireless carrier to bill. They also acknowledged that CPN cannot be used to jurisdictionalize a wireless call because of roaming, and the Commission itself specifically prohibits it:

> . . . We also agree that Calling Party Number (CPN) cannot in all instances be used to determine the proper jurisdiction of wireless calls. We caution all terminating carriers that any attempt to use an OCN or CPN to determine the proper jurisdiction of wireless telephone calls on the LEC-to-LEC network is not permissible under our local interconnection rules.[10]

Moreover, any claim that CPN might be needed in the wireless billing records for general auditing purposes or to help develop jurisdictional factors is overstated. The evidence shows that CPN is currently being made available to MITG/STCG in real time with the call through signaling and that they can and have used this information for each of these purposes.

AT&T Missouri's position here concerning the appropriate use of CPN is not inconsistent with the position it is maintaining at the FCC. The issue arises because the same imprecise label -- "wireless-originated traffic" -- is used with reference to two very different types of traffic, which are subject to completely different sets of regulatory rules. Even though both the traffic at issue here (which is directly terminated to the LEC network by wireless carriers) and the traffic at issue in the FCC case (which is terminated to the LEC network by IXCs as Feature Group D ("FGD") long distance traffic) both originated on a cell phone, they are handled very differently from a technical standpoint.[11] From a regulatory perspective, the wireless terminating traffic at issue here is subject to special FCC rules requiring negotiation of the terms and conditions for terminating such traffic. In contrast, the IXC terminated traffic at issue in the FCC case are all FGD access calls and are subject to the terminating ILEC's interstate and intrastate FGD access tariffs. And most critically, those tariffs require use of CPN to jurisdictionalize the calls between intrastate and interstate jurisdictions. The Commission itself has recognized the different

[10] Order of Rulemaking Adopting 4 CSR 240-29.010, Mo. Reg. Vol. 30, No. 12 (June 15, 2005) pp. 1377-1378.
[11] They enter the LEC network over different types of dedicated trunk groups -- wireless terminating versus FGD access; they are subject to different AMA recording standards under the Telcordia GR-1504 document; and they are subject to different billing record standards under the OBF EMI Guidelines.

treatment for these two types of traffic.[12] While AT&T Missouri intended its discussion of the limitations on the use of CPN to apply only to the directly terminating wireless traffic at issue here, MITG/STCG erroneously attempts to confuse the issue with FGD access traffic.

4. The evidence demonstrates that the Commission could not have intended to impose a new requirement to include CPN in wireless billing records. Had the proposed rule sought to impose a CPN requirement, the parties to the rulemaking would have submitted all of the evidence presented herein, as they do not hold back relevant evidence when a rule which could have significant economic and operational impact is being considered. Parties did not, however, precisely because the rule as proposed did not indicate any intent to impose a new requirement that CPN be provided in wireless billing records. Nor did the Commission's fiscal note accompanying the proposed rule address the significant costs which the industry would incur had CPN been required in wireless billing records, which certainly would have been required had the Commission intended such a requirement through Rule 29.040(4).

COMMISSION QUESTIONS FROM THE EVIDENTIARY HEARING

During the April 17 and 18, 2006 Evidentiary Hearing, the presiding judge directed all parties to file a Memorandum of Law through the Commission's Electronic Filing and Information System ("EFIS") no later than Monday, May 1, 2006 by 8:00 a.m. addressing the following questions:

[12] . . . We recognize that this limitation [on use of CPN to jurisdictionalize wireless terminating calls] contrasts with processes historically employed on the Interexchange Carrier network in which CPN is used to determine the jurisdiction of wireless calls. Order of Rulemaking Adopting 4 CSR 240-29.010, Mo. Reg. Vol. 30, No. 12 (June 15, 2005) pp. 1377-1378.

1. How controlling is a purpose clause?

When the language in an agency regulation or rule is clear on its face, no resort need be taken to the regulation's purpose clause, as no construction of the regulation would be appropriate. However, when the language of a regulation is subject to an ambiguity, the regulation's purpose clause is generally required to be considered in context as part of the overall intendment in enacting the regulation.

