BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of Cass County Telephone Company for Suspension and Modification of the FCC`s Requirement to Implement Number Portability	)))))	Case No. TO-2004-0504
In the Matter of the Petition of Craw-Kan Telephone Cooperative, Inc. for Suspension and Modification of the FCC`s Requirement to Implement Number Portability	)))))	Case No. TO-2004-0505

INITIAL BRIEF OF INTERVENOR WESTERN WIRELESS

August 31, 2004

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INITIAL BRIEF OF INTERVENOR WESTERN WIRELESS

COMES NOW WWC License L.L.C., a/k/a Western Wireless ("Western") d/b/a Cellular One, by and through their counsel of record, and submits its Initial Brief in these matters.

By stipulation of the parties on the record at hearing on July 22, the cross examination of Western Wireless' witness, Mr. Ron Williams, from the hearing in Case No. TO-2004-0401 (*Re: Petition of KLM Telephone Company for Suspension of the FCC Requirement to Implement LNP,* T-334 to 387) was incorporated by reference into the record of the instant cases. (T-250, l. 16 to T-251, l. 12; T-254, ll. 10-15)

BACKGROUND AND SUMMARY:

Petitioners herein, Cass County Telephone Company ("Cass") and Craw-Kan Telephone Cooperative ("Craw-Kan"), are required to provide wireline-to-wireless local number portability, under the Telecommunications Act of 1996

("the Act") and Orders of the Federal Communications Commission. Instead, they are asking the Missouri Public Service Commission to "modify" that requirement to allow them to block calls from their customers to ported numbers until the FCC takes further action on issues related to compensation for the routing of ported calls. Staff proposes that such calls should be mis-routed to a call intercept that would play a "call cannot be completed as dialed" message, making it appear that the reason for that is some error or omission on the part of the wireless carrier.

Both Cass County and Craw-Kan are LNP-capable. "They have made the necessary investments in their switch, the necessary arrangements with vendors to provide database administration and they can provide local number portability." (T-216, ll. 7-11; Schoonmaker Direct, Exh. 1, p. 18, ll. 5-8.)

Under 47 U.S.C. Section 251(f)(2), in order to receive a modification of the LNP requirement, Cass and Craw-Kan have the burden of proving that such a modification is:

- Necessary "to avoid a significant adverse economic impact on telecommunications users generally;" or
- Necessary "to avoid undue economic burden;" or
- "[N]ecessary to avoid imposing a requirement that is technically infeasible;" AND
- Is "consistent with the public interest, convenience and necessity." (47 U.S.C. Section 251 (f) (2), emphases added).

Petitioners have failed to meet this burden of proof. Cass and Craw-Kan:

- Have provided no actual evidence of the costs of implementation of LNP;
- Have not made even minimal efforts to determine such costs;
- Have provided no standard by which customer impact from these unknown costs could be evaluated as "significant adverse economic impact" or not;
- Have provided no company financial data whatsoever in order to provide the basis for an evaluation of whether these unknown costs would impose an "undue economic burden" or not;
- Have admitted that LNP *could be* provided and is therefore not "technically infeasible."

Western Wireless submits, upon the evidence of record in this case, that: (1) Cass County and Craw-Kan have not met their burden of proof for a modification of their LNP obligations; (2) the modification proposed by Staff would be in clear contravention of Orders of the FCC and of the Telecommunications Act of 1996; and (3) the Petitions filed in these cases should be denied.

LNP OBLIGATION:

As the Commission is aware, the Telecommunications Act of 1996 requires the provision of Local Number Portability (LNP),[1] so that a telephone

[1] 47 U.S.C. § 153(30) defines "Local Number Portability as: "The ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers ***without impairment of quality, reliability, or convenience*** when switching from one telecommunications carrier to another." [Emphasis added.]

customer who changes telephone suppliers may take his current telephone number with him to his new telephone company. Upon request by the customer, the first telephone company is required to "port" that customer's telephone number to the customer's new service provider.[2]

The Federal Communications Commission (FCC) has ordered incumbent local exchange carriers (ILECs) to provide wireline-to-wireless number portability.[3] The FCC's *Intermodal Porting Order* of November 10, 2003 reaffirmed prior FCC orders establishing intermodal (wireline-to-wireless) porting obligations and directed rural ILECs like Cass and Craw-Kan to offer local number portability (LNP) as of May 24, 2004 in accordance with specific rules. That Order was attached to Mr. Williams' Rebuttal Testimony of July 2 in this case (Exhibit 21) as "RW-1".

Indeed, it *is* "Exhibit One" for the proposition that Cass, Craw-Kan and their sister companies in rural America have been on notice for years, not just months, that they would need to provide LNP. Paragraphs 26-29 of the *Intermodal Porting Order* are important to the Commission's understanding of the timing and purpose of the FCC's actions implementing wireline-to-wireless LNP.

