

**T**his section will contain the final text of the rules proposed by agencies. The order of rulemaking is required to contain a citation to the legal authority upon which the order or rulemaking is based; reference to the date and page or pages where the notice of proposed rulemaking was published in the *Missouri Register*; an explanation of any change between the text of the rule as contained in the notice of proposed rulemaking and the text of the rule as finally adopted, together with the reason for any such change; and the full text of any section or subsection of the rule as adopted which has been changed from that contained in the notice of proposed rulemaking. The effective date of the rule shall be not less than thirty (30) days after the date of publication of the revision to the *Code of State Regulations*.

**T**he agency is also required to make a brief summary of the general nature and extent of comments submitted in support of or opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with the rulemaking, together with a concise summary of the agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule. The ninety (90)-day period during which an agency shall file its order of rulemaking for publication in the *Missouri Register* begins either: 1) after the hearing on the proposed rulemaking is held; or 2) at the end of the time for submission of comments to the agency. During this period, the agency shall file with the secretary of state the order of rulemaking, either putting the proposed rule into effect, with or without further changes, or withdrawing the proposed rule.

### **Title 3—DEPARTMENT OF CONSERVATION Division 10—Conservation Commission Chapter 10—Wildlife Code: Commercial Permits: Seasons, Methods, Limits**

#### **ORDER OF RULEMAKING**

By the authority vested in the Conservation Commission under sections 40 and 45 of Art. IV, Mo. Const., the commission amends a rule as follows:

3 CSR 10-10.725 is amended.

This amendment establishes fishing seasons and limits and is excepted by section 536.021, RSMo from the requirement for filing as a proposed amendment.

The Department of Conservation amended 3 CSR 10-10.725 by establishing seasons and limits for the harvest of shovelnose sturgeon on a portion of the Missouri River.

#### **3 CSR 10-10.725 Commercial Fishing: Seasons, Methods**

*PURPOSE: This amendment changes the last day of the closed season on the commercial harvest of shovelnose sturgeon on a portion of the Missouri River.*

(4) From May 16 through October 31 on the Missouri River downstream from U.S. Highway 169 to Carl R. Noren Access and downstream from Chamois Access to its confluence with the Mississippi River or banks thereof, game fish (including channel, blue and flat-head catfish, paddlefish and shovelnose sturgeon) may not be possessed or transported while fishing by commercial methods or while

possessing commercial fishing gear and shall be returned to the water unharmed immediately after being caught.

SUMMARY OF PUBLIC COMMENT: Seasons and limits are excepted from the requirement of filing as a proposed amendment under section 536.021, RSMo.

This amendment filed June 4, 2004, effective **June 15, 2004**.

### **Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT Division 240—Public Service Commission Chapter 36—Alternative Dispute Resolution Procedural Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996**

#### **ORDER OF RULEMAKING**

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-36.010 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 197). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, and Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

COMMENT: Sprint suggests revising section (7) of the rule to append the language "or any other date as mutually agreed upon by both parties in writing" to that section.

RESPONSE: The definition of “request for negotiation” of section (7) is tied to proposed rule 4 CSR 240-36.040(2) which states the dates within which a petition for arbitration may be filed with the commission. The dates found in 4 CSR 240-36.040(2) are established by section 252(b)(1) of the Telecommunications Act of 1996. The parties may seek a waiver of the rule. No changes have been made to the rule as a result of this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. propose to revise section (5) to “Arbitration means the submission of a dispute to the commission for resolution with the assistance of a third party neutral” because the commission will make the final decision. They propose modifying section (6) to specify that the relief sought is under section 252 of the Act, not just the Act. They propose that, for consistency with other proposed rules, section (8) be modified to: “Arbitrated agreement means the entire agreement filed by the parties in conformity with the arbitrator’s report as approved or modified by the commission.”