The same principles of construction are used in interpreting agency rules and regulations as are used in interpreting statutes.[13] First and foremost, where the language used is clear and unambiguous, there is no room for construction. As the Supreme Court has ruled, the primary rule of statutory construction requires intent to be ascertained by focusing on the plain and ordinary meaning of the words used in the enactment:

> The primary rule of statutory construction requires this Court to ascertain the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute. *Union Elec. Co. v. Director of Revenue*,799 S.W.2d 78, 79 (Mo. banc 1990). Where the language of the statute is clear and unambiguous, there is no room for construction. *Community Federal Savings and Loan Ass'n v. Director of Revenue*, 752 S.W.2d 794, 798 (Mo. banc 1988).[14]

Here, the Commission's rules contain no requirement to include CPN in Category 11 wireless billing records. Nothing in Rule 29.040(4) imposes an obligation requiring carriers to include CPN in billing records for wireless-originated calls. It merely states that:

> 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.

[13] Teague v. Missouri Gaming Com'n, 127 S.W.3d 679, 685 (Mo. App. W.D. 2003).
[14] Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992).

The Commission, in its Brief filed with the Cole County Circuit Court, has indicated that nothing in the rule required CPN to be included in the wireless billing record:

> The Commission concedes that the single sentence of which SBC Missouri complains is an incorrect statement of what Rule 4 CSR 240-29.040(4) requires. This is so because the Commission now believes that neither a "category 11-01-XX record" nor a "Missouri-specific category 11-01-XX record" must include the CPN for wireless-originated calls.[15]

Staff has reached a similar conclusion:

> SBC is correct. Nothing in the rules specifically requires that CPN be placed in the billing record of wireless originated calls. Rather, 4 CSR 240-29.040(4)(A) merely requires that a "category 11-01-XX billing record" be created.[16]

As the language of the Commission's rules are clear and unambiguous that CPN is not required to be included in the wireless billing record, there is no room for construction.

But to the extent an agency rule or regulation contains an ambiguity, its purpose clause -- as well as its title -- must be viewed in context as an indication of the overall intent of the regulation. Courts have directed that it is necessary to "construe all the provisions of the statute or regulation together and [to] harmonize all the provisions if reasonably possible."[17] Like statutory preambles and titles, the purpose clause and title of an agency rule or regulation are part of the overall enactment.[18] Where the language at issue is clear, the language in a preamble is not to be considered for the purpose of contradicting express statutory language. But where there may be some doubt as to the application of a statute, "preambles must be viewed in their context

[15] MoPSC Brief, Cole County Case No. 05AC-CC00732, filed December 9, 2005, page 6.
[16] Constable Direct, p. 5, Staff's August 11, 2005, Memorandum in response to the Commission's Order, Case No. TE-2006-0053, p. 5.
[17] Daly v. State Tax Com'n, 120 S.W.3d 262, 267 (Mo. App. E.D. 2003); Kincade v. Treasurer of State of Missouri, 92 S.W.3d 310, 311 (Mo. App. E.D. 2002).
[18] See Proposed Rules, Mo. Reg. Vol. 30, No. 1 (January 3, 2005) at pp. 50-67; and Order of Rulemaking, Mo. Reg. Vol. 30, No. 12 (June 15, 2005) at pp. 1373-1401.

as part of an overall legislative intendment."[19] Explaining when preambles may be used to determine legislative intent, the Missouri Supreme Court stated:

> The function or effect of the preamble in a statute or an ordinance should be considered. The authorities are in accord on that subject. . . . it is said: "in cases of doubt as to the proper construction of the body of a statute, resort must be had to the preamble or recitals for the purpose of the ascertaining the legislative intent. But where the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals."[20]

Similarly, titles enacted as part of the statute by the Legislature,[21] are to be considered in construing the enactment:

> . . .we must consider the entire Legislative enactment, and under our Constitution 1945, Article 3, § 23, V.A.M.S., the title of the statute is necessarily a part thereof and is to be considered in construction.[22]

