BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the application of USCOC of Greater Missouri, LLC for designation as an eligible telecommunications carrier pursuant to the Telecommunications Act of 1996.	))))	Case No. TO-2005-0384

MOTION TO STRIKE
OR, IN THE ALTERNATIVE, REQUEST FOR HEARING AND RESPONSE

COMES NOW the Missouri Small Telephone Company Group ("STCG"), and for its motion to strike portions of U.S. Cellular's January 31, 2007 *Supplemental Brief*, states to the Missouri Public Service Commission ("PSC" or "Commission") as follows:

I. INTRODUCTION AND SUMMARY

The Commission should strike certain extra-record information and hearsay that was incorporated into U.S. Cellular's January 31, 2007 Supplemental Brief. First, the Commission should strike the first full sentence at page 21 and the accompanying footnote 61 because it is an inappropriate post-hearing attempt to challenge the STCG's witness, and it includes and is completely based upon extra-record information that is not in evidence. Second, the Commission should strike Section IV.E (pp. 32-34) in its entirety, as this argument is based upon extra-record information, and it violates the Commission's rules for pre-filed testimony. U.S. Cellular's untimely attempt to bolster its case with extra-record information in a post-hearing brief is impermissible, and it must be stricken. U.S. Cellular has already had two bites at the apple in this case; it should not be allowed a third.

II. DISCUSSION

A. EVIDENCE, OFFICIAL NOTICE, AND DUE PROCESS

1. **The Commission's Rules of Evidence**. The Commission's Rules of Evidence prohibit supplementing pre-filed testimony. Specifically, "No party shall be permitted to supplement prefiled direct, rebuttal, or surrebuttal testimony unless ordered by the presiding officer or the commission." 4 CSR 240-2.130(8).

2. **Official Notice**. Missouri's Administrative Procedure Act allows the Commission to take official notice under the following circumstances:

> Agencies shall take official notice of all matters of which the courts take judicial notice. **They may also take official notice of technical or scientific facts, not judicially cognizable**, within their competence, **if they notify the parties**, either during a hearing or in writing before a hearing, or **before findings are made after a hearing, of the facts of which they propose to take such notice and give the parties a reasonable opportunity to contest such facts or otherwise show that it would not be proper for the agency to take notice of them**.

§536.070(6) RSMo. 2000(emphasis added). Thus, the Commission must: (a) notify the parties if the Commission intends to grant U.S. Cellular's request to take official notice of the various post-hearing information included in U.S. Cellular's post-hearing brief; and (b) allow the parties a reasonable opportunity to respond to that information.

3. **Judicial Notice**. Missouri courts may take judicial notice of facts that are: (a) part of the common knowledge of every person of ordinary understanding and intelligence; or (b) capable of accurate and ready

determination by resort to sources the accuracy of which cannot reasonably be questioned.

> Courts may properly take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence; **but not of facts merely because they may be ascertained by reference to dictionaries, encyclopedias, or other publications; nor of facts which the court cannot know without resort to expert testimony or other proof**.

Timson v. Manufacturer's Coal and Coke, 119 S.W. 565, 569 (Mo. banc 1909)(emphasis added). "It follows, therefore, that judicial notice must be exercised cautiously, and **if there is doubt as to the notoriety of such fact, judicial recognition of it must be declined**." *English v. Old American Insurance Co*., 423 S.W.2d 33, 41 (Mo. 1968)(emphasis added). The information cited in U.S. Cellular's brief is not "common knowledge" of every person, nor is it information that is "capable of accurate and ready" determination. Rather, the information includes: (a) a lengthy quotation from a wireless company witness in a 2005 Illinois Commerce Commission proceeding, and (b) pieces of data plucked from various reports prepared by state and federal government agencies and a quasi-governmental entity.[1] This is the type of information that should have been presented in pre-filed testimony or during the hearing, not slipped into a post-hearing brief.

[1] "The refreshing of one's recollection or the verification of a matter of general information by reference to such publications as dictionaries or encyclopedias is a wholly different thing from taking judicial notice of a fact merely because it may be found in some specialized and technical publication." *Cupples Hesse Corp. v. State Tax Comm'n*, 329 S.W.2d 696, 701 (Mo. 1959).