RESPONSE AND EXPLANATION OF CHANGE: Revision of sections (5) and (8) is warranted to clarify that it is the commission that ultimately makes the decision, not the arbitrator. Further, because it is the purpose of this and the accompanying proposed Chapter 36 rules to implement the provisions of section 252 of the Telecommunications Act of 1996, the proposal to modify section (6) to specify section 252 of the Act should be adopted. Sections (5), (6) and (8) of the rule will be changed.

#### 4 CSR 240-36.010 Definitions

(5) Arbitration means the submission of a dispute to the commission for resolution by a process that will employ a neutral arbitrator who will facilitate resolution of the disputed issues through markup conferences and limited evidentiary hearings, and who will prepare a final report for acceptance, modification or rejection by the commission.

(6) Petition means an application to the commission for relief under section 252 of the Act.

(8) Arbitrated agreement means the entire agreement filed by the parties in conformity with the commission’s order approving, rejecting or modifying the arbitrator’s final report, in whole or in part.

### Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT

#### Division 240—Public Service Commission Chapter 36—Alternative Dispute Resolution Procedural Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996

#### ORDER OF RULEMAKING

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-36.020 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 197-198). The section with changes is reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan

Williams, Senior Counsel in General Counsel’s Office of the Public Service Commission of Missouri, and Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O’Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

COMMENT: Three specific comments were directed to this rule, in particular section (2) of the rule. Sprint suggests revising section (2) to delete all but the first sentence of that section. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. question that the rule would not cost the industry more than five hundred dollars (\$500) to preserve and maintain historic information regarding prior cases. The staff of the Public Service Commission suggests modifying the existing language to reduce the amount of information required and therefore reduce the burden it places on a petitioner. The effect of implementing any of these comments would be to not require a petitioner to provide a “list of the telecommunications service(s) the petitioner offers in Missouri.”

RESPONSE AND EXPLANATION OF CHANGE: Revision of section (2) is warranted to reduce the burden on a petitioner. Section (2) of the rule will be changed.

#### 4 CSR 240-36.020 Filing Procedures

(2) Only telecommunications carriers, as defined in the Act, providing or in the process of enabling their provision of telecommunications service, as defined in the Act, in the state of Missouri may file petitions under this chapter.

### Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT

#### Division 240—Public Service Commission Chapter 36—Alternative Dispute Resolution Procedural Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996

#### ORDER OF RULEMAKING

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-36.030 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 198-199). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

**COMMENT:** Those who appeared at the public hearing generally endorsed this proposed rule as part of the group of rules proposed for Chapter 36 and the staff of the Public Service Commission of Missouri endorsed this rule in its written comments; however, particular issues were raised with respect to certain sections of this rule, as stated in the comments that follow.

**RESPONSE:** No changes have been made to the rule as a result of these general endorsements.

**COMMENT:** The staff of the Public Service Commission suggests modification of section (1) to add the word "rates" to the list of matters that may be the subject of mediation under the rule.

**RESPONSE:** As the commission's staff clarified in response to a query from the presiding officer during the public hearing, section (1) of the proposed rule tracks the language of section 252(a) of the Telecommunications Act of 1996 which lists "interconnection, services or network elements" and makes reference to section 251 of the Telecommunications Act of 1996. Section 251(c)(2)(D) expressly requires that interconnection be "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ." Specific inclusion of rates in the list of matters that may be the subject of mediation under the rule could be read as a limitation on the items that may be mediated under the rule. No changes have been made to the rule as a result of this comment.

**COMMENT:** Sprint suggests revising section (2) of the rule to eliminate the possibility under the rule that a commissioner might be the mediator since any commissioner who acted as a mediator might not be able to vote on an agreement presented to the commission after mediation and arbitration and, further, because topics or issues may

be discussed or addressed that might have interplay with other commission cases. Southwestern Bell Telephone, LP, in addition to proposing that commissioners not be eligible to serve as mediators, proposed that commission staff also be ineligible to serve as mediators.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission recognizes that, absent consent of the parties to the agreement, it would be inappropriate for a mediator to vote to accept, reject or modify an agreement reached after arbitration of the same matters that were the subject of the mediation. Further, the commission understands that matters may be disclosed during a mediation that could be relevant to other commission cases. To avoid these issues the commission will revise the rule to eliminate the option of a commissioner being the mediator. The commission staff has the technical expertise needed to conduct successful mediations without the added cost of procuring a mediator, which cost could be an impediment to participation in the process. Use of outside mediators is permissible under the proposed rule. Section (2) of the rule will be changed.