On May 13, 2004, the FCC denied a request for a waiver from LNP requirements to North-Eastern Pennsylvania Telephone Company ("NEP"), a

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[2] The term **"port"** and the phrase **"port the call"** are used frequently in the testimony and briefs in these cases. They mean, **fulfilling a carrier's N-1 responsibility to route and deliver a call** to a ported number. (Williams Surrebuttal, Exh. 22, p. 6, l. 22 to p. 8, l. 13; KLM Transcript, TO-2004-0401, T-342, l. 24 to T-344, l. 15)

[3] *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 155 (1996); *see also* Mem. Op. and Order and Further Notice of Proposed Rulemaking, ¶ 8, CC Docket No. 95-116, FCC 03-284 (rel. Nov. 10, 2003) "*Intermodal Porting Order*" – attached to Williams Rebuttal (Exh. 21) as Exhibit RW-1.

rural LEC, saying: "…all carriers have been on notice since July 2002 that wireless and intermodal LNP would become available beginning in November 2003. Thus, NEP has had sufficient time to follow through with these mandates and prepare for LNP."[4]

In its November 2003 Order, the FCC said this, which is important to the discussion and evidence in this case: ***"The focus of the porting rules is on promoting competition, rather than protecting individual competitors."***[5] (At Paragraph 27, emphasis added.)

The FCC went on (in Paragraph numbered 29) to waive the LNP requirement for smaller LECs like Cass and Craw-Kan until May 24, 2004. "We find that this transition period will help ensure a smooth transition for carriers operating outside of the 100 largest MSAs and provide them with *sufficient time to make necessary modifications* to their systems."

PETITIONERS' UNWILLINGNESS TO PROVIDE LNP

Both Cass and Craw-Kan are LNP-capable. "They have made the necessary investments in their switch, the necessary arrangements with vendors to provide database administration and they can provide local number portability." (T-216, ll. 7-11; Schoonmaker Direct, Exh. 1, p. 18, ll. 5-8.) Thus,

[4] In the Matter of Telephone Number Portability, Petitions of The North-Eastern Pennsylvania Telephone Company for Temporary Waiver of its Porting Obligations, CC Docket No. 95-116, FCC 04-1312, at ¶10 (released May 13, 2004) – attached to Williams Rebuttal (Exh. 21) as Exhibit RW-2.

[5] *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 155 (1996); *see also* Mem. Op. and Order and Further Notice of Proposed Rulemaking, ¶ 8, CC Docket No. 95-116, FCC 03-284 (rel. Nov. 10, 2003) "*Intermodal Porting Order*" – attached to Williams Rebuttal (Exh. 21) as Exhibit RW-1.

Petitioners have already incurred the most significant portions of LNP start-up costs.

However, the record in this case reveals that, between the FCC Order on November 10, 2003 and the time they filed their LNP suspension and modification petitions before this Commission, Cass and Craw-Kan did *not* make the necessary call transporting arrangements to fulfill their LNP obligations.

There is no evidence in the record of these cases that Cass and Craw-Kan made any effort to ascertain what arrangements it would need to make in order to meet their LNP obligations, such as even calling SBC or Sprint or any wireless company to explore methods of transiting wireline calls from the Cass or Craw-Kan service territories to a wireless carrier that does not have facilities inside the Cass or Craw-Kan service territories. **Mr. Schoonmaker admitted in his Direct Testimony that Cass and Craw-Kan made no such exploratory contacts.** (Schoonmaker Direct, Exh. 1, p. 19, ll. 9-10). He offered no testimony as to what the cost of transit might be. **Without making any effort to ascertain the costs of implementation of LNP, Petitioners cannot, as a matter of law, meet their burden of proof** that the impact of such costs meets the standards of Section 251(f)(2).

The only "cost evidence" offered by Petitioners, through Mr. Schoonmaker, is so full of qualifying words and phrases as to render it mere hypothesis and speculation, at best. Mr. Schoonmaker says he "***assumed"*** that negotiations of transport arrangements would be required, and "***estimated***" that such negotiations "***would likely***" cost between $20,000 and $100,000 to

conclude, a wildly imprecise implementation cost on its face. (Schoonmaker Direct, Exh. 1, p. 19, ll. 16-19, emphases added.) Mr. Schoonmaker testified that this "cost estimate" is based on the following: "***Potentially*** the process [of establishing routing arrangements for ported calls] ***could*** involve negotiations of interconnection agreements between the Companies and SBC and some type of indirect interconnection arrangement with Sprint." (Schoonmaker Direct, Exh. 1, p. 18, ll. 14-16, emphases added.) "Such negotiations ***might*** be under Section 251(b) of the Act . . . ." (*Id.,* ll. 16-17, emphasis added.) "Consequently, there ***may*** be conflicts between the Companies and other LECs as to how such agreements should be negotiated and whether they are subject to the arbitration provisions in Section 252 of the Act." (*Id.,* ll. 20-22, emphasis added.) "At this point in time I am ***uncertain*** how SBC or Sprint would react to such a proposal." (*Id.,* p. 18, l. 22 to p. 19, l. 1, emphasis added.) ***Of course he is uncertain how they would react, since neither he nor anyone else from Cass or Craw-Kan ever even contacted them!*** (*Id.,* p. 19, ll. 9-10) Mr. Schoonmaker goes on, in the same answer, to speculate that, "***if,*** in fact, such negotiations ***were*** conducted under provisions of Sections 251 and 252 of the Act, I would ***not expect*** the negotiations to be easy. . . . I find that SBC and the small telephone companies in the state ***frequently*** have significantly differing viewpoints of the appropriate resolution of such issues. That is ***frequently*** true in regard to Sprint as well." (*Id.,* ll. 1-7, emphases added.) **This unsupported speculation, based upon uncertainty upon uncertainty and producing an expansive range of**

$20,000 to $100,000, is the totality of Petitioners' implementation cost evidence in these cases!