4. **No Good Cause**. All of the information that U.S. Cellular seeks to include in its post-hearing brief appears to have been available before the December 2006 hearing. In fact, some of the information was specifically objected to during that hearing, and the Judge did not allow it to come in as fact. (Tr. 814-15) There is no good cause to allow U.S. Cellular to supplement the record with late-filed information after the hearing and without the opportunity for the other parties to address and/or respond to that information.

5. **Due process rights of parties in contested cases**. To allow U.S. Cellular to introduce evidence after the hearing would violate the Missouri Administrative Procedure Act's due process protections:

> Each party shall have the right to call and examine witnesses, to introduce exhibits, **to cross-examine opposing witnesses** on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, **and to rebut the evidence against him**.

§536.070(2) RSMo. (emphasis added); *see also State ex rel. Util. Consumers Council v. PSC*, 562 S.W.2d 688, 692-4 (Mo. App. 1978).

B. MOTION TO STRIKE SECTIONS OF U.S. CELLULAR'S BRIEF

6. **Page 21**. The Commission should strike the first full sentence on page 21 of U.S. Cellular's Brief and the accompanying footnote 61. This sentence is an untimely attempt to challenge the qualifications of STCG witness Mr. Schoonmaker. First, the sentence and footnote refer to and rely upon the testimony of a witnesss in an Illinois proceeding that was not a witness in this case, so it is inadmissible hearsay. Second, the entire footnote 61 is prejudicial

and inflammatory in that it is nothing more than one witness (in a foreign proceeding) criticizing another witness, so it is not fact. Third, the Illinois testimony appears to have been filed in 2005. Thus, it was clearly available for U.S. Cellular to try and present or use during the Missouri hearing, and there is no good reason to allow U.S. Cellular to use such hearsay after the close of the hearing. Rather, it is untimely and should be stricken.

7. Finally, and most fatally, the sentence and footnote refer to and rely upon information that was not offered at any time during the hearing. If the information was important, then it should have been offered by one of U.S. Cellular's own witnesses in prefiled testimony. U.S. Cellular should not be allowed to add extra-record information to challenge the qualifications of a witness after the close of the hearing. The first full sentence on page 21 and the accompanying footnote 61 are inappropriate and untimely, so they must be stricken from U.S. Cellular's brief.

8. **Section IV(E) of U.S. Cellular's Brief (pages 32-34).** The Commission should strike Section IV(E) of U.S. Cellular's Brief (pages 32-34) in its entirety. Here again, U.S. Cellular seeks to add to the record with information that was available previously and should have been included in U.S. Cellular's prefiled testimony. Moreover, a number of other assertions in this section are unsupported by any citation to authority or record evidence.

(a) First, under the Commission's rules of evidence, "No party shall be permitted to supplement prefiled direct, rebuttal, or surrebuttal testimony unless ordered by the presiding officer or the commission." 4 CSR 240-2.130(8).

Therefore, U.S. Cellular's post-hearing request for "official notice" should be denied under the Commission's rules.

(b) Second, U.S. Cellular now asks the Commission to take "official notice" of information that was specifically objected to during the hearing. *See* Tr. 814-15. At that time, the Judge did not allow the information to come in as fact. Rather, the questions were only allowed in the context of a hypothetical. (Tr. 815)("I'll overrule the objection. I'm – I'm not taking it for the truth of – of the question. . . . at this point. **He's just asking a hypothetical**.")(emphasis added). U.S. Cellular should not be allowed to introduce information after the hearing that was not allowed into evidence during the hearing.

(c) Third, the Missouri Administrative Procedure Act requires the Commission to either: (i) deny the request for official notice; or (ii) identify any information that the Commission is considering taking official notice of, notify the parties, and allow the parties to respond. §536.070(6). Because the information was not allowed during the hearing and is untimely now, the Commission should deny the request for official notice. Alternatively, if the Commission does want to consider taking official notice at this late date, then it must notify the parties what information it is considering and allow them to respond.

(d) Fourth, U.S. Cellular's request for "official notice" does not involve facts that are "commonly known" or information that is "capable of accurate and ready" determination. Rather, U.S. Cellular has selectively lifted data from reports prepared by various state and federal government agencies and a quasi-governmental agency. U.S. Cellular asks the Commission to take "official notice"

of small bits of information plucked from these lengthy reports without providing any context or opportunity for cross-examination or rebuttal. Moreover, it appears that much of the information may be stale, including data from 2004.

