BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Rule to Require All Missouri Telecommunications Companies To Implement an Enhanced Record Exchange Process to Identify the Origin of IntraLATA Calls Terminated by Local Exchange Carriers	))))))	**Case No. TX-2003-0301**

STAFF'S SUGGESTIONS IN OPPOSITION TO SBC MISSOURI'S MOTION TO CONSIDER IMPACT OF NEW FCC DECISIONS AND ABATE RULEMAKING

COMES NOW the Staff of the Missouri Public Service Commission and, for its Suggestions in Opposition to SBC Missouri's Motion to Consider Impact of New FCC Decisions and Abate Rulemaking, states to the Commission as follows.

In a Motion that it filed on February 17, 2005, SBC Missouri requested that the Commission reopen the record in this case to consider the impact of two recently released FCC "orders" and that the Commission "abate" the rulemaking in this case.

Historical Background of This Rulemaking Case

The Commission opened this case for the purpose of adopting rules to address issues that have existed in what is known in the telecommunications industry in Missouri as the "LEC-to-LEC network" since the creation of that network. These issues have been brought before the Commission in various ways over the past few decades. They were before the Commission in Case No. TO-84-222[1], in which it created the Primary Toll Carrier Plan; again in Case No. TO-99-254, in which companies sought elimination of the PTC plan; and yet again in Case No. TO-99-593, in which the Commission examined signaling protocols and other network issues in a

competitive environment. The instant case sprang from Case No. TO-99-593, in which the Commission initially, on December 13, 2001, ordered that Issue 2056, developed by the Ordering and Billing Forum, be implemented, and later, on January 28, 2003, directed the Staff to proceed with drafting a rule, which culminated in the establishment of this case.

Rulemaking Procedure

In adopting rules, the Commission follows the provisions of Chapter 536, RSMo, which specify the procedures that an agency must follow when adopting administrative rules. Chapter 536 provides, generally, that an agency files a notice of proposed rulemaking with the Secretary of State, who publishes the notice in the *Missouri Register*. Interested parties may file written comments on the proposed rule(s) for a period of 30 days after such publication. The agency may also conduct a public hearing, at which interested parties may again comment on the proposed rule(s). The agency must then review the comments received and file its final order of rulemaking with the Secretary of State within 90 days after the end of the written comment period or after the public hearing, whichever is later.

In this case, the Secretary of State published the notice of proposed rulemaking in the *Missouri Register* on January 2, 2005, written comments were accepted until February 2, 2005, and the Commission conducted a public hearing on February 9, 2005. SBC Missouri timely filed written comments, and subsequently testified at the public hearing.

SBC Missouri has not cited any authority for filing the motion that it filed on February 17, and the Staff knows of no such authority. Nonetheless, the Staff will respond to the arguments presented in SBC Missouri's motion.

In its motion, SBC Missouri asked the Commission to do two things: first, to reopen the record to consider two recent FCC "orders"; and second, to "abate this rulemaking until the FCC

[1] It is worth noting that this case was filed more than twenty years ago.

has completed its investigation in the Unified Intercarrier Compensation docket and issues rules or determinations concerning intercarrier compensation, transit traffic and intercompany billing records."

SBC Missouri's Request to Abate This Rulemaking

It appears that, in asking the Commission to "abate" the rulemaking, SBC Missouri is either requesting that the Commission delay it, or cancel it altogether. Section 536.021.5, RSMo requires the Commission, in this case, to file its final order of rulemaking within 90 days after the conclusion of the public hearing – that is, by May 10, 2005. At that time, the Commission must, for each proposed rule, either adopt the proposed rule, with or without further changes, withdraw the proposed rule, or allow the proposed rule to lapse by failing to act. If the Commission fails to act, the proposed rule "shall lapse and shall be null, void and unenforceable."[2] Because it is not possible for the FCC to "complete[] its investigation … and issue rules or determinations" by May 10, SBC Missouri's request is tantamount to a request that the Commission cancel this rulemaking.

