Sonnenschein
SONNENSCHEIN NATH & ROSENTHAL LLP

Mark P. Johnson
816.460.2424
mjohnson@sonnenschein.com

4520 Main Street
Suite 1100
Kansas City, MO 64111
816.460.2400
816.531.7545 fax
www.sonnenschein.com

Chicago
Kansas City
Los Angeles
New York
San Francisco
Short Hills, N.J.
St. Louis
Washington, D.C.
West Palm Beach

February 2, 2005

Via Hand-Delivery

FILED[3]
FEB - 2 2005
Missouri Public
Service Commission

Mr. Dale H. Roberts
Executive Secretary
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

RE: Case No. TX-2003-0301

Dear Mr. Roberts:

Enclosed for filing with the Commission please find the original and eight copies of Joint Wireless Carriers' Comments Concerning Proposed Enhanced Record Exchange Rules in the above-referenced case. Please return one "filed" copy of the Comments to me via our messenger.

By copy of this letter, I have served a copy of the Comments upon all counsel of record via U.S. mail.

If you have any questions, please give me a call.

Very truly yours,

Mark Johnson /rgr

Mark P. Johnson

MPJ/rgr
Encl.
cc: All Parties of Records (w/encl.) (via U.S. mail)
Martin C. Rothfelder, Esq. (w/encl.)
Mike Bartolacci, Esq. (w/encl.)

BEFORE THE PUBLIC SERVICE COMMISSION
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

JOINT WIRELESS CARRIERS' COMMENTS CONCERNING PROPOSED ENHANCED RECORD EXCHANGE RULES

Mark P. Johnson
MO Bar No. 30740
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111
816-460-2400
Fax: 816-531-7545

Martin C. Rothfelder
MO Bar No. 31794
Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, New Jersey 07090
908-301-1211
Fax: 908-301-1212

Mike Bartolacci
Mo Bar No. 35441
Thompson Coburn, LLP
One US Bank Plaza
St. Louis, Missouri 63101
Phone: (314) 552-6126
Fax: (314) 552-7126

February 2, 2005

Table of Contents

BEFORE THE PUBLIC SERVICE COMMISSION
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

JOINT WIRELESS CARRIERS' COMMENTS CONCERNING PROPOSED ENHANCED RECORD EXCHANGE RULES

T-Mobile,[1] Nextel West Corp., and Cingular Wireless[2] ("collectively the Wireless Carrier Group"), and pursuant to 4 CSR 240-2.180(4) and The Notice of Public Hearing and Notice to Submit Comments in Volume 30, Number 1 of *The Missouri Register* (January 3, 2005), submit these comments in response to the proposed Exchange Record Exchange Rules ("Proposed Rules").[3]

I. INTRODUCTION AND SUMMARY

In 1993, Congress amended the Communications Act of 1934 to "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[4] In doing so, Congress expanded the Federal Communications Commission's ("FCC") jurisdiction over intrastate wireless services to "foster the growth and development of mobile services that, by their very nature, operate without regard to state lines as an integral part of the national telecommuni-

---

[1] In Missouri, T-Mobile provides its wireless services through the following operating entities: VoiceStream PCS II Corporation, VoiceStream Kansas City, Inc., and Powertel/Memphis, Inc. – collectively, d/b/a T-Mobile.

[2] In Missouri, Cingular Wireless provides its wireless service through the following entities: New Cingular Wireless PCS, LLC, Eastern Missouri Cellular Limited Partnership, Kansas City SMSA Limited Partnership, Missouri RSA 11/12 Limited Partnership, Missouri RSA 8 Limited Partnership, and Missouri RSA 9B1 Limited Partnership.

[3] *See* 30 Missouri Register 49 (Jan. 3, 2005).

[4] H.R. CONF. REP. NO. 103-213, 103d Cong., 1st Sess., at 490 (1993).

cations infrastructure."[5] As part of this national framework, Congress also empowered the FCC to establish how wireless carriers should interconnect with other carriers, including for intrastate traffic, because it recognized that "the right to interconnect [is] an important one which the [FCC] shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[6]

The Missouri Legislature also has independently determined that this Commission should not regulate wireless carriers in any way. Specifically, in Section 386.020(53)(c), RSMo., the Legislature has barred the Commission from regulating the "offering of radio communication services and facilities when such services and facilities are provided under a license granted by the [FCC] under the commercial mobile radio services rules and regulations."[7]

In this proceeding, however, the Commission proposes to divest wireless carriers of their federal rights by regulating how wireless carriers route their traffic and by limiting the options that they may utilize. The rule proposals would, moreover, require wireless carriers to change fundamentally how they route their customers' calls. Specifically, in order to comply with the rule proposals, wireless carriers in Missouri would be compelled to perform during call set-up three new processing functions – new "triple screening" functions – for every wireless call directed to a customer with a Missouri telephone number:

---

5 H.R. REP. NO. 103-111, 103d Cong., 1st Sess., at 260 (1993).

6 *Id.* at 261 (1993). *See also Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9640 ¶ 84 (2001)("The 1993 Budget Act significantly changed the regulatory framework for CMRS. In place of traditional public utility regulation, the 1993 Budget Act sought to establish a competitive *nationwide* market for commercial mobile radio services with limited regulation. CMRS interconnection was a significant element of this framework.")(emphasis added); 47 U.S.C. §§ 152(b), 332(c)(1).

