

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the Matter of a Proposed Rule to Require            )  
all Missouri Telecommunications Companies            )  
to Implement an Enhanced Record                    )  
Exchange Process to Identify the Origin of            )  
IntraLATA Calls Terminated by Local                )  
Exchange Carriers.                                        )

Case No. TX-2003-0301

**SBC MISSOURI’S REPLY TO MITG, STCG AND STAFF**

SBC Missouri,<sup>1</sup> in Reply to the Missouri Independent Telephone Group (“MITG”), the Small Telephone Company Group (“STCG”) and Staff of the Missouri Public Service Commission (“Staff”), respectfully submits that (1) SBC Missouri’s Application for Rehearing was timely and should be granted;<sup>2</sup> (2) its Request for Expedited Treatment was well taken; and (3) its Alternative Request for Temporary Variance or Waiver should be granted if rehearing is denied.

1.     Timeliness of Application for Rehearing.<sup>3</sup> SBC Missouri timely filed its Application for Rehearing in accordance with applicable Missouri Public Service Commission (“Commission”) rules and case law. Under Section 386.500(2) RSMo (2000), an application for rehearing of a Commission order must be filed before the effective date:

No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public

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<sup>1</sup> Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, will be referred to in this pleading as “SBC Missouri” or “SBC.”

<sup>2</sup> Except for issues raised concerning the requirement to include CPN in Category 11-01-XX billing records for wireless-originated calls (which are the subject of both the Application for Rehearing and the Request for Variance or Waiver and which SBC Missouri addresses here), MITG and STCG raise no issues regarding the Application for Rehearing that are not already addressed in SBC Missouri’s Application. Staff raised no substantive issues with respect to the Application for Rehearing.

<sup>3</sup> The substantive issues MITG and STCG raise concerning rehearing on the CPN requirement are addressed in Section 3 below.

utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. . . .

Parties seeking review of a Commission rulemaking must follow this statutory procedure.<sup>4</sup>

Under Section 386.490(3), a Commission order becomes effective 30 days after service, unless the Commission provides otherwise:

Every order or decision of the commission shall of its own force take effect and become operative 30 days after service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

By statute, “service” is to be affected:

either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby, or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the code of civil procedure.<sup>5</sup>

But in the context of state administrative agency rulemakings, it is well settled that “service,” as contemplated by Section 386.500 of a Commission order of rulemaking, occurs through publication in the Missouri Register.<sup>6</sup>

Staff, however, appears to claim that the Commission affected valid service of its Orders of Rulemaking by its counsel’s sending a copy<sup>7</sup> of a transmittal to the Secretary of State on an ad

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<sup>4</sup> State ex rel. Atmos Energy Corporation v. Public Service Commission of the State of Missouri, 103 S.W.3d 753, 758 (Mo banc 2003) (“ . . . the procedures set forth in chapter 386 govern judicial review of PSC rulemaking.”)

<sup>5</sup> Section 386.490(1).

<sup>6</sup> See, e.g., State ex rel. City of Springfield v. Public Service Commission of the State of Missouri, 812 S.W.2d 827, 834 (Mo App. WD 1991) (denying claim that rule was invalid as a result of PSC’s failure to send a copy of Order of Rulemaking to all affected parties under Section 386.490 because no mailing was required as such orders are published in the Missouri Register).

<sup>7</sup> See, Staff Response, Exhibit B, which transmitted an electronic version of what the Commission provided to the Missouri Secretary of State, whose office would later need to edit or format it for publication in the Missouri Register.

hoc basis to SBC Missouri’s counsel by e-mail.<sup>8</sup> While this act of professional courtesy was not intended to constitute service on SBC Missouri by the Commission, it would have been defective if it was so intended, as no “certified copy thereof” was delivered by “personal delivery” or “by mailing” to an officer or agent designated for service of process as required by Section 386.490(1). As the Western District in City of Springfield explained, Missouri statutes specifically require orders of rulemaking to be published in the Missouri Register and such publication constitutes valid service of such orders, which allows affected parties the opportunity to request hearing and review of the Commission’s orders in accordance with Sections 386.500 and 386.510.<sup>9</sup>

Staff also attempts to argue that SBC Missouri’s Application is untimely because it was filed after the Orders of Rulemaking were published in the Missouri Register, claiming the Commission at that point was “simply powerless to grant the Application for Rehearing.”<sup>10</sup> This argument should be rejected out of hand. In Atmos Energy, the Missouri Supreme Court unequivocally ruled that the procedures set out in Chapter 386, including Sections 386.500 and 386.510, govern the review of Public Service Commission rulemakings.<sup>11</sup> The Court would not have required parties seeking such review to apply to the Commission for rehearing if the Commission had no authority to grant any relief.