This is a drastic step that the Commission should not take. As the Commission is well aware, the Staff and the vast majority of local telecommunications companies in Missouri have worked diligently for several years to develop these rules. The Commission should not discard the results of this massive effort in the vain hope that the FCC will finally take action in the Unified Intercarrier Compensation docket, which has, itself, been open since 2001.[3] The FCC's rulemaking is not exactly proceeding with lightning speed, and there is no determinable end to it; nor is there any assurance that the FCC's rules will address the issues. It simply makes no sense for this Commission to further delay action on this needed rulemaking.

[2] See Section 536.021.5, RSMo.

The other relief that SBC Missouri seeks is that the Commission reopen the record to consider two recent FCC "orders." The Staff will also address this request.

The Declaratory Ruling and Report and Order

The first of the two FCC "orders" that SBC Missouri relies upon is the Declaratory Ruling and Report and Order in the FCC's CC Docket No. 01-92. The Declaratory Ruling was adopted on February 17, 2005 and released on February 24, 2005. It is not yet effective, and will not become effective until 30 days after publication in the *Federal Register*. This ruling may be challenged. It is certain that the ruling will not become effective prior to May 10, 2005, and it is by no means certain that the FCC's declaratory ruling will ever become effective. The Commission should not abate this rulemaking merely because of the mere *possibility* that the FCC's Declaratory Ruling may someday be effective.

But, even if the Declaratory Ruling does ever become effective, it will not conflict in a significant way with the terms of the Commission's proposed Enhanced Records Exchange rules. In its Declaratory Ruling, the FCC first held that tariffs filed by an incumbent LEC imposing termination charges on wireless traffic are not unlawful under the existing rule. But the FCC did amend its rules, on a going-forward basis, to prohibit such wireless termination tariffs and to grant to incumbent LECs the right to compel negotiations with wireless carriers.

Even SBC Missouri could only cite three provisions of the proposed ERE rules that might conflict with the Declaratory Ruling.[4] SBC Missouri does not explain its rationale for its conclusory statement that these three provisions have been "rendered unlawful;" it merely states that they are. If the Commission believes that these rules do conflict with the FCC's Declaratory

[3] See footnote 1 to the FCC's *Further Notice of Proposed Rulemaking*, Attachment 2 to SBC Missouri's motion herein, where the FCC noted: "This examination was initiated in April 2001 by a Notice of Proposed Rulemaking."
[4] See page 5 of SBC Missouri's Motion, where it claims that the FCC action "[has] rendered unlawful" proposed rules 4 CSR 240-29.030, 4 CSR 240-29/070, and 4 CSR 240-29.110.

Ruling, the Commission could either make minor modifications to the proposed ERE rules, to eliminate any conflict with the Declaratory Ruling, or adopt the ERE rules, as proposed, and then modify them if and when the Declaratory Ruling ever does become effective. In any event, the conflict between the proposed ERE rules and the Declaratory Ruling is not so great as to justify the withdrawal of the ERE rules that are not in conflict with the Declaratory Ruling and to discard the hard work of those who developed these proposed rules.

The Further Notice of Proposed Rulemaking

The second of the two FCC "orders" that SBC Missouri relies upon is not an order at all; it is only a further notice of proposed rulemaking.

This FCC rulemaking proceeding is at a very preliminary stage. As the FCC said in the very first paragraph of its Further Notice:

> With this Further Notice of Proposed Rulemaking (Further Notice), we *begin the process* of replacing the myriad existing intercarrier compensation regimes with a unified regime designed for a market characterized by increasing competition and new technologies.

(Emphasis supplied.) Former FCC Chairman Michael Powell acknowledged this, as well, stating in his Separate Statement: "Today we act to *begin the second phase* or our unified intercarrier compensation docket. (Emphasis supplied.) Similarly, Commissioner Kathleen Q. Abernathy began her Separate Statement by saying: "I am pleased that the Commission is *launching this important rulemaking* regarding intercarrier compensation. (Emphasis supplied.)