Although Staff liked Mr. Schoonmaker's view of rural LNP enough to whole-heartedly concur with his modification recommendation in these cases, even Staff witness Dietrich would not endorse his "cost estimate." "While I have no personal knowledge as to the validity of the cost estimates or costs associated with deploying additional facilities to accommodate transporting ported calls, I agree the costs ***could be*** substantial." (Dietrich Rebuttal, Ex. 11, p. 5, ll. 15-18, emphasis added.) Staff offered no support for that opinion, nor any implementation cost evidence of its own. (Williams Surrebuttal, Exh. 22, p. 2, ll. 18-19) Mr. Williams of Western Wireless aptly described Mr. Schoonmaker's broad-ranging "cost estimate" as **"unsubstantiated estimates of a potential cost for hypothetical negotiations of routing arrangements . . . ."** (Williams Surrebuttal, Exh. 22, p. 6, ll. 7-9, emphasis added.)

There is also no evidence that Cass or Craw-Kan sought legal opinions concerning their avowed (and convenient) theory that arranging for the transport of calls outside their service territory boundaries would violate the terms of their certificates of service authority from this Commission, nor that they consulted Staff counsel to explore that concern. Further, there is no evidence that Cass or Craw-Kan approached other small ILECs about trying to work together to explore unified solutions to this issue such as Minnesota achieved, nor that Staff had taken steps to do so.

In contrast, Mr. Williams of Western Wireless testified about the approach to LNP taken by the rural ILECs in Minnesota, where a global settlement was reached that was approved by the Minnesota PUC on July 8, 2004. (Williams Surrebuttal, Exh. 22, p. 3, l. 17 – p. 4, l. 23, and attachment thereto, RW-5.) This "tandem routing approach" provides for LECs to get calls to the wireless carrier as a mirror-image of the way wireless carriers currently get their calls to the ILEC today – a symmetrical obligation. (Williams Surrebuttal, Exh. 22, p. 4, ll. 5-19; p. 5, ll. 1-6) It is a far more economical answer than for the wireless carrier to invest in permanent interconnection facilities inside the rate centers of Cass and Craw-Kan, which is why wireless carriers use that approach today in areas where traffic volumes make construction of interconnection facilities uneconomic. (*Id.*) The difference between the approach of Cass, Craw-Kan and other Missouri rural ILECs, and that of the telecommunications providers in the State of Minnesota, is stark and unfortunate. As Mr. Williams testified:

> "The difference between Minnesota and Missouri is really one of the initiatives of the LECs. In Minnesota the LECs saw their routing obligations, put together a plan to address it in an efficient means, and approached a transit provider that is available to them, which is Qwest, to resolve it. In Missouri, that just hasn't happened. The decision was made to seek a suspension or a modification rather than pursue a solution." (KLM Transcript, TO-2004-0401, T-341, L. 7-15)

Mr. Williams explained that it was the Minnesota LECs that developed the tandem routing approach for delivering calls to ported numbers. (Williams Surrebuttal, Exh. 21, p.4, ll. 5-7). "Not only did the Minnesota LECs admit to their obligation to route traffic to ported numbers, they proactively sought the most economical solution to fulfill those obligations." (Williams Surrebuttal, Exh. 21, p. 4, ll. 17-19).

Unfortunately, in Missouri, rather than "admit to their obligation to route traffic to ported numbers" and pursue a solution, the decision was made by Cass, Craw-Kan and the other rural ILECs, *en masse,* to seek suspension or modification of the LNP obligations.

PETITIONERS' OBLIGATION TO ROUTE CALLS

The FCC has steadfastly held that the ILEC has a responsibility to deliver local calls as local calls. Indeed, the federal Commission told the D.C. Circuit Court of Appeals just recently that its interconnection rules are not just clear, but that they are "long-standing" and that the time for challenging these rules has "long passed":

> Rural LECs thus *always* have been required to deliver traffic to other carriers through direct or indirect interconnection – even when a wireless carrier's switch is not located in the rural LEC's rate center.[6]

As the FCC has explained, "[u]nder current intercarrier compensation rules, then, when a wireless customer calls a rural LEC customer, the wireless

[6] Brief for Federal Communications Commission, *United States Telecom Ass'n, et al.* v. *FCC,* Nos. 03-1414, 1443, at 32-33 (D.C. Cir., filed July 9, 2004)("*FCC Intermodal LNP Brief*")(emphasis added).

carrier is responsible for transporting the call and paying the cost of this traffic. And, conversely, when a rural LEC customer calls a wireless customer, the rural LEC is responsible for transporting the call and paying the cost of this transport."[7] Section 251(b)(5) of the Act imposes on all LECs the "duty to establish *reciprocal* compensation arrangements for the *transport* and termination of telecommunications."[8] Section 252(d)(2) of the Act specifies that for "purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), . . . *each carrier* [shall recover the] costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the network carrier."[9]

The transport rules that the FCC has adopted (and that have been affirmed on appeal) comply with these reciprocity requirements, because the same transport obligations are imposed whether the originating carrier is a rural ILEC or a wireless carrier. In stark contrast, the discriminatory position that Cass and Craw-Kan advocate in this case is flatly inconsistent with the directive in Sections 251(b) and 252(d) of the Act that compensation arrangements for the transport of traffic be "reciprocal."