**COMMENT:** Sprint, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest modifying section (3) of the rule as to the triggering event for the filing of written summaries with the mediator. Sprint proposes the triggering event be changed to the appointment of the mediator. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. propose the triggering event be the date of the initial mediation conference addressed in section (4), that the trigger for the date of the initial mediation conference be tied to the date of the request for mediation and that both substantive and procedural issues be addressed at the initial mediation conference. They propose the initial mediation conference occur fifteen (15) days after the filing of the request for mediation rather than twenty-five (25) days and that the written summaries be filed two (2) days before the initial mediation conference.

**RESPONSE AND EXPLANATION OF CHANGE:** A party to a negotiation that does not request mediation should advise the commission of its willingness to mediate when another party to the negotiation requests the commission to mediate differences between the negotiating parties. Parties to negotiations do not require twenty-five (25) days from the date a request for mediation is made before they should be prepared to discuss procedure and substantive issues during a mediation conference. A new section (2) will be added to the rule, sections (2), (3) and (4) of the rule will be changed, and sections (2) to (18) will be renumbered to sections (3) to (19).

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest modifying section (10) of the rule to expand it beyond exchange of information in the form of documents or material to include access to information.

**RESPONSE AND EXPLANATION OF CHANGE:** The rule should be expanded to include participation by the mediator in resolving disputes over access to all forms of information as well as disputes as to the individuals who may have access to information.

**COMMENT:** The staff of the Public Service Commission suggests that section (11) be revised to state that the mediator may require parties to provide clarification and additional information needed to assist in resolution of the dispute rather than state that the mediator may request clarification and additional information. The staff notes that section (3) states that the mediator may require additional information or material at an earlier stage of the proceeding. Southwestern Bell Telephone, LP suggested that staff's proposed



change not be adopted as the party may not have the information the mediator desires.

**RESPONSE AND EXPLANATION OF CHANGE:** To emphasize the voluntary nature of mediations the language in section (11) should not be revised; however, the authority of the mediator to require supplemental material or information in section (3) should be revised to authorize that such material or information may be requested. Section (3) of the rule will be changed.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., assert that the parties do not need the ten (10) days to determine whether a final proposed resolution made by the mediator is acceptable found in section (15) and suggest that five (5) days is adequate.

**RESPONSE AND EXPLANATION OF CHANGE:** The parties to a negotiation should not need ten (10) days to determine whether a final proposed resolution made by the mediator is acceptable; however, given that days here are calendar days, not business days, seven (7) days is an appropriate time period. Section (15) of the rule will be changed.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest that the reference in section (17)(A) to section 386.480 could be read as allowing the commission to order disclosure of information exchanged during mediation and, if so read, would inhibit candid mediated negotiations.

**RESPONSE:** As worded subsection (17)(A) states that "The entire mediation process shall be kept confidential. . . ." The suggested interpretation of the reference to the statute in subsection (17)(A) is, at best, strained. This rule will be promulgated by an order of the commission. Accordingly, the commission exercises its discretion under section 386.480 not to disclose this information. No changes have been made to the rule as a result of this comment.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest that section (18) could be modified to state that the agreement must be submitted under another proposed rule, 4 CSR 240-36.060.

**RESPONSE:** As indicated in response to comments made as to proposed rule 4 CSR 240-36.060, the Public Service Commission is withdrawing that rule because the commission is considering the substance of proposed rule 4 CSR 240-36.060 in another rulemaking for another chapter. No changes have been made to this rule as a result of this comment.