7 Personal Communications Services ("PCS") licensees like T-Mobile are providers of CMRS. *See* 47 U.S.C. § 20.9(a)(11).

1. A wireless carrier would have to determine whether a call is directed to a customer served by "a LEC-to-LEC network," because the proposed rules would require special routing for such calls;
2. A wireless carrier would then need to identify whether the call is an interMTA or intraMTA call by identifying the physical location of the originating cell site, comparing that location to the physical location of the rate center associated with the called party's telephone number, and processing that information against MTA boundary tables that do not exist; and
3. A wireless carrier would then need to identify whether the call is an interstate or intrastate call using a similar methodology utilized in connection with making the inter/intraMTA distinction, except that state boundary tables would be utilized in performing this screening function.

The Commission's suggestion – each wireless carrier in Missouri should be capable of implementing and operating under these new "triple screening functions" for less than $46.00 – is unrealistic.[8]

This Commission does not have the authority, under either state or federal law, to impose these new requirements on wireless carriers. Such Missouri-specific rules would prevent the FCC from establishing "a Federal regulatory framework to govern the offering of all commercial mobile services." The Joint Wireless Carriers demonstrate in Part II below that the FCC has already preempted states from adopting rules of the very sort that this Commission proposes be applied to wireless carriers.

In addition, the Commission should not apply these rules to wireless carriers, given that:

- The FCC, which has plenary jurisdiction over wireless carriers and services (including intrastate services), has already determined that the Commission's proposed "triple screening functions" are "not necessary;"[9]

---

[8] The Commission states without any factual support that its proposed rules "will not cost private entities more than five hundred dollars ($500) in the aggregate." *See* 30 Missouri Register at 49, 52, 58, 63, 64, 65, 66 and 67 (Jan. 3, 2005). There are 11 wireless carriers that provide wireless services in Missouri (and that serve more than 10,000 customers). *See* FCC Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2004*, at Table 13 (Dec. 2004). The Joint Wireless Carriers submit that the Commission's per-carrier cost impact estimate of $46 ($500/11) defies common sense and commercial realities.

[9] *See First Local Competition Order*, 11 FCC Rcd 15499, 16017 ¶ 1044 (1996).

- This Commission concedes that it is "impossible" for wireless carriers to comply with the very routing rules it proposes;[10]
- The Commission proposes that wireless carriers implement "triple screening" to accommodate rural LECs that continue to utilize a signaling protocol that became antiquated over 20 years ago, since the AT&T divestiture and the emergence of competition in the landline toll market – and even though rural LECs have chosen not to modernize their networks to 21st century standards despite receiving in the past five years alone, over $216 million in federal universal service subsidies to modernize their networks;
- Wireless carriers would have to make these major modifications and incur these costs so a tiny percentage of traffic terminating in Missouri – Joint Wireless Carriers estimate approximately one-percent[11] – is routed in a special way;
- The Commission makes its new rule proposals even though it acknowledges that transit carriers would be required to increase needlessly trunk capacity by 20 percent because "the total quantity of traffic [would] remain the same under the proposed rule."[12] In other words, the Commission is proposing that the industry install sizable trunk capacity that is not needed and may never been needed;
- The proposed "solution" will not fix the "problem" complained of by Feature Group C rural LECs – namely, assist them in determining whether incoming wireless calls should be billed at reciprocal compensation or exchange access rates; *and*
- The FCC is currently considering reform that would make the proposed Missouri rules irrelevant and that would strand any investment wireless and other carriers might make in an attempt to comply with the rules.[13] In fact, the "unified rate" proposals advocated by rural LECs in this FCC proceeding would obsolete the very modifications and investments the proposed rules would require.

---

10 *See* Proposed Rule 29.070(1).

11 There are approximately 5.8 million LEC and wireless customers in Missouri. *See Local Telephone Competition: Status as of June 30, 2004*, at Tables 9 and 13 (Dec. 2004). Joint Wireless Carriers estimate that rural LECs in Missouri serve approximately 100,000 customers – or fewer than two percent of all telecommunications customers in the State. The proposed special routing rules, however, would apply only to a subset of traffic destined to rural LECs ("interstate interMTA" calls), so the new "triple screening functions" proposed would at most have possible value to only approximately one percent of all calls terminating in Missouri.

12 *See* 30 Missouri Register at 57 (Jan. 3, 2005).

13 *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).

For these reasons and those set forth below, The Joint Wireless Carriers urge this Commission to exempt wireless carriers from any rules that might be adopted in this proceeding.

II. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO APPLY TO WIRELESS CARRIERS ANY OF THE PROPOSED RULES

The proposed rules would impose new requirements and restrictions on wireless carriers. This Commission does not have the authority, under either state or federal law, to apply any of the proposed rules to wireless carriers.