Here, to the extent any ambiguity exists, both the title of Rule 29.040 and its Purpose Clause make clear that the intent of the rule is to identify the originating carrier for purpose of intercompany billing. The title of the rule is: "4 CSR 240-29.040 Identification of Originating Carrier for Traffic Transmitted over the LEC-To-LEC Network." And the Purpose Clause of Rule 29.040 states:

> *PURPOSE*: *The purpose of this rule is to establish 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 stated intent of the rule as reflected in both the title and the Purpose Clause is also consistent with the Commission's definition in the rule of the Category 11-01-XX billing record, which

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[19] Lett v. City of St. Louis, 948 S.W.2d 614, 617 (Mo. E.D. 1996) (interpreting city earnings tax ordinance); see also City of Rolla v. Studley, 120 S.W.2d 185, 187 (Mo. App. 1938) (preamble considered part of a city resolution and may be considered in determining purpose of resolution).

[20] Doemker v. City of Richmond Heights, 18 S.W.2d 394, 398 (Mo. 1929) (construing ordinance concerning street improvements).

[21] Which must be distinguished from "catch words" or subtitles add by the Reviser of Statutes that are not part of the statute itself and are not to be used as an aide in construing a statute. State ex rel. Rybolt v. Easley, 600 S.W.2d 601, 606 (Mo. App. W.D. 1980).

[22] Bullington v. State, 459 S.W.2d 334, 341 (Mo. 1970) (construing kidnapping statutes); A.J. Meyer & Co. v. Unemployment Comp. Comm'n, 152 S.W.2d 184, 189, (Mo. 1941) ("under our Constitution, the title of a statute is necessarily a part thereof, and is to be considered in construction").

makes clear -- through the specific requirement to include either a CIC or an OCN -- that the purpose of these billing records is to identify the responsible originating carrier:

> (5) A Category 11-01-XX Record is 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 digits in this record are "11."
>
> > (A) 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 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 digits in the 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 through 49.[23]

As in construing a statute, if terms are defined by the enactment, those terms must be given effect.[24] Here, undisputed evidence establishes that both the CIC and the OCN[25] identify the responsible carrier, not the originating end-user, which clearly reflects the purpose of these records to identify the responsible carrier.

2. How controlling is an Order of Rulemaking?

Commission statements in an Order of Rulemaking can be used for interpretive purposes provided they are consistent with the plain language of the rule. Such statements, however, cannot be employed to impose additional requirements beyond what the rule itself required. Any additional requirements that could potentially impact a member of the public will be considered void because the statutory notice and comment rulemaking procedures were not followed.

[23] 4 CSR 240-29.020(5) (emphasis added).
[24] St. Louis Country Club v. Administrative Hearing Comm'n, 657 S.W.2d 614, 617 (Mo. banc 1983).
[25] An OCN is a 4-digit code assigned by the National Exchange Carrier Association ("NECA") used in the telephone industry to identify telephone companies. NECA also assigns OCNs to other carriers such as CLECs and wireless carriers. OCNs are used in intercompany billing records to identify the carrier responsible for paying intercarrier compensation charges on telephone calls. Read Direct, p. 8.

Courts have generally held that the Commission's power to enact rules and regulations also includes the power to reasonably interpret and apply the rules.[26] Explaining this interpretive authority, the Courts have stated that the Commission is:

> vested with the power of exercising discretion in the adoption of rules and regulations and in the declaration of its policies in reference to the interpretation and application of said rules in the future.[27]

But there is a significant difference between an agency's articulation of its policy through an appropriate interpretation of an existing rule and an agency's attempt to impose new requirements under the guise of interpretation.

While Courts have held that not every generally applicable statement of agency policy is a "rule" under the Missouri Administrative Procedure Act,[28] those that have a "potential, however slight, of impacting the substantive or procedural rights of some member of public" are generally considered to be "rules" that must be enacted though statutory rulemaking procedures