(e) Fifth, the Commission's past practice has been to strike portions of post-hearing briefs that attempt to add extra-record information after the hearing. For example, in a 1997 UtiliCorp rate case, UtiliCorp's briefs: (i) referred to information that was ruled inadmissible during the hearing; and (ii) included information that was based upon a request for "official notice" from the Commission. At the outset, the Commission struck the portions of the brief based on information that was ruled inadmissible at hearing:

> In regard to the Staff's motion to strike, findings made by the Commission must be based on substantial and competent evidence, taken on the record as a whole. **In making its findings, the Commission may not take into consideration any matter not on the record and may not base a finding of fact on any matter not in evidence. UtiliCorp, by making an inappropriate reference to the excluded document in its brief, is asking the Commission to make a finding of fact based on a document not in evidence. The Commission finds this to be improper. As the excluded document is not a part of the record that the Commission may consider in making its decision, the Commission finds that the Staff's motion to strike references to the document from the UtiliCorp brief is reasonable**.
>
> The Commission will grant the Staff motion to strike and exclude from the UtiliCorp initial brief the last paragraph on page 48, beginning with the word "finally" and continuing on to page 49 and ending with the word "added," and, on page 49, the first full paragraph beginning with the word "so" and ending with the word "issue."[2]

[2] *In the Matter of Missouri Public Service, a Division of UtiliCorp United*, Case No. ER-97-394, *Report and Order*, issued March 6, 1998 (emphasis added).

Next, the Commission addressed UtiliCorp's request for "official notice" and concluded that **it would violate due process to grant a request for "official notice" after the end of the hearing**:

> The Commission finds that all parties had fair opportunity to exercise their due process rights prior to and during the evidentiary hearing, including offering testimony, proffering evidence for consideration and admission and cross-examination of adverse parties. **At the conclusion of the on-the-record portion of the evidentiary hearing, the Commission considered the record closed. The Commission will not accept the offer of evidence subsequent to the conclusion of the evidentiary hearing unless by consent of the parties. To do so would be violative of the due process rights of the remainder of the parties and would be fundamentally unfair**.
>
> **The requests of UtiliCorp for the Commission to take judicial notice of various documents, found on pages 25 and 88 of its reply brief, are denied for the reasons as set out above**. In addition, the Staff motion to strike is granted.[3]

The Commission struck portions of the Empire District Electric Company's initial and reply briefs in a 1997 rate case on similar grounds. In that case, the Commission explained:

> In order to have a full and fair hearing, the derivation of the $6 million deficiency must be contained in testimony which is subject to cross-examination. It is not sufficient for the calculation to appear for the first time in posthearing briefs or pleadings.[4]

Accordingly, the Commission granted Staff's motion to strike portions of Empire's post-hearing briefs.

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[3] *Id*.
[4] *In the Matter of the Empire District Electric Company*, Case No. ER-97-82, *Report and Order*, issued Feb. 13, 1997.

9. In sum, Section IV(E) of U.S. Cellular's Brief (pages 32-34) must be stricken because it is based upon: (a) assertions that are unsupported by any citation to authority; or (b) extra-record information that should have been presented in pre-filed testimony or during the hearing. Neither the Judge nor the Commission asked for this information. Rather, some of the information was specifically objected to during the hearing, and the Judge did not allow it to come in as fact. (Tr. 814-15) Therefore, it must be stricken.

C. ALTERNATIVE MOTION TO RESPOND AND PRESENT DATA

10. If the Commission chooses to deny this motion and/or grant U.S. Cellular's request for official notice, then the STCG specifically requests a hearing and the opportunity to respond to the information presented by U.S. Cellular pursuant to §536.070(6) RSMo. 2000. The STCG also requests the opportunity to rebut U.S. Cellular's information with other data that was not publicly available before the December 2006 hearing. Specifically, the Commission should be aware of and weigh the following facts:

a. **The FCC's Universal Service Monitoring Report**.[5] This FCC report was released on December 29, 2006 (after the hearing). It shows that the General Lifeline support in Missouri for the STCG member companies increased substantially between 2004 and 2005 (the most recent data available). Specifically, General Lifeline support increased for the STCG company study areas by **78.85%** between 2004 and 2005 (from $80,572 to $144,106), whereas the total General Lifeline support in Missouri only increased by **29.14%** between

[5] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269251A1.pdf.