A. THE COMMISSION LACKS JURISDICTION OVER WIRELESS CARRIERS AND SERVICES UNDER STATE LAW

At issue in this proceeding is one category of commercial mobile radio services ("CMRS") – mobile-to-land calls where a wireless customer calls a person served by a Missouri rural LEC using Feature Group C (or, "a LEC-to-LEC network"). The Commission unquestionably proposes to regulate wireless carriers and their traffic. As but one example, Proposed Rule 29.070 would require wireless carriers to route traffic destined to a "LEC-to-LEC network" in a certain prescribed way and to certain prescribed carriers. The Commission proposes to engage in this wireless regulation even though the Missouri Legislature has made clear that the Commission has no authority over the telecommunications services "provided under a license granted by the [FCC] under the commercial mobile radio services rules and regulations." Section 386.020(53)(c), RSMo.

The Missouri Supreme Court has held that this Commission is "vested with only such powers as are conferred upon it by the Public Service Commission Law."[14]

> The Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred up it by the Statutes and powers reasonably incidental thereto.[15]

---

14 *Laundry* v. *Public Service Comm'n,* 327 Mo. 93, 34 S.W.2d 37, 43 (1931).

The Missouri legislature has determined *not* to delegate to the Commission any regulatory authority over CMRS carriers and their services. Accordingly, the Commission lacks the regulatory authority to apply to wireless carriers any rules adopted in this proceeding.

The Commission purports to exercise authority over wireless carriers by its proposed rule definition of a telecommunications company. Proposed Rule 29.020(34) provides:

> Telecommunications company means, for the purpose of this chapter only, a telecommunications company that includes those companies included within the definition as set forth in section 386.020(51), RSMo Supp. 2003 *and also includes companies providing radio communications services under license granted pursuant to the [FCC's] commercial mobile radio services (CMRS) rules and regulations* (emphasis added).

As the Commission effectively recognizes in this Proposed Rule, wireless carriers are *not* telecommunications companies under state statutes because they do not provide "telecommunications service" as that term is defined in the statutes. *Compare* Sections 386.020(51) *with* 386.020(53)(c). The Commission thus proposes to expand its regulatory authority over wireless carriers – even though the Missouri legislature has explicitly determined that this Commission may not regulate wireless services.

The Commission cannot, through the simple expedient of adopting a rule, exercise regulatory authority in the very areas where the Legislature has chosen not to give it any authority. The Commission may not adopt a rule (or exercise jurisdiction) when the Legislature has chose not to delegate to it the authority covered by the rule. As Missouri courts have held, the Commission has "no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature."[16] In particular, the Commission "cannot, under the theory of

---

[15] *Kansas City Power & Light* v. *Public Service Comm'n*, 350 Mo. 763, 168 S.W.2d 1044, 1049 (1958).

[16] *Springfield Warehouse* v. *Public Service Comm'n*, 240 Mo. App. 1147, 225 S.W.2d 792, 794 (1049).

'construction' of a statute, proceed in a manner contrary to the plain terms of the statute."[17] The Commission may not evade the Legislature's directives simply by adopting rules inconsistent with those directives.

B. THE COMMISSION LACKS AUTHORITY OVER ALL INTERSTATE TRAFFIC

Congress has long recognized that "*national* regulation is . . .essential to the efficient use of radio facilities." *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 279 (1933) (emphasis added). Through a number of enactments, Congress has specifically encouraged the development of wireless competition on a national basis by centralizing regulatory authority in the FCC. Congress began in 1993 with a revolutionary amendment to the Communications Act to underscore the need for a uniform federal regulatory framework governing the wireless industry. Specifically, to remove any doubt that the FCC has adequate authority to implement a unified, national framework, Congress amended Section 2(b) of the Act to eliminate the traditional limitation on federal authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service" insofar as they relate to the provision of commercial mobile service. 47 U.S.C. Section 152(b) (emphasis added). As courts have uniformly held, "as to interstate and foreign communications, [FCC] jurisdiction is exclusive of state regulation commissions."[18] State statutes similarly provide that

---

[17] *Id. See also Sprint Missouri* v. *Public Service Comm'n,* WD 63580, 2004 Mo. App. LEXIS 1885 (Mo. App., Dec. 7, 2004).

[18] *MCI* v. *AT&T,* 462 F. Supp. 1072, 1095 (N.D. Ill. 1978). *See also Crockett Telephone* v. *FCC,* 963 F.2d 1564, 1566 (D.C. Cir. 1992)("The FCC has exclusive jurisdiction to regulate interstate common carrier services."); *Qwest* v. *Scott,* 2003 U.S. Dist. LEXIS 818 at *16 (D. Minn., Jan. 8, 2003)("§ 152 of the Act vests in the FCC the exclusive authority to regulate interstate communications."); *id.* at * 30 ("The FCC's exclusive jurisdiction over interstate communications is established."); *AT&T* v. *PAB,* 935 F. Supp. 584, 590 (E.D. Pa. 1996)("The FCC retains exclusive jurisdiction over interstate communication by wire or interstate transmission of energy by radio."); *AT&T* v. *People's Network,* 1993 U.S. Dist. LEXIS 21248 at *14 (D.N.J., March 31, 1993)("The FCC retains exclusive jurisdiction over interstate communications."); *GTE Sprint* v. *Downey,* 628 F. Supp. 193, 194 (D. Conn. 1986)("Congress charged

this Commission has no authority over interstate telecommunications. *See* Section 386.030, RSMo; *see also id.* at § 386.250(2).