[26] State ex rel. City of Springfield v. Public Service Com'n, 812 S.W.2d 827, 833 (Mo. App. 1991) (challenge to amended gas safety rules).
[27] State ex rel. Dail v. Public Service Commission, 203 S.W.2d 491, 499 (Mo. App. 1947).
[28] Section 536.010(4) (2000) defines a "rule" as "each agency statement of general applicability that implements, interprets, prescribes law or policy, . . . including the amendment or repeal of an existing rule . . . [subject to certain exemptions]." Exceptions to NANPA's definition of a "rule" include, inter alia, (a) statements regarding internal management of an agency not substantially affecting the public; (b) interpretations or judgments interpreting a specific set of facts; (c) intergovernmental communication not substantially affecting the public or any segment thereof; (d) determinations, decisions or orders; (e) Attorney General Opinions; and (f) Staff Guidelines. Id., Section 536.010(4)(a)-(f).

specified in Section 536.021[29] in order to be valid. [30] A rule adopted without following these procedures is void.[31] Any purported rule not formalized by observance of these requirements acquires no controlling force.[32] Any attempt to "interpret" 4 CSR 240-29.040(4) to require the provision of CPN in the billing record for wireless-originated calls would require a new rulemaking proceeding as this provision was not contained in the proposed rule as published in the Missouri Register. The Commission cannot now adopt an "interpretation" that imposes such a requirement as such a step would violate the notice and comment procedures required by Section 536.021 RSMo (2000).

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[29] Section 536.021 RSMo (2000) provides:

> 1. No rule shall hereafter be proposed, adopted, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent final order of rulemaking, both of which shall be published in the Missouri Register by the secretary of state as soon as practicable after the filing thereof in that office. . .
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> . . . .
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> 7. Except as provided in section 536.025, any rule, or amendment or rescission thereof, shall be null, void and unenforceable unless made in accordance with the provisions of this section.

[30] Compare Baugus v. Dir. Of Revenue, 878 S.W.2d 39, 42 (Mo. banc 1994) (Director of Revenue's decision to include the word "prior" before the word "salvage" on automobile title is not a rule because it did not have a potential impact on anyone's rights) with NME Hosps., Inc. v. Dept. of Soc. Servs., 850 S.W.2d 71, 73-74 (Mo. banc 1993) (change in Mo. Department of Social Services' policy governing Medicaid reimbursement for psychiatric services was a rule because it changed statewide policy and impacted the rights of Medicaid recipients) and Tonnar v. Mo. State Hwy & Transport Comm'n, 640 S.W.2d 527, 531 (Mo. App. W.D. 1982) (holding a "right-of-way manual" prepared by Missouri Highway Commission as required by the federal Dept. of Transportation in order to receive federal highway funding was a rule because it declared the policy of the Highway Commission in respect to compensation and relocation payments and set practices and procedures governing rights of the public in these areas, which the court reasoned would have a substantial impact on rights of the public.)

[31] NME Hospital v. Dept. of Social Serv., 850 S.W.2d at 74 (Mo. banc 1993) (voiding Department Of Social Service's policy of disallowing Medicaid reimbursement for psychiatric services other than electroshock therapy because the department failed to comply with section 536.021's notice and comment procedures); Tonnar v. Mo. State Hwy & Transp. Comm'n, 640 S.W.2d at 531 (Mo. App. W.D. 1982) (contents of the right-of-way manual concerning compensation relocation payments were "rules" and, in the absence of formalization by rulemaking requirements, acquired no controlling force, even though the manual was required by federal regulations and approved by a federal agency).

[32] State, ex rel. Beaufort Transfer Company v. Pub. Serv. Comm'n, 610 S.W.2d 96, 99-100 (Mo. App. W.D. 1980)

Here, no provision of proposed rule 4 CSR 240-29.040 as published in the January 3, 2005 Missouri Register purported to require the wireless billing records to include CPN.[33] As noted above, the definitional section of the Rule contained a very detailed definition for a Category 11 record, requiring it to contain either a CIC or an OCN, and specified the field in which that information was to be populated. But neither the proposed rule nor the applicable definitions imposed a requirement that such record contain CPN. This new requirement did not even appear in the final text of Rule 29.040. Instead, this statement appeared for the first time, buried in the body of the Commission's Final Order of Rulemaking adopting the final rule for CSR 240-29.040. But as an "agency statement of general applicability that implements, interprets, or prescribes law or policy" with an undisputed material negative impact on AT&T Missouri and CenturyTel, such a statewide requirement constitutes a "rule" within the meaning of Section 536.010(4) and the failure to follow the required rulemaking procedures renders the purported requirement void.[34]

