

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

T-MOBILE USA, INC.,)	
)	
Complainant,)	
)	
v.)	Case To. TC-2006-0486
)	
BPS TELEPHONE CO., et al.,)	
)	
Respondents)	

**BPS TELEPHONE COMPANY ET AL.'S
OPPOSITION TO EXPEDITED TREATMENT**

Respondents BPS Telephone Company, Cass County Telephone Company, Citizens Telephone Company of Higginsville, Mo., Craw-Kan Telephone Cooperative, Inc., Fidelity Communication Services I, Inc., Fidelity Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, and Mark Twain Rural Telephone Company ("BPS Telephone Co. et al." or "Respondents"), oppose T-Mobile's eleventh-hour request for extraordinary relief and respectfully state to the Missouri Public Service Commission ("Commission" or "PSC") as follows:

I. INTRODUCTION AND SUMMARY

In January of 2005, the Commission found that T-Mobile had failed to pay Respondents for T-Mobile's use of Respondents' network facilities and services. See PSC Case No. TC-2002-1077. T-Mobile has refused to comply with that Commission order and has failed to pay Respondents for the use of their networks between 2001 and 2005 as ordered by the PSC. Accordingly, on May 12, 2006, BPS et al. notified both T-Mobile and

the Commission's Staff that T-Mobile's traffic would be blocked over the LEC-to-LEC network beginning on June 21, 2006. T-Mobile's request for expedited treatment must be denied because T-Mobile has failed to meet Missouri law's standards for expedited relief.

First, T-Mobile has failed to allege sufficient harm because T-Mobile can simply deliver its traffic over other network connections and has done so in the past. Indeed, **the Commission's rules expressly allow T-Mobile to deliver its traffic over other connections.** 4 CSR 240-29.130(1). In fact, T-Mobile has already delivered its traffic over such other connections when T-Mobile's traffic was blocked on the LEC-to-LEC network between December 15, 2004 and April 29, 2005. See Attachment A. Respondents will continue to allow T-Mobile to deliver its traffic over other network connections on and after June 21, 2006. Thus, T-Mobile will not be prevented from delivering wireless calls to Respondents' rural exchanges, and there will be no customer disruption.

Second, T-Mobile has totally failed to comply with the Commission's rules which require it to act immediately or explain why it has not. T-Mobile received notice of LEC-to-LEC blocking over thirty-eight (38) days ago, and T-Mobile offers no good reason why it has waited over one month to seek expedited relief from the PSC. Instead, T-Mobile filed its pleading the day before blocking is to commence and asks for Commission action in less than twenty-four hours. Thus, T-Mobile has prevented the full Commission from even considering its request since the next scheduled agenda meeting is not until Friday, June 23. Moreover, T-Mobile now asks the Commission to do what the United States Court of Appeals for the Eighth Circuit would not. See Attachment B. T-Mobile has failed to comply with the Commission's rules, so its request for expedited relief must be denied.

II. DISCUSSION

A. EXPEDITED TREATMENT

The Commission's Rules of Practice and Procedure **require** any party seeking expedited treatment to show: (1) the harm that will be avoided to the party's customers or the general public if the commission acts by the date desired by the party; and (2) that the pleading was filed as soon as it could have been or an explanation why it was not. 4 CSR 240-2.080(16). T-Mobile has failed to satisfy either of these requirements, so its request for expedited relief must be denied. Similarly, the Commission's Enhanced Record Exchange (ERE) Rules require that any carrier that wishes to dispute blocking under those rules "should **immediately** seek action by the commission through the filing of a formal complaint." 4 CSR 240-29.130(9)(emphasis added). Here again, T-Mobile has failed to immediately seek action from the Commission. Therefore, T-Mobile's request for expedited treatment must be denied.