Nevertheless, several of the proposed rules purport to regulate interstate services. For example, Proposed Rules 29.010(1), 29.030(2), 29.050(4), and 29.070(2) purport to dictate how wireless carriers must route their "interstate, interMTA" traffic. Proposed Rule 29.040 purports to dictate the kind of signaling information that wireless carriers must provide with the interstate calls their customers originate.

If the FCC has exclusive jurisdiction over interstate traffic, as federal courts have consistently held, it necessarily follows that this Commission has no regulatory authority at all over any interstate traffic. The Joint Wireless Carriers therefore submit that this Commission does not have any authority to regulate in any way the interstate services that wireless carriers offer.

C. Under Federal Law, the Commission Lacks Authority Over Wireless Intrastate Traffic as Well

As previously mentioned, Congress amended Section 2(b) of the Act to eliminate the traditional limitation on federal authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service" insofar as they relate to the provision of commercial mobile service. 47 U.S.C. Section 152(b) (emphasis added). Additionally, the FCC has historically applied a geographic "end-to-end" analysis in determining whether a given call is interstate or intrastate.[19] As the FCC explained recently, under this approach, "when the end points of a carrier's service are within the boundaries of a single state the service is deemed a purely intrastate service, subject to state jurisdiction for deter-

---

the FCC with exclusive federal jurisdiction to uniformly regulate interstate transmissions or communications."); *AT&T* v. *Public Service Comm'n,* 625 F. Supp. 1204, 1208 (D. Wy. 1985)("Exclusive FCC jurisdiction over interstate matters is well-established).

[19] *See, e.g., Bell Atlantic* v. *FCC,* 206 F.3d 1, 3 (D.C. Cir. 2000).

mining appropriate regulations to govern such service. When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission's exclusive jurisdiction."[20] However, and importantly, FCC jurisdiction also extends to intrastate services when it is "impossible or impractical to separate the service's intrastate from interstate components."[21]

It is impossible or impractical for wireless carriers to determine at the time of call origination whether the call is interstate or intrastate. Assume a call from a St. Louis wireless customer to a person served by a Missouri rural LEC. The rural LEC might assume that the call is intrastate, because the wireless customer has been assigned a telephone number with the 314 area code. However, the St. Louis customer may have originated this particular call from East St. Louis, Illinois (or Springfield, Illinois or from any other location in the country). This would be an interstate call (using the "end-to-end" analysis) even though the calling party's telephone number would suggest that it is an intrastate call. In the end, because of the mobility enjoyed by wireless customers, it is impractical, if not impossible in many situations, for wireless carriers to determine whether a given call is interstate or intrastate.

This Commission has recognized that wireless carriers cannot determine whether a given call is interstate or intrastate (or interMTA or intraMTA):

> It is acknowledged that technical limitations of wireless carriers' equipment may render the establishment of a demarcation point impossible for certain wireless-originated calls. Proposed Rule 29.070(1).[22]

---

20 *Vonage Preemption Order,* WC Docket No. 03-211,19 FCC Rcd 22404 at ¶ 17 (Nov. 12, 2004).

21 *See id.*

22 This observation is an understatement. The Joint Wireless Carriers are not aware of any wireless carrier that is capable of routing calls based on whether the call is intraMTA or interMTA.

The FCC has recognized the same point and has therefore ruled that it is "not necessary" for wireless carriers to "ascertain geographic locations when determine the rating for any particular call at the moment the call is connected."[23]

The Commission's proposed rules apparently would require wireless carriers to ascertain geographic locations during call origination so they can route their traffic in a certain way. For example, Proposed Rule 29.070(2) states that "[i]nterstate, interMTA wireless-originated traffic *shall* be routed by wireless carriers to the facilities of an interexchange carrier" (emphasis added), which, as discussed above, would require wireless carriers to implement new "triple screening" functionality in the call set-up process. However, given the FCC's ruling that it is "not necessary" for wireless carriers to determine geographic locations during call origination, this Commission may not, under the Supremacy Clause of the U.S. Constitution, require wireless carriers to engage in the very activity that the FCC has held is "not necessary."

In fact, the FCC has already preempted states from regulating wireless carrier interconnection with other carriers, including when the interconnection is used for intrastate wireless services. 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."[24]

---

23 *First Local Competition Order,* 11 FCC Rcd 15499, 16017 ¶ 1044 (1996).