2004 and 2005 (from $3,948,590 to $5,099,200).[6] This data rebuts U.S. Cellular's claims that rural ILECs are failing to advertise or offer Lifeline services.

b. **The FCC's Telephone Subscribership Report.**[7] This FCC report was released on January 17, 2007 (after the hearing). First, it shows **that the percentage of households subscribing to telephone service in Missouri as of July 2006 was 96.5%**, which is a statistically significant increase from the March 2006 percentage of 92.8%.[8] Missouri's telephone subscribership penetration rate was higher than the national average of 94.6% as of July, 2006 (which was also a statistically significant increase from the national average of 92.8% in March 2006). Thus, the most recently available numbers demonstrate that Missouri's penetration rate is higher than the national average and has increased significantly during 2006. Second, the report shows that Missouri's telephone penetration rate increased from 92.1% in 1983 to 96.5% in 2006, and this fact was also identified as a "significant increase" and "statistically significant" by the FCC.[9] This data rebuts U.S. Cellular's false assumption that rural Missouri consumers "cannot afford wireline telephone service…or have not been informed that federal Lifeline benefits exist."[10] On the contrary, the FCC has concluded that Missouri's telephone penetration rate has shown a **statistically significant increase**.

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[6] *Id*. at Table 2.5, Low-Income Program Dollars by Study Area.
[7] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269512A1.pdf.
[8] *Id*. at page 3 and Table 3, p. 21.
[9] *Id*. at p. 8, Table 2 ("statistically significant") and p. 10, Chart 3 ("significant increase").
[10] *U.S. Cellular Post-Hearing Brief*, filed Jan. 31, p. 34.

c. **The FCC's Local Telephone Competition Report**.[11] This FCC report was released on January 31, 2007 (after the hearing). The report found that, as of the end of June 2006, there were approximately 142.2 million ILEC switched access lines in service and 217.4 million "wireless" service subscriptions nationwide.[12] In Missouri, there were 2,841,990 ILEC access lines[13] in service and 3,942,213 wireless subscribers.[14] Thus, according to the FCC's most recent data, there are over 1,000,000 more wireless subscribers in the state of Missouri than ILEC wireline subscribers. This data rebuts U.S. Cellular's claim that Missouri consumers do not have a choice of providers or cannot afford wireline and/or wireless service. On the contrary, it appears that Missouri consumers are already able to afford telephone service, and many Missouri consumers have chosen to have both wireless and wireline service.

11. The information discussed above rebuts US Cellular's false and unsupported assumptions that rural Missouri consumers "cannot afford" telephone service or "have not been informed" about Lifeline support.[15] On the contrary, the FCC's Universal Service Monitoring Report shows that General **Lifeline support in the STCG study areas increased by nearly 79% between 2004 and 2005**. The FCC's Telephone Subscribership report shows that Missouri's penetration rate has had statistically significant increases over the recent past and now stands at 96.5%, which is above the national average.

[11] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270133A1.pdf.
[12] *Id*. at p. 1.
[13] *Id*. at p. 11, Table 7, as of June 30, 2006.
[14] *Id*. at p. 18, Table 14, as of June 2006.
[15] U.S. Cellular offers no citation to authority for these statements on page 34 of its brief, so they must be stricken.

Therefore, if the Commission chooses to grant U.S. Cellular's request for official notice, then the STCG requests the opportunity pursuant to §536.070(6) to rebut U.S. Cellular's post-hearing information and introduce contrary evidence including, but not limited to, that discussed above.

III. CONCLUSION

WHEREFORE, the STCG respectfully requests that the Commission strike the following portions of U.S. Cellular's Supplemental Brief: (1) the first full sentence at page 21 and the accompanying footnote 61; and (2) Section IV.E (pp. 32-34) in its entirety. Alternatively, if the Commission does not strike those portions of U.S. Cellular's Brief, then the STCG requests an opportunity to respond to any new post-hearing information that the Commission may choose to take notice of pursuant to §536.070(6) RSMo. 2000, including reopening the record and reconvening a hearing for additional testimony on the matters and cross-examination regarding U.S. Cellular's untimely information.

RESPECTFULLY SUMBITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or via electronic mail, or hand-delivered on this 9th day of February, 2007, to the following parties:

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