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September 1, 2009

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VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602-6015

Re: Case No. 2008-00135 - Information Requested by Staff at the August 11 Hearing

Dear Mr. Derouen:

At the August 11, 2009, hearing in this case Mr. J.E.B. Pinney asked whether Sprint Communications Company L.P. ("Sprint") would be willing to provide docket numbers for cases in other states in which Sprint has litigated similar issues to those before the Commission in this docket. Hearing Transcript, p. 78. I responded: "I believe the witness's testimony is this is the first time this issue has been brought into a contested case proceeding anywhere." *Id.* My answer was incorrect. In 2002, Sage Telecom Texas, L.P., a competitive local exchange carrier, filed a complaint with the Texas Public Service Commission relating in part to Sprint's position that Sage was obligated to use Sprint's percent interstate usage ("PIU") factor to account for traveling wireless calls. That case was assigned Docket No. 26112, and the all of the filings in the case can be obtained though the Texas Public Service Commission's web site.

The parties ultimately resolved the issues raised in Sage's complaint, so there was no final order issued by the Texas Commission. However, Commission Staff's position statement (attached as Exhibit A hereto) included the following discussion:

> The use of NPA-NXX codes from Category 11 records works well to determine the interstate/intrastate jurisdiction of a wireline call. In a wireline call situation, the calling parties' geographic location is fixed. However, with the portability and ubiquitous nature of wireless phones, the use of such codes cannot be a sole determinant of the jurisdiction of a call for billing purposes. It is clear that the FCC has recognized this problem as has ATIS, which is the reason why it is attempting to establish new industry standards in OBF Issue No. 2308.[5] In light of these inherent problems, Staff contends that the use of a reasonable PIU factor for

the terminating traffic may be an efficient way to prevent the incorrect taxing about which ATIS had concerns.

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[5] In its November 19, 2001 notice, ATIS states that "...there needs to be a method to identify the switch location where call detail records actually originated. This jurisdictional information needs to be carried through the network to the terminating recording office and captured in a terminating switch recording. It is understood that there is nothing in today's industry signaling and recording requirements that will cause the needed call origination information to be populated in terminating interexchange call detail records. Another concern is whether existing industry standards took into account the use of wireless calls in long distance/interstate applications.
See also "First Report and Order", *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, Interconnection Between LECs and CMRS Providers, CC Dkt. No. 95-185, Paragraph 1044 (Aug. 8, 1996).

I apologize for my error at the hearing.[1] If you have any further questions, please do not hesitate to contact me.

Sincerely,

Philip R. Schenkenberg

cc: Sprint Communications Company L.P.
Bill Atkinson, Esq.
Douglas Brent, Esq.
John N. Hughes, Esq.
John Selent, Esq.
J. D Tobin, Jr.

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[1] At page 79 of the Hearing Transcript Mr. Selent indicated that he believed Brandenburg had asked for this information in a data request. Sprint has reviewed all data requests served by Brandenburg and determined that Brandenburg did not ask for this information.

DOCKET NO. 26112

COMPLAINT OF SAGE TELECOM TEXAS, L.P. AGAINST SPRINT COMMUNICATIONS COMPANY	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

COMMISSION STAFF'S SUPPLEMENTAL RESPONSE TO THE HEARING EXAMINER'S REQUEST FOR AN OPINION STATEMENT

COMES NOW, the Commission Staff (Staff) of the Public Utility Commission of Texas (PUC), representing the public interest, and submits its Supplemental Response to the Hearing Examiner's Request for an Opinion Statement and in support thereof would respectfully show the following:

A. COMMISSION STAFF POSITION

I. JURISDICTION

Staff recognizes that this dispute may concern at least two main issues: (1) the interpretation and application of the Settlement Agreement ("Agreement") between Sage Telecom of Texas ("Sage") and Sprint Communications Company ("Sprint") that relates to the billing of access charges; and (2) the jurisdictional nature of wireless calls for access charge billing determination.

Staff contends that as to the first issue, the PUC has jurisdiction and authority to render a decision in this matter under PURA §§14.001, 52.001, 52.002, 52.108 and 52.155. Staff asserts that the language of the Agreement and Sage's Local Access Tariff may be determinative in determining the potential application of Sprint percentage interstate usage (PIU) factors to the terminating traffic in question.