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

The FCC's recent *Vonage Preemption Order* is instructive.[25] In that proceeding, states argued that the Communications Act "requires the [FCC] to recognize state jurisdiction over [VoIP] to the extent it enables 'intrastate' communications to occur."[26] The FCC rejected this argument and preempted states from asserting regulatory authority over VoIP services, holding the VoIP providers have "no means of directly or indirectly identifying the geographic location of a [VoIP] subscriber" and "no service-driven reason to know user' locations":

> Furthermore, to require Vonage to attempt to incorporate geographic "end-point" identification capabilities into its service solely to facilitate the use of an end-to-end approach *would serve no legitimate policy purpose.* Rather than encouraging and promoting the development of innovative, competitive advanced service offerings, we would be taking the opposite course, molding this new service into the same old familiar shape.[27]

It is noteworthy that in preempting states from regulating VoIP services, the FCC observed that VoIP is "similar to CMRS, which provides mobility, is offered as an all-distance service, and needs uniform treatment on many issues."[28]

Because wireless carriers cannot separate their traffic at the time of call origination, as the Commission itself recognizes, wireless traffic is jurisdictionally mixed and subject to the FCC's exclusive jurisdiction. Accordingly, this Commission may not regulate wireless services – interstate or intrastate services – as a matter of federal law.

---

25 *See Vonage Preemption Order,* WC Docket No. 03-211, FCC 04-267, 19 FCC Rcd 22404 (Nov. 12, 2004).

26 *Id.* at ¶ 22.

27 *Id.* at ¶¶ 23 and 25 (emphasis added). *See also id.* at ¶ 29.

28 *Id.* at ¶ 22.

D. THE COMMISSION ALSO DOES NOT HAVE THE AUTHORITY UNDER FEDERAL LAW TO LIMIT THE TRANSIT CARRIERS THAT WIRELESS CARRIERS MAY USE – INCLUDING FOR THEIR INTRASTATE TRAFFIC

Section 251(a) of the Communications Act permits a competitive wireless carrier to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[29] The FCC has ruled that it is the competitive carrier, not the incumbent carrier, that determines whether to interconnect directly or indirectly "based upon their most efficient technical and economic choices."[30] Clearly, this federal right to determine whether to interconnect directly or indirectly includes the right to choose to use one transit carrier over another "based upon their most efficient technical and economic choices."

Nevertheless, the proposed rules would restrict which transit carriers that wireless carriers may use for their mobile-to-land traffic.[31] For example, Proposed Rule 29.070(2) states that "[i]nterstate, interMTA wireless-originated traffic *shall* be routed by wireless carriers to the facilities of an interexchange carrier" (emphasis added). The Joint Wireless Carriers submit that the Commission may not lawfully restrict the rights provided in federal law, including the right of a wireless carrier to select a transit carrier of its choice.[32]

---

29 47 U.S.C. § 251(a)(1).

30 *See First Local Competition Order,* 11 FCC Rcd 15499, 15991 ¶ 997 (1996).

31 It is important for the Commission to understand that while an interexchange carrier ("IXC") may provide interexchange services to its own retail customers, it ordinarily acts as a transit carrier – not as an IXC – for mobile-to-land calls. Under the "one rate" plans that wireless carriers offer, a mobile customer pays the same price whether the call is to a person across the street or to a person on the other side of the country. *See Federal-State Joint Board on Universal Service,* 17 FCC 3752, 2758 ¶ 12 (2002). In other words, wireless carriers do not provide any "toll service" in connection with their "one rate" service plans; with such plans, the "wireless exchange" is conterminous with the boundaries of the United States. *Compare* 47 U.S.C. § 153(47) *with* § 153(48). When viewed in this light, the Commission's proposal to limit the type of transit carriers that wireless carriers may utilize for interstate, interMTA traffic is completely arbitrary.

32 It further bears noting that the proposed "wireless routing" rule is unreasonably vague and does not put wireless carriers on notice of what they may do to comply with the rule. What is an "interexchange carrier" for purposes of Proposed Rule 29.070(2)? AT&T and MCI are commonly classified as

E. THE PROPOSED RULES AS APPLIED TO WIRELESS CARRIERS WOULD FURTHER CONSTITUTE ENTRY REGULATION PROHIBITED BY FEDERAL LAW

Section 332(c)(3) of the Communications Act specifies that, "[n]otwithstanding sections 152(b), . . . *no State* or local government *shall have any authority* to regulate the entry of . . . any commercial mobile service."[33] Federal courts have ruled that there can be "no doubt that Congress intended complete preemption":

> This clause completely preempted the regulation of rates and market entry. . . . Cases that involve the "entry of or the rates charged by any commercial mobile service or any private mobile service" are the province of federal regulators and courts.[34]

The FCC has similarly observed that Section 332(c)(3) "completely preempts state entry regulation of CMRS."[35] Importantly, Section 332(c)(3) bars *any* regulation affecting wireless entry, even if the regulation does not have the effect of prohibiting entry.[36]

The proposed rules purport to regulate how wireless carriers provide their services. As noted above, certain rules purport to require wireless carriers to route their traffic in certain ways or to provide certain information with their calls. For example, Proposed Rule 29.030(1) purports to specify that a wireless carrier may originate or terminate its traffic "only upon compliance with the rules set forth in this chapter." Proposed Rules 29.130 and 29.140 purport to give

---

interexchange carriers, but they also provide local exchange services. SBC and Sprint are commonly classified as incumbent local exchange carriers, although they also provide interexchange services. For example, what if a switch operated by SBC or AT&T is used for both their exchange and interexchange services? Will such a switch be considered an "interexchange carrier" switch for purpose of the proposed rules?