Here, SBC Missouri filed its Application for Rehearing well within the required time limits. By the terms of the Commission’s own order, the Enhanced Record Exchange Rule was not to become effective until 30 days after publication in the Code of State Regulations. As this

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<sup>8</sup> Staff Response, pp. 2-3.

<sup>9</sup> City of Springfield, 812 S.W.2d at 834.

<sup>10</sup> Staff Response, pp. 3-4.

<sup>11</sup> Atmos Energy, 103 S.W.3d at 758.

rule was not published in the Code of State Regulations until June 30, 2005, it did not become effective until July 30, 2005. Therefore, parties wishing to file Applications for Rehearing are required to do so before July 30, 2005 (i.e., at least by July 29, 2005).

And even if the Orders of Rulemaking can be construed to have an earlier effective date than the rules themselves, SBC Missouri's Application for Rehearing was still timely. The Commission's Orders of Rulemaking were published in the Missouri Register on June 15, 2005. Applying the calculus of Section 386.490(3), the effective date of those Orders was July 15, 2005. Thus, under a more restrictive view, parties that wished to file Applications for Rehearing would have needed to file them before July 15, 2005 (i.e., at least by July 14, 2005). As SBC Missouri filed its Application for Rehearing on July 14, 2005, its Application fell within this timeframe and was timely.

2. Motion for Expedited Treatment. MITG and Staff claim that SBC Missouri's request for expedited treatment was deficient because it did not specifically state that it was filed as soon as possible or explain why it was not.<sup>12</sup> But as explained in its underlying Application for Rehearing, SBC Missouri's Motion for Expedited Treatment relates to a matter that did not specifically appear in the rule and only appeared in the Commission's comments to the rule contained in the Orders of Rulemaking. At that time, SBC Missouri was unaware of any technical impediments and had to research whether it could comply with this requirement and how long it would take. This investigation required consultation with various technical subject matter experts in the company and discussions with manufacturers. And even now, this investigation is continuing with respect to SBC Missouri's Lucent switches. All of this information was detailed in its verified request for variance.

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<sup>12</sup> MITG Opposition to Motion for Expedited Treatment, p. 1; Staff Response, p. 4.

3. The Request for Temporary Variance or Waiver. Only the MITG group categorically opposes SBC Missouri’s Request for a Temporary Variance or Waiver.<sup>13</sup> Staff, as can be seen in its Response, does not oppose this alternative request and in fact, requests that the Commission “grant SBC’s request for variance or waiver only if authority can be found that authorize the Commission to take such action.”

Clearly, the Commission has such authority here. It is well established that the power of the Commission to make rules includes the power to determine any reasonable interpretation and application of such rules,<sup>14</sup> which includes the granting of waivers or variances. Here, the Enhanced Record Exchange Rule itself contains a provision authorizing such waivers:

Telecommunications companies may originate, transit, and terminate telecommunications traffic utilizing the LEC-to-LEC network only upon compliance with the rule set forth in this chapter. Any request for variance from the rule set forth in this chapter must be made to the Missouri public service commission pursuant to 4 CSR 240-2.060(4).<sup>15</sup>

The Commission’s General Practice and Procedure Rules also authorize it to waive Commission rules:

In addition to the requirements of section (1), applications for variances or waivers from commission rules and tariff provisions, as well as those statutory provisions which may be waived, shall contain information as follows. . . .<sup>16</sup>

As the Courts have recognized, it is entirely appropriate for the Commission to formulate a rule that includes a process for applying for a variance of the rule and for the Commission to

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<sup>13</sup> MITG Response, pp. 7-8. Although STCG opposes a one year waiver, it does not oppose a waiver of between 30-60 days “to allow SBC to finalize its processes and systems for capturing and passing wireless calling party number information.” STCG Response, p. 1

<sup>14</sup> Deaconess Manor v. Public Service Commission, 994 S.W.2d 602, 609-611 (Mo. App. W.D. 1999) (MoPSC acted within its statutory authority in determining residential electric rate applied to residential section of retirement facility even though it had granted a variance of its separate power metering rules for that section of the facility).