As Mr. Williams has testified, it has been industry practice, consistent with applicable requirements, that carriers originating local traffic have the obligation to deliver that traffic to the terminating carrier. (Williams Rebuttal, Exh. 21, p. 14,

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[7] *Id.* at 35. *See also* Brief for Respondents, *Central Texas Telephone Cooperative, et al.* v. *FCC,* No. 03-1405, at 21 n.39 (D.C. Cir., filed June 24, 2004)("*FCC Wireless LNP Brief*")("Thus, under the Commission's pre-existing rules, a rural LEC would be required to deliver calls that originate on its network to a non-ported number of a CMRS carrier's customer where the CMRS carrier has telephone numbers assigned to the rural LEC's rate center but no local presence in the rate center or direct interconnection with the rural LEC.").

[8] 47 U.S.C. § 251(b)(5)(emphasis added).

[9] 47 U.S.C. § 252(d)(2)(a)(i)(emphasis added).

ll. 18-23; *See also,* footnote 75 in FCC *Intermodal Porting Order,* RW-1 attached to Exh. 21.) **Calls to a ported number with the same rate center designation as the originating call are local calls,** just as Western Wireless takes responsibility for the cost of routing local calls to Cass and Craw-Kan today. (Williams Rebuttal, Exh. 21, p. 15, ll. 4-10)

In fact, the FCC's rules provide that a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network. 47 C.F.R. 51.703(b) Two federal circuit courts have confirmed that under Rule 51.703(b), an ILEC must take financial responsibility for local calls originated by its own customers. *Mountain Communications, Inc. v. Federal Communications Commission*, 355 F.3d 644 (D.C. Cir. 2004); MCIMetro Access Transmission Servs., Inc. v. BellSouth Telecommunications, Inc., 352 F.3d 872 (4th Cir. 2003). The primary issue raised in both cases was whether the incumbent carrier whose customer originates a call can pass that cost on to the carrier whose customer receives that call. In each case, the court applied Rule 51.703(b) to prohibit such cost shifting.

In the instant cases, it is telling that there is no evidence in the record that indicates a single step Petitioners have taken to develop the business relationships that would be necessary to fulfill their obligation under the law to port calls to Western Wireless – there is no evidence of even a phone call to SBC or Sprint, no evidence of an engineering analysis -- just, "we can't do it." But the FCC says the ILEC must deliver calls which originate as local calls, as local calls.

What the FCC has not addressed yet is the compensation for the routing of calls where the actual routing of the traffic involves routing outside of the ILEC's rate center for proper delivery. (Williams, cross by Mr. Meyer, KLM Transcript, TO-2004-0401, p. 339, ll. 2-4, 16-19) The responsibility to port the call is clear. For Cass and Craw-Kan to argue otherwise is either disingenuous or just wishful thinking. As the FCC Enforcement Bureau Chief stated in May, as quoted by Mr. Williams on page 7 of his Surrebuttal testimony, "Regardless of the status of a carrier's obligations to provide number portability, all carriers have the duty to route calls to ported numbers. In other words, carriers must ensure that their call routing procedures do not result in dropped calls to ported numbers." [10] (Williams Surrebuttal, Exh. 22, p. 7, ll. 3-10; *See also,* Williams Rebuttal, Exh. 21, p. 15, ll. 1-4)

And, as stated above, *no* evidence has been offered by Petitioners in this case, *or* by Staff, indicating what it would cost Petitioners to port calls to wireless customers, nor have Petitioners or Staff offered any estimate of what such costs would be. Only Mr. Williams has offered a method of developing an estimate of such costs. His model resulted in a monthly transit usage cost of $270.00 per month for each Petitioner. (Williams Surrebuttal, Exh. 22, p. 3, ll. 7-16)

[10] In the Matter of CenturyTel, Inc., CenturyTel of Washington, Inc., CenturyTel of Cowiche, Inc., and CenturyTel of Inter Island, Inc. Apparent Liability for Forfeiture, DA 04-1304, Released May 13, 2004, ¶ 4.

TRANSPORT OF LOCAL CALLS TO PORTED NUMBERS DOES NOT RESULT IN A LEC "OPERATING MUCH LIKE AN INTEREXCHANGE CARRIER"

In her testimony, Staff Witness Dietrich stated that, "[t]ransporting calls to numbers that have been ported to a wireless carrier with no point of presence in the Cass or Craw-Kan local service area could result in the carriers inappropriately operating much like an interexchange carrier instead of a local exchange carrier." (Dietrich Rebuttal, Exh. 11, p. 4, ll. 14-17) This statement is in error, and appears to have caused confusion as to the potential impacts of intermodal porting. There is no evidence in the record that calls to ported numbers in the absence of a direct connection require a toll call. In fact, such calls are completed today between many carriers. (Williams Rebuttal, Exh. 21, p. 14, ll. 10-13; p. 15, ll. 4-10)

The simple fact that a ported call may be routed outside of the rate center does not turn that call into a toll call (interexchange call) for rating purposes. (Williams Surrebuttal, Exh. 22, p. 2, ll. 4-6) The rating and the routing of a call are distinct issues. The Central Office Code (NXX) Administration Guidelines (COCAG), published by the Alliance for Telecommunications Industry Solutions on behalf of the Industry Number Committee, permit a carrier to receive a rate center number assignment and designate a routing point for calls to those numbers that are outside the rate center to which they are assigned. (Williams Rebuttal, Exh. 21, p. 14, footnote 20, and ll. 3-7) As discussed above (under *Petitioners' Obligation to Route Calls*), a local call must remain a local call for

rating purposes even if the routing may be different because the number is ported. As Western Wireless Witness Williams testified: "The FCC has made explicit that this intermodal call is within the local calling area and these calls maintain their rate center designation."[11] (Williams Surrebuttal, Exh. 22, p. 2, ll. 11-12; *See* Paragraph 28 of the FCC's *Intermodal Porting Order* of November 10, 2003, attached to Williams Rebuttal, Exh. 21, as RW-1)