Although it is fair to say the FCC has recognized a problem, it cannot be said that it has figured out the solution, or that it even has one in mind. The FCC does not have a proposed rule. Rather, it is merely inviting comment on several proposals that it has received. There is no way to know whether the FCC will adopt *any* of these rules, or if so, which one it will adopt, or whether it will adopt something entirely different. As the FCC itself said:

> Many parties advocate a unified regime, but *there is little consensus* as to what type of unified regime we should adopt.[5]

(Emphasis supplied.) In fact, the FCC has invited comments on no fewer than nine separate proposals that it has received from the industry, namely those provided by: Intercarrier Compensation Forum; Expanded Portland Group, Alliance for Rational Intercarrier Compensation, Cost-Based Intercarrier Compensation Coalition, Home Telephone Company and PBT Telecom, Western Wireless, National Association of State Utility Consumer Advocates, NARUC, and CTIA – The Wireless Association. These proposals do not closely resemble one another, and predicting which one the FCC will adopt – if any – is pure guesswork. Without knowing which rule the FCC will adopt – if it adopts a rule – this Commission cannot determine whether the ERE rules will conflict with the rule that SBC Missouri is so sure the FCC will adopt.

SBC Missouri suggests in its Motion that the FCC will move toward a "bill-and-keep" approach, or some variation thereof. But the composition of the FCC is changing, with the departure of Chairman Powell and the impending departure of Commissioner Abernathy, casting doubt on the prospects for such a proposal. For example, financial analysts at Medley Global Advisors filed an equity brief with the FCC in which they opined that Level 3 LLC's decision to withdraw its access charge forbearance petition "confirms our view that currently there is no FCC majority in favor of a 'bill-and-keep' approach to intercarrier compensation, which is a positive sign for rural LECs that stand to lost (*sic*) the most in access revenue if such a regime is adopted."[6]

[5] See Further Notice of Proposed Rulemaking, Paragraph 37.
[6] A copy of an item from the "Telecom Regulation" report on the withdrawal by Level 3 of its forbearance petition at the FCC, which contains the quoted material, is attached hereto as Appendix A.

In addition, the Further Notice of Proposed Rulemaking appears to primarily address the question of intercarrier compensation. See, for example, SBC Missouri's listing of the FCC's goals, at pages 6-7 of its Motion, which address compensation issues. The proposed ERE rules, on the other hand, would make no changes in compensation arrangements, but would instead require the provision of records that are adequate to allow telecommunications companies to properly bill for the services that they provide to other companies.

The Federal Pre-emption Issue

Finally, SBC Missouri claims that: the FCC "inten[ds] to address the issues the Missouri Commission is attempting to cover" with the proposed ERE rules,[7] that the FCC has "stated [its] intent to reform the current system of intercompany compensation,"[8] and that any action by the FCC "will likely impact" various provisions of the proposed ERE rules.[9] But the mere fact that a federal agency *intends to do something* that will *likely impact* the regulation by a state agency does not amount to federal pre-emption, as SBC Missouri seems to suggest; more is required. As the Southern District of the Court of Appeals stated in *Empire Dist. Elec. Co. v. Gaar*:

The law of preemption is well-settled:

> [The federal government may preempt state laws] *by federal statute or by federal regulations* which have been properly adopted in accordance with statutory authorization. Thus, a federal agency acting within the scope of its congressionally delegated authority may preempt state law.
>
> An Agency's *statutorily authorized regulations* will preempt any state or local law that conflicts *with those regulations* or frustrates their purpose. In addition, in proper circumstances, an agency may determine that its authority is exclusive and preempt any state efforts to regulate in the forbidden area. When determining whether *an agency regulation* preempted stated law, we must look at 1) whether the agency intended to preempt state law and 2) whether Congress authorized the agency to preempt state law.

[7] See page 6 of SBC Missouri's Motion.
[8] See page 9 of SBC Missouri's Motion.
[9] See page 10 of SBC Missouri's Motion.

(Emphases supplied.)

Thus, state laws may be pre-empted by *federal statute* or by *federal regulation.* Neither this case, nor any other case that the Staff has found, support the theory that a federal agency, such as the FCC, could pre-empt state regulation merely by *considering* various proposals to regulate the activity that the state regulates.

By its Motion, SBC Missouri asks the Commission to consider the impact of the new FCC "decisions." The Staff does not object to the request that the Commission consider these FCC actions. But the Staff does oppose SBC Missouri's requests that the Commission "reopen the record" and that it abate this rulemaking, for the reasons set forth herein.

WHEREFORE, the Staff prays that the Commission overrule SBC's motion to reopen the record and to abate the rulemaking in this case.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record 1st day of April, 2005.