In regard to the second issue, Staff notes that the Federal Communication Commission (FCC) has already determined the jurisdictional nature of a wireless call for billing purposes.[1] As noted by Sprint, the FCC has concluded that, for jurisdictional

[1] "First Report and Order", *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, Interconnection Between LECs and CMRS Providers, CC Dkt. No. 95-185, Paragraphs 1043 & 1044 (Aug. 8, 1996)

EXHIBIT A

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purposes and determination of transport and termination rates, the geographic locations of the calling and called parties should define whether intrastate or interstate access charges are appropriate. Thus, Staff will refrain from revisiting the FCC's ruling related to the jurisdictional nature of wireless calls at this time.[2]

II. STAFF OPINION

(1) "Safe Harbor" Switched Access Rates

Staff contends that the provisions set in PURA §52.155 and PUC Subst. R. §26.223 as well as the terms of the Agreement are controlling in this matter. Staff agrees with Sage that as long as the intrastate switched access rates are consistent with the PUC Safe Harbor rules as initially established in PUC Docket No. 21174 and the Commission's then-established rates, there should be little argument with the intrastate rates. Thus, to the extent that Sprint has engaged in "self-help" measures in withholding monies that are lawfully due Sage for the termination of intrastate switched access minutes, Sprint would be in violation of Commission rules.

However, this dispute deals with more than the setting of Sage's intrastate switched access charges to Sprint. This docket deals with how the intrastate switched access charge has been applied to wireless traffic that may have originated outside of Texas.

(2) PIU Factors

It is evident to Staff that a complete reading of the terms of the Agreement as well as the Sage Local Access tariff is warranted in this case. Staff notes that the terms of the Agreement indicate that PIU factors were to be submitted by Sprint in determining the amount to be paid to Sage for switched access.[3] The Agreement states in Section A.1 that "... (Starting July, 2000) Sprint agrees to pay Sage for switched access services provided at the switched access service rates agreed upon herein and shown on the attached Schedule A, using the Percent Interstate Usage (PIU) factor provided by Sprint in accordance with Paragraph 3.F herein...". Moreover, Section 3.F notes that "Sprint

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[2] See PURA §§11.009 & 53.001(b).

[3] Staff did not see the PIU factors in the parties' briefs that were submitted by Sprint. Staff would like to see those factors as well as a description as to the methodology used by Sprint to arrive at the factors.

reserves the right to file percent interstate usage (PIU) factors with Sage which shall govern the jurisdiction of originating and terminating traffic." Staff does not note any limitation in the Agreement on the characterization of the traffic to be included in the calculation of a PIU factor. Sprint claims that the Agreement maintains that all terminating traffic requires the use of Sprint PIU's while Sage contends otherwise. Staff would appreciate further information from the parties that may provide any further clarification of the terms of the Agreement as it relates to the use of customer-provided PIU factors for all traffic.

Sage appears to be concerned with the accuracy of the Sprint PIU factors as a basis for its position. However, Sage has presented no evidence that Sprint has improperly calculated its PIU factors. Staff notes that Sprint has indicated that it would be willing to conduct a traffic study to determine the reasonableness of its PIU factors. Sage has expressed reluctance as it states that a traffic study would only give a "snapshot" of traffic at a given time studied. Staff supports the idea of a traffic study to determine the propriety of the Sprint calculations. Staff suggests that a longer traffic study, possibly up to one year in duration, may give Sage and Sprint a better opportunity to determine the accuracy of the PIU factors. In the meantime, the parties could agree to an interim PIU factor on a going-forward basis, subject to true-up, that could be in place until the completion of the traffic study.[4] If possible, Staff suggests that a review of the process that Sprint employs to identify the switch location where wireless call actually originate would also be of use to Sage in determining the accuracy of Sprint PIU factors.

(3) Imposition of Intrastate Switched Access Charges

Staff notes that PURA requires that all rates, including switched access charges, be just and reasonable. One factor in determining whether a rate is "just and reasonable" is whether the application of the rate fairly compensates all utilities for the uses of their network elements in delivering a telephone call to the called party. Staff contends that Sage's use of the Category 11 call records for wireless calls to determine the jurisdictional nature of the call for switched access rate charges may have some defects. In using the NPA code to determine the interstate/intrastate character of a wireless call, it

[4] The disputed sum of $83,272.00 could be either be placed in escrow or paid by Sprint subject to refund, if necessary. It is also not clear if this amount being withheld is due to any purported problems in establishing the jurisdiction of wireless calls for billing purposes.

ignores the FCC rulings that have defined that the geographic location of the calling and called party determine the jurisdiction of transmission for billing purposes. If, for example, an Austin wireless user currently in Wisconsin makes a wireless call back to Austin, it will appear on Category 11 call records as a local call. If it is characterized as a local call, then the terminating party would assess intrastate switched access charges. Staff does not agree with that conclusion as it ignores all of the network elements and transport costs incurred by all of the utilities that were involved in the delivery of that call from Wisconsin to Texas.