[33] 47 U.S.C. § 332(c)(3)(A)(emphasis added).

[34] *Bastien* v. *AT&T Wireless,* 205 F.3d 983, 986-87 (7th Cir. 2000).

[35] *Ohio CMRS Regulation Petition Denial Order,* 10 FCC Rcd 12427, 12432 ¶ 10 (1995).

[36] The entry regulation prohibition in Section 332(c)(3) is far more expansive than the entry prohibition contained in Section 253. Section 253 prohibits state rules that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). In stark contrast, Section 332(c)(3) prohibits "any" regulation involving entry – whether or not is has the effect of prohibiting the provision of any service.

the competitors of wireless carriers the right to block calls made by wireless customers if wireless carriers do not comply with the state rules – in other words, to prevent wireless carriers from providing their services.

These proposed rules constitute the very kind of entry regulation that Section 332(c)(3) forbids. The Joint Wireless Carriers submit that under Section 332(c)(3), this Commission does not possess the legal authority to impose these requirements on wireless carriers as a condition to their provision of wireless services.

* * *

In summary, if the Commission decides to adopt the proposed rules or a revised version of the rule proposals, it should make clear the rules adopted do not apply to wireless carriers or to telecommunications traffic sent or received by wireless customers.

III. THERE ARE NUMEROUS FATAL PROBLEMS WITH THE PROPOSED RULES EVEN IF THE COMMISSION POSSESSED REGULATORY AUTHORITY OVER WIRELESS CARRIERS

The Commission should not apply to wireless carriers any rules it may adopt in this proceeding even if it determines that it possesses regulatory authority over wireless carriers and their services.

A. It Is Unreasonable for the Commission to Impose Requirements on Wireless Carriers When It Concedes that Wireless Carriers Cannot Comply with Them

The proposed rules would require wireless carriers to route their calls differently based on whether the call is interMTA or intraMTA and interstate or intrastate. Specifically, Proposed Rule 29.070(2) would require wireless carriers to route their "interstate, interMTA" traffic to "the facilities of an interexchange carrier," while Proposed Rule 29.010(1) would prohibit wire-

less carriers from routing their "interstate/interMTA" traffic over a "LEC-to-LEC network," which is apparently defined as any LEC network that uses the Feature Group C protocol.

In order to comply with these requirements, wireless carriers would need to have the ability, at the time a call is originated, to distinguish "interstate, interMTA" calls from all other calls (*e.g.*, intrastate-interMTA, interstate-intraMTA, and intrastate-intraMTA traffic) – that is, begin performing the "triple screening" function described above. According to the rule proposals, wireless carriers would make these classification and routing decisions instantaneously by comparing "the location of the cellular site where the mobile call originates" with the telephone number of the person being called. *See* Proposed Rule 29.070(1).

The Commission proposes these new requirements even though it readily admits that wireless carriers are incapable of complying with the proposed rules:

> It is acknowledged that technical limitations of wireless carriers' equipment may render the establishment of a demarcation point impossible for certain wireless-originated calls. Proposed Rule 29.070(1).

Not only is routing in real time on demarcation point currently impossible, in many cases it is impossible to determinate the location of the terminating side of the call. Telephone numbers initially assigned to LECs may be ported to wireless carriers or VoIP providers. Thus, even if a mobile switch was capable of routing traffic based on individual telephone number called, the location of the end user in some cases is indeterminable.

The Joint Wireless Carriers submit that it would be unreasonable, under both state and federal law, for the Commission to impose new requirements on wireless carriers – and permit their competitors to block wireless traffic – when the Commission concedes that wireless carriers cannot comply with the rules. If, on the other hand, the Commission does not intend to enforce its rules as applied to wireless carriers, then it should not adopt the rules in the first instance.

B. The Commission's Proposed Solution Will Not Fix the Rural LEC Problem – and There Are Better Alternatives That Rural LECs Could Use

Rural LECs have complained for years that they cannot identify incoming wireless traffic and cannot determine which rate to apply to this incoming traffic: reciprocal compensation, intrastate access or interstate access. The problem is largely self-inflicted. First, rural LECs have chosen to maintain their FGC networks even though the protocol become obsolete 20 years ago with the AT&T divestiture and the emergence of competition in the toll market.[37] Second, unlike other incumbent LECs that negotiate interMTA and interstate factors with wireless carriers, some rural LECs in Missouri have deliberately chosen not to initiate negotiations with wireless carriers – which would solve their complained-of problem.

Proposed Rule 29.010(1) would prohibit wireless carriers from placing "interstate, interMTA" traffic on a "LEC-to-LEC network," Proposed Rule 29.070(2) would require wireless carriers to route this traffic to an IXC (even though the wireless calls may be local), and Proposed Rule 29.050 would require transit carriers to place IXC traffic on a separate trunk group. Presumably, the Commission is proposing these rules to facilitate the ability of rural LECs to identify the wireless traffic that should be assessed interstate access charges.