STATUTORY STANDARD FOR SUSPENSION OR MODIFICATION OF LNP OBLIGATION

The Act provides for a small, rural telephone company like Cass or Craw-Kan to be able to petition a State commission for suspension or modification of the LNP requirements. It also establishes what is intended to be a very high standard of proof in seeking such a suspension or modification. Section 251(f)(2) of the Act provides that the State Commission shall grant a petition for suspension or modification:

> *to the extent, and for such duration as*, the State Commission determines that such suspension or modification –
>
> (A) is ***necessary*** –
>
> (i) to avoid a ***significant adverse*** economic impact ***on users*** of telecommunications services ***generally***
>
> (ii) to avoid imposing a requirement that is ***unduly*** economically burdensome; or

[11] In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, CC Docket No. 95-116, FCC 03-284 **¶28** (rel. November 10, 2003). ("*Intermodal Porting Order*") – attached to Rebuttal Testimony of Ron Williams (Exh. 21) as Exhibit RW-1.

(iii) to avoid imposing a requirement that is ***technically infeasible***; ***and***

(B) is ***consistent with the public interest, convenience and necessity***. *(Emphases added.)*

The FCC has also clarified the limited nature of this state commission review process: "Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule…. We believe that Congress did not intend to insulate smaller or rural LECs from competition."[12]

Further, the FCC stated in its *LNP First Report and Order,* that, to meet this standard for suspension or modification, **the ILEC must show "undue economic burden beyond the economic burden typically associated with efficient competitive entry."** [13] Any change in responsibility in order to promote competition is going to require some costs. Such costs are merely incidental to competitive change, and irrelevant to the suspension standard. Only *undue* economic burden or *significant adverse* economic impact on users is relevant to this discussion.

Nowhere in this record have Cass or Craw-Kan suggested a standard for determining when an economic burden is "undue" or a user impact "significant" and "adverse." Apparently, any cost at all is too much for Cass and Craw-Kan (as well as Staff). But that is not the law, as discussed above.

[12] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report & Order, 11 F.C.C.R. 15499, 16118 (1996) ("*LNP First Report and Order*").
[13] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report & Order, 11 F.C.C.R. 15499, 16118 (1996) ("*LNP First Report and Order*").

(Also, *See* Re North-Eastern Pennsylvania Telephone Company, page 5 and footnote 3, *supra.*)

What Cass, Craw-Kan and the other rural ILECs have asked, with apparent success thus far, was for the Missouri Public Service Commission to revisit the underlying rules and policies that have been put in place by the Congress and the FCC. That is not what this case is supposed to be about, as a matter of law. It is supposed to be about proper application of the statutory standards for suspension or modification. The entire discussion and debate over how far a call would have to go, and through what facilities or locations, in order to be ported to Western Wireless, is a red herring. It appears designed to dazzle the Commission with the alleged impossibility of Cass and Craw-Kan learning how to do something new, which goes to the underlying policy decisions already made by the FCC. **Western Wireless does not have the burden of proof here.** On the other hand, Cass and Craw-Kan do have an obligation to correctly route ported calls, as discussed further below.

LACK OF APPLICATION OF STATUTORY STANDARD BY PETITIONERS AND STAFF

It is the position of Western Wireless that Petitioners have not met their burden of proof in this case. In fact, they have confused and changed the standard to be applied by the Commission. Mr. Schoonmaker's entire treatment of the statutory standard for modification of the LNP requirement is found in a single sentence on page 9 of his Direct Testimony (Exh. 1): ". . . there

is a key issue yet to be resolved that would adversely impact customers, that would be economically burdensome for the Companies, and because such modification is fully consistent with the public interest." (Exh. 1, p. 9, ll. 10-12) Staff Witness, Ms. Dietrich, never even mentions the Section 251(f)(2) standard in her testimony (although it is at least quoted and referred to in the Staff memorandum attached to her testimony). Rather, the standard she would have the Commission employ is the following: "that neither the companies, nor their customers, will be responsible for any transport or long distance charges associated with porting numbers and any associated calls outside companies' local service area." (Dietrich Rebuttal, p. 7, l. 23 through p. 8, l. 3) According to both Petitioners and Staff, the Commission need not bother itself with evaluating actual costs and determining whether they would create "undue economic burden" on the companies or "significant adverse economic impact on telecommunications users generally." *Any* cost (except to wireless carriers) is too great. This position is clearly contrary to the law this Commission is required to apply to its determination in these cases.