<sup>15</sup> 4 CSR 20-29.030(1).

<sup>16</sup> 4 CSR Section 240-2.060(4).

determine whether the applicant qualifies for the variance.<sup>17</sup> And the Commission regularly exercises its authority to grant variances or waivers of its rules.<sup>18</sup>

Although the MITG and STCG oppose SBC Missouri's requests for both rehearing and alternatively a one-year variance of any requirement to include CPN in the Category 11-01-XX billing record, neither raise any points that undermine SBC Missouri's requests for relief:

- MITG and STCG claim SBC Missouri's request is unsubstantiated, MITG claiming that the request was "unverified,"<sup>19</sup> and STCG suggesting the necessity for an SBC Missouri personnel attest to the underlying facts under oath.<sup>20</sup> SBC Missouri's application, however, was verified by SBC Missouri subject matter expert Marlon Hines.<sup>21</sup>
- MITG and STCG fault SBC Missouri for not raising its inability to include CPN in a Category 11-01-XX billing record during the comments phase of the rulemaking.<sup>22</sup> As SBC Missouri indicated in its Application for Rehearing, the proposed rule never included a requirement that CPN be included in an 11-01-XX billing record. As a result, SBC Missouri had no need or occasion to provide comments on the feasibility of creating such a nonstandard billing record with its existing systems, and what would be required to accomplish the task, in terms of time and money.<sup>23</sup>
- MITG and STCG claim that SBC Missouri "misses the point" of the requirement to include CPN in the billing records for wireless traffic, inferring that this information is necessary for the jurisdictionalization of

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<sup>17</sup> Hoffman v. Public Service Commission, 530 S.W.2d 434, 439 (Mo. App. W.D. 1975) (review of MoPSC Order denying variance of promotional payments rule).

<sup>18</sup> See, e.g., In the Matter of the Request of Kansas City Power & Light Company for a Variance from the Separate Meter Requirement, Case No. EE-2001-663, Order Granting Variance, 2001 Mo. PSC LEXIS 822, issued July 10, 2001; In the Matter of the Application of Tartan Energy Company, LC, d/b/a Southern Missouri Gas Company for a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain Gas Facilities and to Render Gas Service, Case No. GA-94-127, Report and Order, 1994 Mo. PSC LEXIS 26, issued September 16, 1994 (granting variance from Commission's promotional practice rules).

<sup>19</sup> MITG Response, p. 8

<sup>20</sup> STCG Response, p. 9.

<sup>21</sup> See, SBC Missouri's Verification of Application (which follows the attorney signature page).

<sup>22</sup> MITG Response, p. 4; STCG Response, pp. 3, 8.

<sup>23</sup> SBC Missouri's Application, pp. 6, 14 n. 26. The rule only required that Caller ID be passed, which SBC Missouri has and is doing and all but the rare cases of when CPN is not passed by the originating carrier. Id., pp. 3-4.

the traffic.<sup>24</sup> But as the Commission itself recognized in its Orders of Rulemaking, CPN is of little use in jurisdictionalizing wireless-originated calls:

We also agree that Calling Party Number (CPN) cannot in all instances be used to determine the proper jurisdiction of wireless calls. We caution all terminating carriers that any attempt to use an OCN or CPN to determine the proper jurisdiction of wireless telephone call on the LEC-to-LEC network is not permissible under our local interconnection rules.<sup>25</sup>