However, under the rule proposals, wireless carriers could place on a "LEC-to-LEC network" other wireless traffic, including interstate-intraMTA, intrastate-interMTA, and intrastate-intraMTA calls – traffic that would be commingled over the FGC trunk group. As becomes im-

---

[37] The refusal of rural LECs in Missouri to modernize their networks is not due to lack of financial resources. Over the past five years (2000-2005), they have received federal local switching universal subsidies exceeding $36 million, sums they could have used for FGC upgrades or modifications. *See* Universal Service Monitoring Report, CC Docket No. 98-202, at Table 3.12 (Oct. 12, 2004). Over the same period, Missouri rural LECs collectively received total federal high-cost universal support exceeding $216 million. *See id.* at Table 3.6. In stark contrast, competitive carriers in Missouri received over the same period less than $400,000 in federal universal support – or two-tenths of one percent (0.2%) of the sums received by the incumbent rural LECs. *See id.* at Table 3.14.

mediately apparent, even with the addition of an Operating Company Number ("OCN") with this traffic, the rural LEC would still not be able to determine what rate to apply to any given call. In other words, even with the proposed rules, rural LECs would still face the same challenge they encounter today – namely, is the incoming wireless call over the FGC trunk group an interstate-intraMTA call (reciprocal compensation applies), an intrastate-interMTA call (access charges would apply), or an intrastate-intraMTA call (reciprocal compensation applies).

In the end, the only way that rural LECs can charge wireless carriers for call termination is if they negotiate with wireless carriers the appropriate interMTA and interstate factors that should be utilized (and this is yet another reason why state interconnection tariffs are futile).

C. The Proposed Rules Are Contrary to the Public Interest and Would Harm Missouri Consumers and Competition

Congress enacted the Telecommunications Act of 1996 "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[38] The detailed rules that the Commission proposes to adopt certainly do not reduce regulation. The proposed rules certainly will not encourage the rapid deployment of new technologies, given that the Commission proposes that competitive carriers redesign their modern networks and practices to accommodate a handful of rural LECs that use a technology that became antiquated 20 years ago. Nor will the proposed rules promote competition. In fact, the proposed rules will harm consumers, because they will increase the costs that competitive carriers will incur in providing their services – costs that invariably will be passed on to customers.

---

38 *See* Telecommunications Act of 1996, Pub. L. No. 104-04, 110 Stat. 56, 56 (1996).

Take as but one example Proposed Rule 29.050, which would require transit carriers to establish two separate trunk groups to each rural LEC using the antiquated Feature Group C interface. This State's largest transit carrier has advised the Commission that this proposed rule would require it to increase trunk capacity by 20 percent.[39] This new trunk capacity would be installed even though there is no need for the capacity. If transit carriers are required to incur these additional costs for this needless capacity, they may very well be required to increase the prices they charge for transit, costs that would eventually be passed on to Missouri customers. The Joint Wireless Carriers submit that the interests of Missouri residents are not served by paying more for existing services because this Commission decides to require carriers to install extra trunk capacity that is not needed.

Moreover, the FCC is currently considering reform that would make the proposed rules irrelevant and the needless trunk capacity installed stranded. As this Commission is well aware, the FCC has pending a rulemaking proceeding where it has proposed eliminating the rate disparities associated with different kinds of traffic, including bill-and-keep.[40] None of the rules that the Commission is proposing to adopt, and none of the costs that carriers would incur in attempting to implement these rules, would have any relevance if the FCC adopts bill-and-keep for the exchange of all traffic. Similarly, many of the proposed rules would not be relevant even if the FCC rejects bill-and-keep, and instead requires use of a uniform rate for call termination.

The proposed rules would contravene the public interest in another way – namely, they would contravene the principle of cost-causation and distort competition as a result. The FCC

---

[39] *See* 30 Missouri Register 57 (Jan. 3, 2005)("SBC's estimate to increased overall trunk group capacity an average of 20% was accepted, even though the total quantity of traffic remains unchanged under the proposed rule.").

[40] *See Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).

has held that "economic principles of cost causation dictate that costs should be attributed to their source whenever possible," noting that rules "properly reflecting cost causation . . . will benefit LECs, IXCs, and consumers alike."[41] In fact, with respect to the interconnection of networks, the FCC has declared that "costs *must* be attributed on a cost-causative basis."[42]

This Commission is of the same view. It recognized long ago that economic theory has moved towards cost-causation principle "since the 1983 divestiture," stating that cost-causation is "the cardinal rule" of cost allocation and ratemaking.[43] The Commission has, moreover, applied cost-causation principles in resolving arbitration disputes.[44]

The proposed rules, however, would require wireless and other carriers to pay for the costs that rural LECs would impose. Take, for instance, Proposed Rule 29.050 which would require transit carriers to install separate trunk groups to a rural LEC. A rural LEC is clearly the "cost-causer" of separate trunk groups. *See* Proposed Rule 29.070(1)("At its discretion, a terminating carrier may elect to establish separate trunk groups . . . ."). Yet, the rule proposes that transit carriers pay for the costs that rural LECs would create – with no explanation.

Imposing costs on non-rural carriers to solve a rural LEC problem would be inconsistent with the cardinal rule of the cost-causation principle. If, for example, rural LECs would prefer to have separate trunk groups to the LATA tandem switch, even though additional trunk capacity is

---

41 Jurisdiction Separations Reform, 12 FCC Rcd 22120, 22133 ¶ 26 (1997); *Access Charge Reform,* 12 FCC Rcd 15982, 16060 ¶ 180 (1997).