THE STATUTORY STANDARD APPLIED

1. Is modification of the LNP requirement *necessary to avoid significant adverse economic impact on users of telecommunications services generally?*

Petitioners have presented no competent and substantial evidence upon which the Commission could find and conclude that the modification of the LNP

requirement sought in these cases is necessary "to avoid a significant adverse economic impact on users of telecommunications services generally." To do so, the Petitioners would first have to have offered evidence and proven what the actual cost of LNP implementation would be. They have not. (*See* discussion of Mr. Schoonmaker's "cost evidence" above, at pages 8 to 10)

Second, the Petitioners would have to show that such costs would be passed through to ILEC customers if LNP was implemented. The FCC has provided a mechanism for ILECs to recover their LNP implementation costs from customers under NECA tariffs through a surcharge, spreading those costs over five years. The Petitioners did not identify whether or not they will attempt to recoup LNP costs through an end user surcharge, let alone how much such a charge would be. (Williams Rebuttal, Exh. 21, p. 12, ll. 16-17) Further, Petitioners have offered no comparison as to how any potential costs to end users would be offset by the favorable service and price impacts generally associated with the advent of local competition. (*Id.,* at ll. 17-20)

Third, the Petitioners would have to demonstrate by application of some rational standard or comparison that such costs, as passed through to their ILEC customers, would have a significant adverse economic impact on users of telecommunications services generally. If the company can, and chooses to, pass a cost through to its customers via a surcharge, that cost has an "economic impact on telecommunications users generally," though not necessarily a "*significant adverse* economic impact."

The residential customers of Cass County Telephone only pay from $6.50 to $8.50 per month for basic local telephone service today ($13.00 to $17.00 per month for business customers), according to the company's tariffs on file with the Commission. Craw-Kan's residential customers pay only $5.00 to $7.25 per month for local telephone service today ($7.75 to 10.75 per month for business customers). The companies offered no evidence of what the average amount is that their customers spend every month on total communications, including custom-calling features, interexchange calling, wireless telephone service, and etc. It is highly probable that a significant percentage of Petitioners' customers are capable of paying, and do pay, quite a bit more every month for total communications services than either Cass or Craw-Kan's basic rates. Petitioners offered no evidence by which the Commission could assess this issue.

Since Cass and Craw-Kan have offered no competent and substantial evidence of what the actual costs of LNP implementation would be, nor stated whether they would pass such costs along to customers, nor suggested how the wildly hypothetical costs of which their expert testified would affect individual customers or customer rates at either company, Petitioners clearly have not met their burden of proof on this element of the statutory standard.

2. Is modification of the LNP requirement *necessary to avoid imposing a requirement that is unduly economically burdensome?*

If the company must bear a cost itself, it is an "economic burden" (although not necessarily an "*undue* economic burden"). **"Undue" economic burden means something more than "the economic burdens typically associated with efficient competitive entry," quoth the FCC above.**[14] So, the fact that it would cost Petitioners *something* to implement LNP is irrelevant to this case. The law is that Petitioners shall provide wireline-to-wireless LNP.

Once again, Petitioners have presented no competent and substantial evidence upon which the Commission could base a conclusion that the implementation of LNP by Petitioners would impose a requirement that is "unduly economically burdensome." Both Cass County and Craw-Kan are "LNP capable," and neither has presented any cost evidence in this case, except for the broad and unsupported speculation about the costs of a hypothetical negotiation process and arbitration with SBC, none of which has been shown to be necessary. There is no evidence of undue economic burden.

Neither the Company nor the Staff offered any quantification of transport costs. The only evidence in the record pertaining to transport costs was provided by Mr. Williams of Western Wireless. He provided a method of developing a forecast of the cost of call transport to ported numbers for Petitioners. Williams Surrebuttal, Exh. 22, p. 3, ll. 7-16) Mr. Williams' model resulted in a monthly transit usage cost of $270.00 per month. (*Id.,* ll. 11-14)

Now, if a $270 a month cost to a rural ILEC is what the Congress meant by "undue economic burden," then the possible *permanent* suspension of LNP

[14] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report & Order, 11 F.C.C.R. 15499, 16118 (1996) ("*LNP First Report and Order*").

requirements that members of this Commission expressed concern about at the May 5 "On-the-Record Presentation" will become a reality. If *any* cost, however small, is too great, then the FCC's order will languish over rural Missouri until it dies the natural death that Missouri's rural ILECs obviously hope for it.

However, **Cass and Craw-Kan have provided no evidence in this case upon which this Commission can conclude that provision of LNP would result in an "undue economic burden" on either company. Petitioners have *not presented any evidence of their financial situation* -- no balance sheets, no income statements, no cash flow analyses, no rate of return evidence** – with which to compare their LNP implementation costs in order to determine whether implementing LNP would be "unduly economically burdensome" to the company. **They have articulated no standard by which the Commission should evaluate such financial evidence even if they had presented any.** As a matter of law, Cass and Craw-Kan have failed to meet their burden of proof. And if the Commission concludes that providing LNP would result in an "undue economic burden" on Cass and Craw-Kan in these cases, based on zero evidence concerning the Company's overall financial condition whatsoever, it will have gutted the statutory standard and rendered Section 251 (f) (2) meaningless.

3. Is modification of the LNP requirement *necessary to avoid imposing a requirement that is technically infeasible?*

It is undisputed that providing LNP is not "technically unfeasible" for either Cass County or Craw-Kan. Petitioners in these cases are LNP-capable. "They

have made the necessary investments in their switch, the necessary arrangements with vendors to provide database administration and they can provide local number portability." (T-216, ll. 7-11; Schoonmaker Direct, Exh. 1, p. 18, ll. 5-8.)

4. Is modification of the LNP requirement consistent with the public interest, convenience and necessity?

Since none of the first three standards of Section 251(f)(2) has been met on the record of this case, this question is moot, as a matter of law. However, even if the Commission felt a "public interest" evaluation was necessary, the issue is answered by Missouri law.