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

No. As in construing statutory provisions,[35] Courts in construing an agency rule or regulation require adherence to the primary rule of statutory construction, which is to ascertain intent from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning.[36] In determining intent, the provisions of the entire statute (or rule) must be construed together and, if reasonably possible, all the provisions must be

[33] See Proposed Rule 240-29.040, Identification of Originating Carrier for Traffic Transmitted Over the LEC-to-LEC Network, Mo. Reg. Vol. 30, No. 1 (January 3, 2005), at p. 53.
[34] NME Hospital v. Dept. of Social Serv., 850 S.W.2d at 74.
[35] As indicated under Question No. 1 above, Courts have directed that agency rules and regulations are to be construed using the same principles of construction that are applied in construing statutes.
[36] Harrison v. MFA Mutual Insurance Co., 607 S.W.2d 137, 143 (Mo. banc 1980).

harmonized.[37] Courts however, prohibit "adding provisions under the guise of construction if they are not plainly written or necessarily implied from the words used."[38] But even in the case of remedial statutes, which are generally given a liberal construction,[39] Courts have cautioned that such construction cannot extend beyond its plain terms.[40]

As is clear from the plain language of Rule 29.040(4), there is no requirement to include CPN in the wireless billing record. As there is no ambiguity, there is no room for construction. But even if, arguendo, some ambiguity did exist, the title, the purpose clause, and the definition of the Category 11-01-XX billing record all clearly demonstrate that the purpose of the billing record was to identify the appropriate carrier to bill. Reading this rule to require the wireless billing records to also include CPN would inappropriately extend the rule beyond its plain terms and would not be permissible.

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?

Yes, provided that a construction is warranted under the rules of statutory construction and the Agency's correcting construction is grounded in the plain language of the Agency rule or regulation.

Courts have generally held that the Commission's power to make rules includes the power to alter them and to determine any reasonable policy of interpretation and application of

[37] Collins v. Director of Revenue, 691 S.W.2d 246, 251 (Mo. banc 1985).
[38] Cook v. Pedigo, 714 S.W.2d 949, 952 (Mo. App. E.D. 1986); see also Wilkinson v. Brune, 682 S.W.2d 107, 111 (Mo. App. 1984); and Missouri Public Service Co. v. Platte-Clay Elec. Coop, 407 S.W.2d 883, 891 (Mo. 1966) ("provisions not found plainly written or necessarily implied from what is written 'will not be imparted or interpolated therein in order that the existence of [a] right may be made to appear when otherwise, upon the face of [the statutes], it would not appear'") (internal citations omitted).
[39] State ex rel. Ashcroft v. Wahl, 600 S.W.2d 175, 180 (Mo. App. W.D. 1980). ("Remedial statutes" are those enacted for the protection of life and property or introduce some new regulation conducive to public good and are generally given a liberal construction).
[40] State ex rel. Am. Asphalt Roof Corp. v. Trimble, 44 S.W.2d 1103, 1105 (Mo. banc 1931).

such rules.[41] But as noted under the discussion of Question 1 above, it is only in situations where an Agency rule or regulation is found to be ambiguous that there is any room for construction.

However, assuming an ambiguity arises and the Commission -- operating under a mistake of fact -- issues an interpretation of a rule, the Commission is not bound by the principle of *starae decisis*[42] and should be able to correct its interpretation of a rule provided it is reasonable, and properly grounded in the plain language of the rule or regulation.. Missouri Courts have stated that under its rulemaking power, the Commission is:

> vested with the power of exercising discretion in the adoption of rules and regulations and in the declaration of its policies and reference to the interpretation and application of said rules in the future.[43]

While no Missouri case was found discussing the Commission's ability to correct previous rule interpretations made under a mistake of fact, guidance can be taken from the federal Court's statements concerning the reasonableness of an agency's reversal of policy. Quoting the U.S. Supreme Court's decision in Rust v. Sullivan,[44] the Sixth Circuit in Peoples Federal Savings and Loan v. Commissioner of Internal Revenue[45] stated:

> This Court has *rejected the argument* that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. In *Chevron*, we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." An agency is not required to "'establish rules of conduct to last forever,'" but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" Rust v. Sullivan, 500 U.S. 173, 186, 111 S.Ct. 1759, 1769, 114 L.Ed.2d 233, 251 (1991) (citations omitted) (emphasis added).