42 *Verizon InterLATA Order,* 18 FCC Rcd 5212, 5224 n.282 (2003)(emphasis added).

43 *See, e.g., Investigation of Experimental Extended Measured Service*, 30 Mo. P.S.C. 45 (1989); *Southwestern Bell,* 23 Mo. P.S.C. 374, 405 (1980).

44 *See, e.g., AT&T/Southwestern Bell Arbitration,* 10 Mo. P.S.C. 3d 295 (2001)(PSC refuses to allocate to the incumbent carrier costs caused by the competitive carrier).

not needed, rural LECs should bear the incremental costs of this needless capacity (and they should be prevented from recovering this needless cost from interconnecting carriers).

D. THE PROPOSED RULES ARE DISCRIMINATORY

The proposed rules are discriminatory on their face. For example, Proposed Rule 29.040(4) would require transit carriers to create and forward an "11-01-XX record" for "any" carrier "other than an incumbent local exchange carrier."[45] The Commission proposes the creation of these "11-01-XX records" to facilitate the ability of rural LECs to bill the originating carrier for call termination. No explanation is provided for exempting incumbent LEC traffic from the proposed new requirement.

Competitive carriers also have a right to bill rural LECs for call termination; indeed, Section 251(b)(5) mandates that LECs pay reciprocal compensation if they demand compensation for call termination Thus, if the Commission determines that the public interest would be served by use of "11-01-XX records," including a "Missouri-specific category 11-01-XX record," then this requirement should be imposed on transit carriers for *all* transit traffic, including traffic originating on the networks of rural LECs. There is no basis in logic, policy or the law to establish a new system to facilitate call termination billing, but then exempt rural LEC traffic from such a requirement.[46]

---

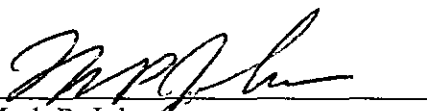
[45] It appears that the proposal to utilize "11-10-XX records" would be a requirement imposed on transit carriers only, and not on originating carriers such as wireless carriers. The Joint Wireless Carriers would object to any Commission proposal to require wireless carriers to modify their national networks to accommodate a such a state-specific proposal.

[46] In addition, the Commission should, at minimum, adopt a *de minimis* exemption in its rules, where the rules would not apply when the cost of the remedy exceeds the value of the traffic at issue. For example, it makes no sense economically to investigate or litigate a billing dispute when the cost of investigation or litigation exceeds the value of the traffic at issue. Clearly, no one benefits – and certainly customers would not benefit – when the cost of the "solution" exceeds the cost of the "problem."

IV. CONCLUSION

For all the foregoing reasons, the Joint Wireless Carriers respectfully request that the Commission take actions consistent with the views discussed above. Specifically, the Commission should conclude that it possesses no regulatory authority over wireless carriers and the services they offer and that any rules that it may adopt in this proceeding will not apply to wireless carriers.

Respectfully submitted,

By: 

Mark P. Johnson
MO Bar No. 30740
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, MO 64111
816-460-2400
Fax: 816-531-7545

ATTORNEYS FOR T-MOBILE,
NEXTEL WEST CORP., and
CINGULAR WIRELESS

Martin C. Rothfelder #31794
Rothfelder Stern, L.L.C.
625 Central Avenue
Westfield, New Jersey 07090
908-301-1211
Fax: 908-301-1212

ATTORNEYS FOR NEXTEL WEST CORP.

Mike Bartolacci #35441
Thompson Coburn, LLP
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6126
Fax: 314-552-7126

ATTORNEYS FOR CINGULAR WIRELESS

Certificate of Service

I hereby certify that a true and final copy of the foregoing was mailed by First-Class United States mail, postage prepaid, on this 2nd day of February, 2005, to the following counsel of record:

Dana K Joyce
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102

John B Coffman
P.O. Box 7800
200 Madison Street, Suite 640
Jefferson City, MO 65102

NuVox Communications of Missouri
Carl Lumley
130 S. Bemiston, Suite 200
St. Louis, MO 63105

Missouri Independent Telephone Group
(MITG)
Craig Johnson
700 E. Capitol
P.O. Box 1438
Jefferson City, MO 65102

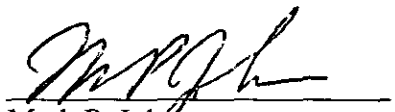
AT&T Communications of the Southwest, Inc.
Rebecca Decook
1875 Lawrence Street, Ste 1575
Denver, CO 80202

SBC Missouri
Leo Bub
One Bell Center, Room 3518
St. Louis, MO 63101

Small Telephone Company Group
W R England
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102

Socket Telecom, LLC
Leland Curtis
130 S. Bemiston, Suite 200
St. Louis, MO 63105

Sprint Missouri, Inc. d/b/a Sprint
Brett Leopold
6450 Sprint Parkway
MS:KSOPHN0212-2A353
Overland Park, KS 66251



Mark P. Johnson