Not only has federal law promoted telecommunications competition, especially since the 1996 Act, but *Missouri state law* has long promoted competition in telecommunications markets, as well. In 1996, our General Assembly enacted, and the Governor signed into law, S.B. 507, adding important new language to Section 392 of the PSC Law.

The "purpose clause" (Section 392.185) and the "intent" language (Section 392.200.4(2)) included in S.B. 507, clearly express the policy of the State of Missouri to promote competition in the telecommunications industry. Section 392.200.4(2) RSMo, expresses the "intent" of that legislation as being "to bring the benefits of competition to all customers …" and to "promote the goals of the federal Telecommunications Act of 1996, …." Section 392.185 RSMo describes the purpose of S.B. 507 as including the promotion of "diversity in the supply of

telecommunications services and products throughout the state of Missouri," and allowing "full and fair competition to function as a substitute for regulation …."

To use the carefully limited "suspension and modification" language in the 1996 federal Act as a device for allowing virtually every rural ILEC in Missouri to avoid its obligations under federal law to provide LNP, will dramatically discourage competition, rather than promoting it, as contemplated by the General Assembly in S.B. 507 in 1996. It cannot *possibly* be consistent with the public interest, convenience and necessity, regardless of whether it may be consistent with Petitioners' private, pecuniary interests.

Therefore, if this issue were even reached, Western Wireless submits that denying the customers of Cass County and Craw-Kan the benefits of competitive telecommunications choices in their service territories in rural Missouri would be inconsistent with the public interest, convenience and necessity, with the legislative policies of the State of Missouri which promote competition in telecommunications markets, with the Federal Telecommunications Act of 1996 and with Orders of the Federal Communications Commission.

SERVICE "BEYOND THE SERVICE TERRITORY?"

Cass and Craw-Kan also make much of the notion that they do not have authority from this Commission to transport calls outside the geographic boundaries of its service territory and, therefore, cannot legally transport calls beyond those borders for purposes of intermodal porting. While Petitioners' concern for complying strictly with the authority of this Commission is

commendable, this is not a serious argument. An order of the Federal Communications Commission requires Petitioners to port calls to wireless carriers whose coverage area overlaps Petitioners' service territories. The customers served, the numbers ported, will all be (and remain) within Petitioners' rate centers. The Petitioners' obligation to route and deliver as local calls, calls to a ported number with the same rate center designation as the originating call, have not and will not change. (*See* discussion above at pp. 12-15.) Further, the FCC's ultimate decision concerning the compensation for the costs of routing such calls outside the ILEC's rate center will not affect these obligations.

It is inconceivable that Petitioners could fulfill their legal obligations only to have the Missouri Public Service Commission respond by filing a formal complaint against them for "serving" beyond their service territories. This fact situation cannot reasonably be argued to be a local exchange provider serving outside its authorized service territory. It does, however, provide another opportunity for Petitioners to try to create obstacles to LNP, rather than solutions.

CUSTOMER DEMAND

Petitioners tried to make much of their position that there is a lack of customer demand for intermodal LNP and that this has something to do with the statutory standard for modification of the LNP requirement. It does not. 47 U.S.C. 251(f)(2) nowhere states that some threshold of customer demand for LNP must be met before an ILEC is be required to implement it. Petitioners'

"estimates" of demand for wireline-to-wireless LNP are irrelevant, as a matter of law, to these proceedings.

Further, Petitioners' "estimates" of demand for wireline-to-wireless porting are gravely flawed and self-fulfilling. Customers don't demand services they don't know about, but wireless companies cannot not promote and market LNP and *let* customers know about it if the service cannot be delivered. Intermodal LNP was not available before May 24, 2004. If Petitioners succeed in these cases, intermodal LNP will still not be meaningfully available to their customers.

Petitioners have performed no market studies of customer demand for LNP. Mr. Williams testified on cross-examination that 16% of rural customers want to port their home phone number to their cell phone. (KLM T-337, ll. 12-16, cross by Meyer) Mr. Williams testified that Western Wireless projects that Cass County is likely to average an intermodal line loss of 240 ports per year over the next five years, and Craw-Kan 80 ports per year – dramatically higher numbers than those offered by Mr. Schoonmaker, who projected only 24 and 8 ported numbers, respectively, for the first year. (Williams Rebuttal, Exh. 21, p. 18, ll. 3-5; Schoonmaker Direct, Exh. 1, p. 22, ll. 16-17) Mr. Williams also explained Western Wireless' development of its projections of ported numbers on cross examination. (KLM T-335, l. 18 to T-338, l. 9)

There is also no evidence in the record of any market studies of customer demand for LNP performed by, or on behalf of, Petitioners or Staff.

Of course rural customers would like to have competitive options. However, if the Commission allows rural ILECs like the Petitioners to ignore their

legal responsibilities to provide LNP, little demand for the service *will have the opportunity* to materialize.

But, most fundamentally, the Commission's perceptions of immediate or projected customer demand for LNP cannot be relied upon as a basis for granting a modification of LNP requirements, as a matter of law. Ultimately, this point is not relevant to the Commission's responsibility in this case.