- Both MITG and STCG confuse the ability to pass Caller ID information through the network (which is accomplished through SS7 signaling) with the capture of CPN in an AMA record and inclusion of that information in a record created by a downstream billing system after the call is made.<sup>26</sup>
- MITG makes the incorrect and unverified assertion that “CPN is captured in AMA switch recordings, even for wireless records.”<sup>27</sup> As demonstrated in SBC Missouri’s verified Application, this assertion is false and the only reference MITG can point to is the Commission’s recitation in its Orders of Rulemaking of what MITG represented to it in its comments during this proceeding. As demonstrated in SBC Missouri’s Application, MITG had no basis for making that statement and simply misled the Commission.<sup>28</sup>
- MITG, also without basis, asserts that the billing records SBC Missouri currently provides “have been programmed not to include a telephone number in the CPN field.”<sup>29</sup> MITG again has turned the facts on their head. As SBC Missouri explained in its Application,<sup>30</sup> the Category 11-01-XX billing record SBC Missouri created for wireless-originated calls results from programming that utilizes information that, pursuant to applicable industry standards, is captured in the AMA switch recording (*i.e.*, the billing account number of the incoming wireless trunk). The problem SBC Missouri is encountering, and the reason for its variance and waiver request, focuses on the potential inability of some of its switches to

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<sup>24</sup> STCG Comments p. 2; MITG Application p. 3, fn 1 (“they do not provide the CPN which enable the jurisdiction of the call to be determined”).

<sup>25</sup> Order of Rulemaking, 4 CSR 240-29.010, p. 12.

<sup>26</sup> MITG Response, pp. 3, 7; STCG Response, p. 8.

<sup>27</sup> MITG Application, p. 2, see also, p. 4 (“what is important here is that the CPN is in the AMA/switch record. . .”).

<sup>28</sup> SBC Missouri Application, pp. 3-4.

<sup>29</sup> MITG Application, p. 3 (emphasis supplied).

<sup>30</sup> SBC Missouri Application, p.p. 3-4, 7.

even capture the CPN in an AMA record for wireless-originated calls; and in switches where such information can be recorded in the AMA, creating the necessary programming for its billing systems to be able to include that information in an EMI record and use it in its own billing systems. Unlike CPN for landline-originated (e.g., IXC calls), which is an integral part of AMA and billing records on such calls, CPN for wireless-originated calls has little value and industry standards do not support its use in AMA or EMI billing records for wireless calls.<sup>31</sup>

- MITG also mischaracterizes SBC Missouri's February 2, 2005 Comments in this proceeding stating "SBC suggested that the inclusion of CPN was not technically feasible only when CPN was not passed by the wireless carrier to SBC."<sup>32</sup> Even most cursory examination of SBC Missouri's Comments reflects that it was referring to Caller ID information passed through the network (i.e., through the network via SS7 Signaling System), and not CPN in EMI billing records (i.e., Category 11-01-XX billing records).

WHEREFORE, SBC Missouri respectfully renews its request that the Commission grant rehearing of its Order of Rulemaking, and on rehearing, issue an Order:

- reversing its conclusion that originating CPN be included in the Category 11-01-XX billing record for wireless-originated calls;
- removing the restrictions in 4 CSR 240-29-010 and 4 CSR 240-29.030(2) that prohibit the use of the LEC-to-LEC network to transit interLATA (interstate and intrastate) traffic without an IXC point of presence; and
- limiting the application of 4 CSR 240-29.050's authorization to require separate trunk groups for IXC traffic only to carriers performing the official recording and records creation function on that traffic.

In the alternative, having shown good cause, SBC Missouri respectfully requests the Commission, before July 30, 2005, to grant its request for temporary variance or waiver of any requirement to provide originating CPN in Category 11-01-XX billing records for wireless-originated calls for at least a one year period in order to permit SBC Missouri to complete its investigation into the capability of its Lucent 5 ESS switches and to effect the necessary changes

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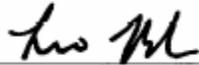
<sup>31</sup> Id., pp. 14-16.

<sup>32</sup> MITG Response, p. 4.

to its record creation and billing systems to include the originating CPN in billing records for calls handled by its Northern Telecom DMS switches.

Respectfully submitted,

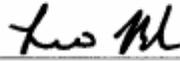
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**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on July 27, 2005.



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