BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Tariff Filing of Xspedius Management Co. of Kansas City, LLC d/b/a Xspedius Communications	)))	Case No. XT-2005-0478 Tariff File No. JX-2005-934

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission and for its recommendation states:

1. On April 26, 2005, Xspedius Management Co. of Kansas City, LLC d/b/a Xspedius Communications issued a revision of its access service tariff that would implement a wireless termination service. Xspedius Communication is a competitive local exchange carrier (CLEC). On June 10, 2005, the Commission suspended the tariff filing and directed the Staff to file a recommendation discussing whether Xspedius communications' tariff is contrary to the requirements of 47 CFR 20.11(d).

2. Federal administrative rules are subject to the same well-known maxims of construction as legislative statutes. A court looks past the express language of a regulation when it is ambiguous or where a literal interpretation would lead to an absurd result or thwart the purpose of the overall statutory scheme. A court will examine the history for any signs that its decision would thwart the agency's intent.[1]

[1] *First Nat. Bank of Chicago v. Standard Bk. & Tr.,* 172 F.3d 472, 476-77 (7th Cir. 1999).

3. The Federal Communications Commission recently promulgated new subsections (e) and (f) to 47 CFR 20.11 Interconnection to facilities of local exchange carriers: [2] [3]

> (e) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.
>
> (f) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in §51.715 shall apply.

4. The FCC promulgated these new sections in response to a joint petition filed by T-Mobile USA, Inc., and other CMRS (Commercial Mobile Radio Service) providers. The T-Mobile Petition asserts that wireless termination tariffs are unlawful. More specifically, the petitioners claim that, by filing these tariffs, the incumbent LECs are acting in bad faith by attempting to pre-empt the negotiation process contemplated by Sections 251 and 252 of the Act and the Commission's rules.[4]

5. The FCC found that LECs were not prohibited by existing rules from filing state termination tariffs and CMRS providers were obligated to accept the terms of the applicable state tariff. Going forward, however, the FCC amended its rules by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff. In addition, the FCC amended its rules to clarify that an incumbent LEC may request interconnection from a

[2] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Declaratory Ruling and Report and Order, released February 24, 2005.
[3] The subsections are designated as (d) and (e) in the Federal Register, 70 FR 16141.
[4] *Id*. at footnote 1 and paragraph 8.

CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act.[5]

6. In its discussion, the FCC acknowledged that LECs may have had difficulty obtaining compensation from CMRS providers because LECs may not force CMRS providers to negotiate interconnection agreements or submit to arbitration under Section 252 of the Act.[6] In light of its decision to prohibit the use of tariffs to impose termination charges on non-access traffic, the FCC found it necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today. Accordingly, the FCC amended Section 20.11 to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in Section 252 of the Act.[7]

7. It is the Staff's opinion that 47 CFR 20.11 (e) does not prohibit a CLEC from filing a state tariff to impose termination charges on non-access wireless traffic. Although the term "local exchange carriers" may encompass both "incumbent local exchange carriers" and "competitive local exchange carriers," it is the Staff's opinion that the FCC intended in this context for the term to encompass only "incumbent local exchange carriers."

(1) In Appendix D, the FCC confirms this reading when it states, "In this Order, the [FCC] adopts new rules that prohibit **incumbent LECs** from imposing non-access compensation obligations pursuant to tariff, and permit **LECs** to compel interconnection and arbitration with CMRS providers." (Emphasis added).[8] Note that the terms "incumbent LECs" and "LECs" are switched from their positions in the rule, thus demonstrating that the FCC viewed the terms as synonymous in this context.

[5] *Id*. at paragraph 9.
[6] *Id*. at paragraph 15.
[7] *Id.* at paragraph 16.
[8] *Id.* at Appendix D, para. 17.

(2) 47 CFR 20.11 predates the federal Telecommunications Act of 1996 and its introduction of competition into the local telecommunications market. Therefore, the term "local exchange carrier" equated to incumbent local exchange carrier in the original rule. This rule was amended in 1996 and again in the current FCC rulemaking, yet there has been no amendatory language to expand the rule's scope to CLECs.

(3) The FCC did not intend to preempt CLECs' state termination tariffs. Federal law can of course override by implication when the implication is unambiguous. But, where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.[9] The T-Mobile Petition asserted that ILEC wireless termination tariffs were unlawful. The FCC's Order does not express or imply an unambiguous intention to broaden the scope of the case and rulemaking to include CLEC wireless termination tariffs.

(4) The FCC's Order found it necessary to ensure that "LECs" have the ability to compel negotiations and arbitrations, and accordingly amended Section 20.11 to clarify that an "incumbent LEC" may invoke the negotiation and arbitration procedures set forth in Section 252 of the Act.[10] In that paragraph, the FCC used "LEC" and "incumbent LEC" as synonymous terms because granting an "incumbent LEC" the ability to compel negotiation and arbitration does not ensure that a "CLEC" will have the ability to compel negotiations and arbitrations.

(5) CLECs do not have the ability to compel negotiations and arbitrations with CMRS providers; Section 252 applies to compel negotiation and arbitration between an

[9] *BFP v. Resolution Trust Corp*., 114 S. Ct. 1757, 1765-66 (1994).
[10] *Id.* at para. 16

incumbent LEC and another telecommunications carrier. Interpreting 47 CFR 20.11 (e) to prohibit CLECs from filing wireless termination tariffs is contrary to the acknowledgement that LECs may have had difficulty obtaining compensation from CMRS providers given the reported lack of incentives for CMRS providers to engage in voluntary negotiations.[11] The Staff opines that the FCC did not intend for this rule to apply to CLECs because the FCC would not have intended to leave CLECs without either means – a tariff or the ability to compel negotiation and arbitration – to ensure payment for its wireless termination services.

WHEREFORE, the Staff suggests that the wireless termination tariff filing by Xspedius Communications is not contrary to the requirements of 47 CFR 20.11 (d).

Respectfully submitted,

DANA K. JOYCE
General Counsel

/s/ William K. Haas
William K. Haas
Deputy General Counsel
Missouri Bar No. 28701

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-7510 (Telephone)
(573) 751-9285 (Fax)
williamhaas@psc.state.mo.us

[11] See, *Id.* at para.15.

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronic mail to all counsel of record this 17th day of June, 2005.

/s/ William K. Haas