#### **4 CSR 240-36.030 Mediation**

(2) **Response to Request for Mediation**—Within five (5) days of a request to the commission for mediation, each party to a negotiation that has not requested mediation shall advise the commission of its willingness to mediate the differences between the negotiating parties.

(3) **Appointment of Mediator**—When all parties to a negotiation agree to mediation, the commission shall appoint a mediator within ten (10) days of the request for mediation. The mediator shall be an employee of the commission unless the parties consent to the appointment of an outside mediator. The costs of an outside mediator shall be borne equally by the parties. The mediator shall be disqualified from participating as an arbitrator or presiding officer in subsequent proceedings regarding the same negotiation. Presiding officer is defined in 4 CSR 240-2.120.

(4) **Parties' Statements**—Within thirteen (13) days after the filing of a request for mediation, each party to the negotiation shall submit a written statement to the mediator summarizing the dispute, and shall furnish such other material and information it deems appropriate to familiarize the mediator with the dispute. The mediator may request any party to provide supplemental material or information.

(5) **Initial Mediation Conference**—Unless the mediator advises the parties otherwise, the mediator shall convene an initial conference within two (2) days after the filing of the parties' statements or the date that they are due, whichever is earlier. At the initial conference, the parties and mediator shall discuss a procedural schedule, and attempt to identify, simplify and limit the issues to be resolved. Each party should be prepared to informally present its position and arguments to the mediator at the initial mediation conference and to engage in mediated negotiations on substantive issues.

(6) **Conduct of the Mediation**—The mediator, subject to the rules contained herein, shall control the procedural aspects of the mediation.

(7) **Mediations Closed to the Public**—To provide for effective mediation, participation in a mediation is strictly limited to the parties involved in the negotiation of the agreement contemplated by sections 251 and 252 of the Act that is the subject of the mediation. All mediation proceedings shall remain closed to the public.

(8) **Caucusing**—The mediator is free to meet and communicate separately with each party. The mediator shall decide when to hold such separate meetings. The mediator may request that there be no direct communication between the parties or between their representatives regarding the dispute without the concurrence of the mediator.

(9) **Joint Meetings**—The mediator shall decide when to hold joint meetings with the parties and shall fix the time and place of each meeting and the agenda thereof. Formal rules of evidence shall not apply to these meetings or any portion of the mediation proceeding.

(10) **No Stenographic Record**—No record, stenographic or otherwise, shall be taken of any portion of the mediation proceeding.

(11) **Exchange of Additional Information**—If any party has a substantial need for documents or other material in the possession of another party, the parties shall attempt to agree on the exchange of requested documents or other material. Further, if any party has substantial need for other information in the possession of another party, or if any party wishes to disclose to its employees information that it obtained from another party, the parties shall attempt to reach agreement on disclosure of the information and who may see it. Should they fail to agree, either party may request a joint meeting with the mediator who shall assist them in their effort to reach an agreement. The parties may enter into nondisclosure agreements. At the conclusion of the mediation process, upon the request of the party that provided the documents or other material to one or more of the mediating parties the recipients shall return such documents or material to the originating party without retaining copies thereof.

(12) **Request for Further Information by the Mediator**—The mediator may request any mediating party to provide clarification and additional information necessary to assist in the resolution of the dispute.

(13) **Responsibility of the Parties to Negotiate and Participate**—Parties are expected to initiate proposals for resolution of the dispute, including proposals for partial resolution. Each party is expected to be able to provide to the mediator that party's justification for the terms of any resolution that it proposes.

(14) **Authority of the Mediator**—The mediator does not have authority to resolve the dispute, but the mediator shall help the parties

attempt to reach a mutually satisfactory resolution. At any time during the mediation, the mediator may recommend to the parties only, oral or written proposals for resolution of the dispute, in whole or in part.

(15) **Reliance by Mediator Upon Experts**—The mediator may use the services of and rely on experts retained by, or employed by, the commission for purposes of the mediation. Other than subsequent mediations, if any, such experts shall not participate, directly or indirectly, in any subsequent proceedings regarding the same negotiation. The mediator shall disclose to the parties the identities of all experts that provide any services to the mediator for purposes of the mediation.