/s/ Keith R. Krueger

ILECs, RURAL LAWMAKERS
CELEBRATE LEVEL 3 ACTION

While financial analysts forecasted delay on intercarrier compensation issues and competitive service providers held out hope for early FCC action on Internet protocol (IP) traffic, incumbent telcos and the Congressional Rural Caucus rejoiced in Level 3 LLC's decision to withdraw its access charge forbearance petition (see separate story).

Rep. Bart Stupak (D., Mich.), co-chairman of the Congressional Rural Caucus's Telecommunications Task Force, said, "The benefits of VoIP [voice over IP] and other services are only as strong as the broadband backbone on which they ride. Reform of the intercarrier compensation and Universal Service is necessary to ensure that telephone access remains strong and broadband access spreads across rural America. However, the way to achieve effective reform that embraces new technologies and the needs of rural America is to proceed with a comprehensive approach with everyone at the table."
The other task force co-chairman, Rep. Gil Gutknecht (R., Minn.), said, "This is a big win for rural consumers. . . . . The House Farm Team will continue working to ensure the rural telecommunications providers get a fair shake."

In a research report issued today, analysts at Legg Mason Wood Walker, Inc., said, "The FCC, in the last days under former Chairman Michael Powell, had circulated a separate draft order that would give some sort of interim relief for VoIP-originated calls. It's still possible the agency under Chairman [Kevin] Martin could consider that draft order, but we think it's more likely that it will attempt to deal with the issue in the broader context of intercarrier compensation, which we expect will take at least another year and probably longer."

Financial analysts at Medley Global Advisors said in an equity brief, "In the absence of action on this matter, the status quo remains, which indeed raises litigation risk for everyone involved. . . . CLECs are expected to challenge ILECs if they are charged access fees and ILECs, in turn, will claim they are unlawfully avoiding their interconnection obligations that cover intercarrier payments for traffic termination." The MGA brief added that Level 3's action "confirms our view that currently there is no FCC majority in favor of a 'bill-and-keep' approach to intercarrier compensation, which is a positive sign for rural LECs that stand to lost the most in access revenue if such a regime is adopted."

MGA went on to predict that partisan disputes over judicial appointments could delay Senate confirmation of yet-to-be-made nominations to fill Mr. Powell's and Kathleen Q. Abernathy's seats on the Commission "until the summer at the earliest," thus pushing back "full Commission consideration on the intercarrier compensation docket toward the end of the year." Ms. Abernathy's term expired last year, but she is allowed to remain on the Commission until a successor is confirmed or until the end of the current session of Congress, whichever comes first.

USTA applauded the withdrawal of the petition and the FCC "for recognizing that it should not take a piecemeal approach to intercarrier compensation."

The National Telecommunications Cooperative Association had a similar reaction, saying that a piecemeal approach to the intercarrier compensation issue "disregards the complexity of the issue and would ultimately have an adverse impact on rural telecommunications networks and the vital funding sources upon which they rely."

In a joint statement, the Independent Telephone and Telecommunications Alliance, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance said that by "resisting granting what was in effect an attempt to short-circuit the broader debate in the Commission's comprehensive

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intercarrier compensation docket, ... the Commission has ensured that all parties, including Level 3, continue to remain constructively engaged in the effort to develop a comprehensive intercarrier compensation regime that is necessary for the facilities-based carriers, particularly midsize and rural carriers."

Jonathan Lee, the senior vice president-regulatory affairs at CompTel/ALTS, on the other hand, said it was unfortunate "that the previous FCC leadership was unable to reach a consensus on this critical issue." He added, "With the change of leadership at the FCC coming so close to the deadline for action on the petition, CompTel/ALTS believes Level 3 made a prudent decision to withdraw its petition at this time. . . . Nonetheless, the issues presented by Level 3 are important issues, which must be resolved expeditiously for this exciting technology to reach its full potential. CompTel/ALTS is optimistic that Chairman Martin will make these issues a priority."

PointOne also backed Level 3's decision as prudent. PointOne President and Chief Executive Officer Mike Holloway said, "FCC Chairman Kevin Martin is just beginning his duties a very demanding role. The removal of the petition . . . . means that the current rules, which enable VoIP providers to offer consumers unlimited packages of innovative communications services, remain solidly in place." - Lynn Stanton, lstanton@tr.com