It is true that in PUC Docket No. 21982 that the Commission had approved the use of terminating records between carriers for billing purposes unless the originating and terminating carriers agreed otherwise. However, Staff notes that this docket was in large measure dealing with the characterization and billing for ISP-bound traffic for reciprocal compensation and this particular dispute appears to center upon the jurisdiction of wireless calls for billing purposes.

The use of NPA-NXX codes from Category 11 records works well to determine the interstate/intrastate jurisdiction of a wireline call. In a wireline call situation, the calling parties' geographic location is fixed. However, with the portability and ubiquitous nature of wireless phones, the use of such codes cannot be a sole determinant of the jurisdiction of a call for billing purposes. It is clear that the FCC has recognized this problem as has ATIS, which is the reason why it is attempting to establish new industry standards in OBF Issue No. 2308.[5] In light of these inherent problems, Staff contends that the use of a reasonable PIU factor for the terminating traffic may be an efficient way to prevent the incorrect taxing about which ATIS had concerns.

Staff notes that Sage has objected to the use of the PIU factors for terminating traffic due to the costs and complications involved with modifying its access billing

[5] In its November 19, 2001 notice, ATIS states that "...there needs to be a method to identify the switch location where call detail records actually originated. This jurisdictional information needs to be carried through the network to the terminating recording office and captured in a terminating switch recording. It is understood that there is nothing in today's industry signaling and recording requirements that will cause the needed call origination information to be populated in terminating interexchange call detail records. Another concern is whether existing industry standards took into account the use of wireless calls in long distance/interstate applications.
See also "First Report and Order", *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, Interconnection Between LECs and CMRS Providers, CC Dkt. No. 95-185, Paragraph 1044 (Aug. 8, 1996)

software and systems. Staff would appreciate further information on the increased problems and potential costs associated with billing Sprint as indicated in the Agreement.[6]

(4) . Settlement Agreement and Tariffs

Staff notes Sage's arguments regarding existing industry standards regarding access billing, however, Staff contends that the signed Agreement defines how the parties are to compute the billing for originating and terminating minutes. Staff contends that the negotiated terms of this contract between the parties may be controlling in this matter. Further, it appears that Sage's Local Access Tariff §2.5.1.B provides for Sprint to provide PIU factors for originating and terminating minutes.

Staff contends that under the "filed rate doctrine", as cited in *Southwestern Bell Telephone Company v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687 (Tex. App. -- Houston 1996), the provisions in a filed tariff, approved by the appropriate regulatory agency has the imprimatur of government.[7] The filed rate doctrine further presumes that both the utility and the customer know the contents and effect of published tariffs. A customer cannot claim ignorance of tariff provisions nor can a utility alter the terms of a published tariff. Both parties must adhere to the tariff terms. Staff believes that all customers must be treated equally according to the terms of the published and approved tariff. While Sage rests its arguments on the industry standards, the facts seem to indicate that the Agreement and its own tariffs have determined to treat the imposition and calculation of switched access charges in a different manner.

B. CONCLUSION

In closing, there is further information from the parties that Staff has requested that could have further bearing upon its position. However, at present, Staff contends that the terms of the Agreement and Sage's existing tariff provisions should control the manner by which billing of terminating minutes is conducted in this dispute.

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[6] If Sage were going to have such problems with its access billing software as indicated, why did Sage sign the Agreement initially? Was the impact of wireless call jurisdiction for billing contemplated by the parties prior to the signing of the Agreement?

[7] *Southwestern Bell Telephone Company v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 692 (Tex. App. – Houston 1996)

Staff sees an opportunity for the parties to discuss this matter for possible settlement and would welcome an informal settlement conference between the parties to deal with these issues.

Staff reserves the right to modify these responses or adopt positions which may be advocated by other parties in this proceeding or which may arise in the course of discovery, hearing and briefing of these cases.

Respectfully submitted,

Tom Hunter
Division Director – Legal Division

Jennifer Fagan
Director – Telecom Legal Section

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading has been tendered upon all parties of record pursuant to Commission procedural rules via regular mail and by facsimile on October 11, 2002.

B. Mark Gladney