(16) **Impasse and Recommended Resolution of Mediator**—In the event that the parties fail to resolve their dispute, the mediator, before terminating the mediation, shall submit to all of the parties a final proposed resolution that addresses all or part of the disputed issues. Each party shall advise the mediator within seven (7) days of the date the mediator issues the proposed resolution as to whether the party accepts the mediator's proposed resolution.

(17) **Termination of the Mediation**—Any of the following events shall terminate the mediation:

(A) The mediating parties execution of an agreement that resolves all disputed issues;

(B) Written service by a party on the mediator and other parties of a declaration that the mediation proceedings are terminated; or

(C) The mediator's submission to the parties and the commission of a written declaration that further mediation would be futile. Such a declaration shall be conclusory and neutrally worded to avoid any negative inference respecting any party to the mediation.

(18) **Confidentiality**—

(A) The entire mediation process shall be kept confidential, except for the terms of any final agreements reached during the mediation. The parties, the mediator and any experts used by the mediator, unless all parties agree otherwise, shall not disclose information obtained during the mediation process to anyone that did not participate in the mediation, including, but not limited to, commissioners, commission staff and third parties; provided, however, that the commissioners may be informed in writing, with a copy provided to each party to the mediation, of the identity of the participants and, in the most general manner, the progress of the mediation. Section 386.480, RSMo 2000 is applicable to mediations.

(B) Except as the parties otherwise agree, the mediator, and any experts used by the mediator, shall keep confidential all information contained in any written materials, the materials themselves and any other information submitted to the mediator. All records, reports, or other documents received by the mediator while serving in that capacity shall remain confidential. The mediating parties and their representatives are not entitled to receive or review any such materials or information submitted to the mediator by another party or representative, without the concurrence of the submitting party. At the conclusion of the mediation, the mediator shall return to the submitting party all written materials and other documents which that party provided the mediator.

(C) The mediator shall not divulge records, documents and other information submitted to him or her during the mediation proceeding, nor shall the mediator testify in regard to the mediation, in any subsequent adversarial proceeding or judicial forum. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitration, judicial or other proceeding, any of the following:

1. Views expressed or suggestions made by another party with respect to a possible resolution of the dispute;

2. Statements made by another party in the course of the mediation;

3. Proposals made or views expressed by the mediator; or

4. The fact that another party had or had not indicated willingness to accept a resolution proposed by the mediator.

(19) **Post-Agreement Procedure**—The parties shall present to the commission for approval any final agreements reached during mediation. Such proposed agreements, on the face of the agreement, shall:

(A) Not discriminate against a telecommunications carrier not a party to the mediated agreement;

(B) Be consistent with the public interest, convenience and necessity; and

(C) Comply with the commission's service quality standards for telecommunications services as well as the requirements of all other rules, regulations, and orders of the commission.

## **Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT**

### **Division 240—Public Service Commission**

#### **Chapter 36—Alternative Dispute Resolution Procedural Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996**

### **ORDER OF RULEMAKING**

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-36.040 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 199-202). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Anderreck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest that section (1) should include a reference to section 252 of the Telecommunications Act of 1996 as well as a reference to section 251 of that act.

RESPONSE AND EXPLANATION OF CHANGE: Because 47 U.S.C. section 252 addresses negotiations and when parties to negotiations may seek arbitration it should also be referenced in the rule. Section (1) of the rule will be changed.

COMMENT: Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company assert that the rule should provide for notice to carriers that are not parties to the negotiations, but to whom traffic contemplated in the negotiations is destined, to allow them the opportunity to participate in the negotiations as to provisions addressing such traffic. In particular, these commenters suggest adding a requirement in section (3) to disclose whether resolved or unresolved aspects of the agreement in question address traffic destined for any carrier not a party to the agreement. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC support limiting the participants in the arbitration to the parties to the negotiation. Southwestern Bell Telephone, LP also takes the position that only parties to the negotiation should participate in the arbitration and, further, suggests that allowing third parties to participate in the arbitration would violate section 252 of the Act. Southwestern Bell Telephone, LP correctly paraphrases section 252(b)(4)(A) which provides: "The State commission shall limit its consideration of any petition filed under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the appropriate point in the proceedings at which a non-party to the negotiation should be heard is when the negotiated agreement is being presented to the commission for approval, not earlier.