1. No Harm

T-Mobile will suffer no harm if its calls are blocked over Missouri's local exchange carrier ("LEC-to-LEC") network because the telecommunications network is redundant and T-Mobile will still be able to deliver its calls to Respondents' rural telephone exchanges over other network connections. The Commission's ERE rules expressly allow T-Mobile to deliver traffic to Respondents over other network connections. Specifically, "In all instances of traffic blocking, originating carriers and traffic aggregators may **utilize alternative methods of delivering blocked traffic to terminating carriers.**" 4 CSR 240-29.130(1)(emphasis added). Such methods may include "**contracting with interexchange carriers for traffic delivery.**" *Id.* Nothing prevents T-Mobile from sending

its traffic over other network facilities. The only difference is that T-Mobile's traffic will be blocked over a LEC-to-LEC network connection that it has abused since 2001.

Respondents' May 12, 2005 letter states that T-Mobile's wireless-originated calls "will be blocked **over the LEC-to-LEC network** on and after June 21, 2006." (emphasis added). The "LEC-to-LEC network" involves a specific set of network connections between large incumbent local exchange carriers (ILECs) such as AT&T Missouri and Sprint Missouri, but there are other ways to deliver wireless calls to Respondents' rural exchanges, such as through an interexchange or "long distance" carrier. T-Mobile will remain free to deliver its wireless calls to Respondents' exchanges through any other long distance carrier. Indeed, T-Mobile's traffic was previously blocked by the Respondents pursuant to their tariffs between December 15, 2004 and April 29, 2005. During this prior blocking on the LEC-to-LEC network, T-Mobile simply delivered its calls over the facilities of other interexchange or "long distance" carriers, as documented in a newspaper article from the ST. LOUIS POST-DISPATCH:

T-Mobile USA, based in Bellevue, Wash., said it would route calls through long distance carriers to avert potential disruption.

See Attachment A, *Companies ask SBC to Block T-Mobile Calls*, ST. LOUIS POST-DISPATCH, ¶2 (Dec. 15, 2004). This is exactly what happened, and there was no disruption of service for anyone's customers. It is misleading for T-Mobile to suggest that its calls will be disrupted, especially when it has already successfully rerouted its calls during the prior four-month period of blocking on the LEC-to-LEC network.

2. No Explanation for Last-Minute Pleading

T-Mobile offers no valid reason why it has waited until the eleventh hour to file its complaint. Respondents' notice of discontinuance of service was sent to T-Mobile's in-house and outside counsel via e-mail and U.S. Mail on May 12, 2006. Respondents' counsel conferred with T-Mobile's local counsel and provided an additional electronic copy of the notice on May 12, 2006. Thus, T-Mobile has known about the intended discontinuance of service for over a month.

T-Mobile's only explanation for its failure to act immediately is that it had filed a request for an injunction with the United States Court of Appeals for the Eighth Circuit. But the Eighth Circuit has now denied T-Mobile's request for an injunction. See Attachment B. Moreover, the underlying case before the Eighth Circuit dismissed T-Mobile's complaint for lack of subject matter jurisdiction, and the District Court stated, **"it would not be in the interest of justice to have this matter litigated in yet another court . . . [T]here has already been an unreasonable delay in the resolution of this matter because of T-Mobile's transparent litigation strategy."** Thus, the Commission's final order in Case No. TC-2002-1077 has not been disturbed by T-Mobile's collateral attack.

3. Forum Shopping

T-Mobile's formal complaint is just the latest chapter in T-Mobile's seemingly endless array of appeals and forum shopping. Simply put, T-Mobile sought to make an end run around the Commission's Order in Case No. TC-2002-1077 as well as the application of the Commission's ERE Rules by filing in federal court. The Eighth Circuit has now denied T-Mobile's motion for an injunction, and the Commission should do the same. T-Mobile chose to go to the Eighth Circuit first, so T-Mobile cannot complain.