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[41] State ex rel. City of Springfield v. Public Service Com'n, 812 S.W.2d 827, 833 (Mo. App. 1991) (challenge to PSC amended gas safety rules).
[42] State ex rel. AG Processing, Inc. v. PSC, 120 S.W.3d 732, 736 (Mo. 2003) ("an administrative agency is not bound by *stare decisis*").
[43] State ex rel. Dail v. Public Service Commission, 203 S.W.2d 491, 499 (Mo. App. 1947).
[44] Rust v. Sullivan, 500 U.S. 173, 186, 111 S.Ct. 1759, 1769, 114 L.Ed.2d 233, 251 (1991) (citations omitted).
[45] Peoples Federal Savings and Loan Ass'n of Sidney v. Commissioner of Internal Revenue, 948 F.2d 289, 303 (6th Cir. 1991).

In Peoples Savings and Loan, the Sixth Circuit found the Internal Revenue Commissioner's issuance of a new regulation for computing taxable income of thrift institutions that abandoned the previous method and adopted the ordinary method under the tax code to be reasonable, stating "His desire to correct a previous ruling later determined to be wrong is not unreasonable, and the freedom of agencies to correct mistakes is a matter of recognized importance in the cases."[46]

Here, the Commission's statements to the Cole County Circuit Court correcting its earlier statement in the Order Adopting Rule 24.040(4) -- which was based on a realization that its prior statement was made under a mistake of fact -- should be permissible. It is especially true here because the Commission's statement to the Court correcting its earlier statement brings its interpretation in line with the plain meaning language of the rule.

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

The "void for vagueness" doctrine applies in both civil as well as criminal cases.[47] The Missouri Supreme Court in State v. Young, explained that vagueness, as a due process violation, takes two forms:

> One is the lack of notice given a potential offender because the statute is so unclear that "men of common intelligence must necessarily guess at its meaning." [citations omitted]. The second is that the vagueness doctrine assures that guidance, through explicit standards, will be afforded to those who must apply the statute, avoiding possible arbitrary and discriminatory application.[48]

The criteria the Courts use to determine vagueness focus on the actual words contained in the statute or rule: "if the terms or words used in the statute are of common usage and are

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[46] Id., at p. 305.
[47] State ex rel. Mo. State Bd. of Reg. for the Healing Arts v. Southworth, 704 S.W.2d 219, 223 (Mo. banc 1986); Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123, 87 S. Ct. 1563, 1566, 18 L.Ed.2d 661 (1967) (where exaction of obedience to rule or standard is so vague and indefinite as really to be no rule or standard at all).
[48] State v. Young, 695 S.W.2d 882, 884 (Mo. banc 1985); cited in State ex rel. Mo. State Bd. v. Southworth, 704 S.W.2d at 223.

understandable by persons of ordinary intelligence, they satisfy the constitutional requirement as to definiteness and certainty."[49]

Here, there is nothing vague about Rule 29.040(4). As both the Commission itself and Staff have stated, it merely requires that a Category 11-01-XX billing record be created. Nothing in the plain language of the rule requires CPN to be included in the wireless billing record. Rather, the rules require inclusion of OCN, which appropriately identifies the responsible wireless carrier to bill.

CONCLUSION

WHEREFORE, AT&T Missouri respectfully requests the Commission to enter an Order confirming its representations to the Cole County Circuit Court that Rule 29.040(4) does not require CPN to be included in wireless billing records.

Respectfully submitted,

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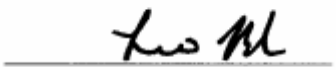
[49] State ex rel. Mo. State Bd. v. Southworth, 704 S.W.2d at 223, citing Prokoph v. Whaley, 592 S.W.2d 819, 824 (Mo. banc 1980).

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on May 1, 2006.



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