INTERCEPT MESSAGE

Staff recommends that a "modification" of LNP requirements for Cass and Craw-Kan be granted to assure those companies do not have to take responsibility for routing ported calls. This "modification" would permit calls to ported numbers to be "intercepted" by a "cannot be completed as dialed" message. **This misrouting of ported calls to an intercept message would be in clear contravention of the ILECs' FCC-mandated routing obligations under federal law, as discussed in detail above.** The FCC has noted that, under "standard industry practice, calls are determined to be local or toll (long distance) by comparing the NPA-NXX codes of the calling and called parties":

> Thus, carriers generally compare the NPA/NXX prefixes of the calling and called parties' telephone numbers to determine both the retail rating of a call (that is, the charge imposed on the calling party) as well as the appropriate intercarrier compensation that is due. . . . All telephone numbers assigned to a particular rate center are presumed for rate-making purposes to be located at that geographic point. . . . As a general matter, a call is rated local if the called number is assigned to a rate center within the local calling area of the originating rate center."[15]

[15] *FCC Wireless LNP Brief* at 11.

Clearly, it would be an unreasonable practice under Section 201 of the Act for rural ILECs to discriminate against wireless carriers and wireless customers with locally rated telephone numbers, by treating calls to these customers as toll while continuing to treat as local, calls to rural ILEC customers with locally rated telephone numbers. In addition, any rural ILEC attempt to require its customers to dial extra digits (*e.g.,* 1-plus seven digits) to reach a wireless customer with a locally rated number (whether ported or not) would violate the FCC's local dialing parity rule, which provides:

> A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider.[16]

In fact, the FCC recently proposed fining CenturyTel $100,000 for failing to properly route calls to wireless customers with ported numbers.[17] (Cited in Williams Rebuttal, Exh. 21, at p. 15)

Most people, when they dial a number and receive such an intercept message, feel they must have made a mistake of some kind. That is how customers of Cass and Craw-Kan will be made to feel if they receive such a recording instead of completing a call. **This recorded message also clearly and wrongly puts the onus on the wireless carrier, as though it has failed to do something that was required of it.** And yet, even Staff Witness Dietrich agrees that it is not the wireless carrier's responsibility to bear the transport costs associated with intermodal porting, and that wireless carriers should not be

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[16] 47 C.F.R. § 51.207. *See also* 47 U.S.C. § 251(b)(3).

[17] *See CenturyTel Notice of Apparently Liability,* File No. EB-04-IH-0012, DA-04-1304 (May 13, 2004). CenturyTel recently paid this sum in response to this complaint. *See CenturyTel Order,* File No. EB-04-IH-0012, DA 04-2065 (July 12, 2004).

required to establish a point of presence in the Petitioners' service territories. (Dietrich Rebuttal, Exh. 11, p. 4, l. 20 to p. 5, l.1; and p. 5, ll. 19-22)

Staff's intercept proposal is also inconsistent with the Telecom Act's definition of LNP:

> "The ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers ***without impairment of quality, reliability, or convenience*** when switching from one telecommunications carrier to another."[18] [Emphasis added]

An intercept message or a toll charge would impair the quality, reliability and convenience of local calling, and would unreasonably discriminate against wireless carriers. Further, neither Petitioners nor Staff have offered any evidence of what the economic burden on Petitioners would be if they were to correctly port these calls rather than misrouting them to intercepts or toll carriers. Nor did Petitioners or Staff provide any evidence of the Petitioners' costs of providing call intercepts.

Western Wireless did not come to this Commission and propose some wild, *avant garde* scheme of its own creation that Petitioners should port calls to its customers upon customer request. LNP is a requirement of federal law, and Western Wireless simply seeks to have Cass and Craw-Kan *follow* that law. **If intercept messages are going to be approved by this Commission, they really should say, "Your call will not be completed as dialed because your local telephone company refuses to follow the requirements of federal law and orders of the Federal Communications Commission."**

[18] 47 U.S.C. § 153(30)

CONCLUSION

In conclusion, Cass County Telephone Company and Craw-Kan Telephone Cooperative have not proven that modification of their LNP obligations under federal law is necessary to avoid a significant adverse economic impact on users of telecommunications services generally, nor that the requirement is unduly economically burdensome. They have not shown technical infeasibility. Absent these elements, the Commission should not reach the public interest standard. Even if public interest was within the scope of this case, Petitioners have not shown that modification is consistent with the public interest, convenience and necessity. Petitioners simply have not met their burden of proof based on the record of this case.

Cass County Telephone Company should be ordered to provide LNP to Western Wireless coincident with the expiration of its interim suspension on October 1, it having been presented with a Bona Fide Request by Western Wireless on November 4, 2003. (Williams Rebuttal, Exh. 21, p. 5, ll. 15-18) Craw-Kan should be ordered to provide LNP to Western Wireless by December 28, 2004, which will be six months from the submission by Western Wireless of a Bona Fide Request to Craw-Kan, which occurred on June 28, 2004. (Williams Rebuttal, Exh. 21, p. 5, ll. 19-21; p. 21, ll. 9-13; Williams Surrebuttal, Exh. 22, p. 9)

Western Wireless respectfully urges the Commission to uphold the competitive telecommunications policies of the State of Missouri and the integrity of Section 251 (f) (2) of the Act and deny the Petition for Suspension and Modification of LNP requirements in this case.

Respectfully submitted,

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ATTORNEYS FOR WWC LICENSE L.L.C. ("WESTERN WIRELESS") d/b/a CELLULAR ONE

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 31st day of August 2004.

/s/ William D. Steinmeier