B. THE FCC REJECTED T-MOBILE'S ARGUMENTS IN 2005.

T-Mobile argues that Respondents cannot block T-Mobile's traffic without first going to the FCC. (Complaint, pp. 8-14) But T-Mobile fails to cite the FCC case expressly rejecting T-Mobile's arguments. Specifically, while the Respondents' PSC complaint case against T-Mobile was pending, T-Mobile filed a motion for declaratory judgment with the FCC. T-Mobile raised the same arguments before the FCC that had already been rejected by the PSC and Missouri courts. In February of 2005, the FCC denied all of T-Mobile's arguments. The FCC's decision held, **"[I]ncumbent LECs were not prohibited from filing state termination tariffs and [wireless] providers were obligated to accept the terms of applicable state tariffs."**¹ The FCC concluded, "By routing traffic to LECs in the absence of a request to establish reciprocal mutual compensation, **[wireless] providers accept the terms of otherwise applicable state tariffs.**"² This FCC decision simply confirmed what the prior PSC and Missouri court decisions had already held: Respondents' wireless tariffs were neither preempted by nor in conflict with federal law or FCC rules during the time period in question.

T-Mobile also suggests that Respondents sat on their hands since the PSC's rule went into effect on July 30, 2005. (Complaint, ¶7, p. 6) T-Mobile is wrong. On April 29, 2005, prior to the effective date of the PSC Rule, Respondents were granted, for the first time, the right to request negotiations and compel arbitration. Respondents did so and included T-Mobile's past due bills as an arbitration issue before the PSC. T-Mobile argued

¹ *T-Mobile's Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs; In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, 20 F.C.C.R. 4855, rel. Feb. 24, 2005, ¶9 (emphasis added).

² *Id.* at ¶12 (emphasis added).

strenuously to have the issue of past due compensation stripped from the arbitration proceedings, and the PSC issued an order declining to resolve the matter through arbitration in March of 2006 in Case No. TO-2006-0147. Thus, Respondents did not pursue blocking under the PSC's rules until recently because Respondents had been pursuing good faith negotiation and arbitration of this very issue before the PSC.

C. BLOCKING IS EXPRESSLY ALLOWED UNDER STATE LAW.

The right to block calls for failure to comply with Commission-approved tariffs has been upheld by the Missouri Court of Appeals:

We disagree that the Act prohibits blocking the traffic of a carrier in default of applicable tariff provisions, such failing to pay approved rates. . . . It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.

Sprint Spectrum v. Missouri PSC, 112 S.W.3d 20, 26 (Mo. App. 2003)(emphasis added); see also *Tel-Central v. Missouri PSC*, 806 S.W.2d 432 (Mo. App. 1991)(affirming disconnection after five days notice).

III. CONCLUSION

Ultimately, the question presented by T-Mobile's request for expedited relief is whether the Commission is going to enforce its final orders and rules, or not. In Case No. TC-2002-1077, the Commission held that T-Mobile had failed to pay for service between 2001 and 2005. Contrary to T-Mobile's claims, that Commission order is final, and the United States District Court for the Western District of Missouri dismissed T-Mobile's purported appeal for lack of jurisdiction. Moreover, the District Court stated, "**[T]here has already been an unreasonable delay in the resolution of this matter because of T-Mobile's transparent litigation strategy.**"

The Eighth Circuit declined to grant T-Mobile's request for an injunction to prevent blocking on the LEC-to-LEC network. Thus, Respondents are entitled to block T-Mobile's traffic pursuant to the PSC's ERE Rules. The Commission's ERE Rules have the force and effect of law, and Respondents have complied with those rules. T-Mobile, on the other hand, has pursued a constant course of delay and litigation. Every other wireless carrier in Missouri has played by the rules and paid for its calls. The Commission should decline to reward T-Mobile's "transparent litigation strategy."

Respondents respectfully request that the Commission deny T-Mobile's request for expedited relief.

BRYDON, SWEARENGEN & ENGLAND P.C.

By: **/s/ Brian T. McCartney**
William R. England Mo. #23975
Brian T. McCartney Mo. #47788
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Phone: (573) 635-7166
Fax: (573) 635-0427
E-mail: trip@brydonlaw.com
bmccartney@brydonlaw.com

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was emailed this 20th day of June, 2006, to the following parties:

Mark P. Johnson
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City, Mo 64111
Email: mjohnson@sonnenschein.com

Bill Haas
Deputy General Counsel
Missouri Public Service Commission
200 Madison Street, P.O. Box 360
Jefferson City, MO 65102
william.haas@psc.mo.gov

/s/ Brian T. McCartney