RESPONSE: No changes have been made to section (3) of the rule as a result of this comment.

COMMENT: The staff of the Public Service Commission suggests that subsection (3)(B) be revised to require the petition to only state the petitioner's positions on unresolved issues and not those of the other parties. Southwestern Bell Telephone, LP points out that section 252(b)(2)(A)(ii) of the Telecommunications Act of 1996 requires the petition to a state commission for arbitration to include the position of each of the parties with respect to the unresolved issues and opposes the staff's proposed change.

RESPONSE: No changes have been made to the rule as a result of this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that subsection (3)(D) mandates the organization of a proposed agreement follow that of an agreement previously arbitrated and approved by the commission and that such a requirement should be eliminated, or that at least the limitation to arbitrated agreements should be eliminated.

RESPONSE: The rule does not mandate the organization of a proposed agreement; it expresses a preference. No changes have been made to the rule as a result of this comment.

COMMENT: Sprint, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services,

LLC and AT&T of the Southwest, Inc. suggest that the subsection (3)(E) requirement that direct testimony supporting the petitioner's positions be filed with the petition be deleted. In support of their position MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that individuals involved in negotiations also tend to be the witnesses in arbitrations, that similar activities may be taking place in multiple jurisdictions at the same time and that it would be better for the parties and arbitrator to develop a schedule for filing testimony in each arbitration, with filing testimony with the petition an available option.

RESPONSE AND EXPLANATION OF CHANGE: Section 252(b)(2)(A) of the Telecommunications Act of 1996 directs that a petitioner shall provide to the commission all relevant documentation concerning the unresolved issues, the position of each party on each unresolved issue, and any issue discussed and resolved by the parties. Rather than requiring the filing of testimony, subsection (3)(E) will be changed to require the filing of all relevant documentation that supports the petitioner's position on each unresolved issue.

COMMENT: Sprint suggests that the reference to proposed rule 4 CSR 240-36.020(2) be deleted from subsection (3)(F) as Sprint has proposed the certification requirement of proposed rule 4 CSR 240-36.020(2) be deleted.

RESPONSE AND EXPLANATION OF CHANGE: Because the commission has deleted the certification requirement of proposed rule 4 CSR 240-36.020(2) it adopts Sprint's proposal. Subsection (3)(F) of the rule will be revised.

COMMENT: Southwestern Bell Telephone, LP objects to section (4) which provides that the commission will appoint an arbitrator. The bases of the objection are Southwestern Bell Telephone, LP's claims that neither the Telecommunications Act of 1996 nor state statute authorize the commission to delegate its authority to act as an arbitrator. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that as the rule is drafted, the arbitrator acts as a special master who develops the record and recommends a decision to the Public Service Commission which ultimately decides the arbitration.

RESPONSE: Under the rule, the Public Service Commission ultimately makes the arbitration decision. No changes have been made to the rule as a result of this comment.

COMMENT: Southwestern Bell Telephone, LP objects to the authorization for the arbitrator to utilize entire package arbitration found in subsection (5)(A) for providing no standard for when the arbitrator may use this approach, for providing no deadline by which parties will know what approach the arbitrator is using, for limiting the commission's ability to make decisions on each issue and because entire package arbitration appears inconsistent with section (19) which requires the arbitrator's report to the commission to address each issue and for the arbitrator, on each issue, to adopt the position of one of the parties. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. echo the concern with use of entire package arbitration pointing out that it could force the acceptance of bad results on particular issues.

RESPONSE AND EXPLANATION OF CHANGE: Unresolved issues being decided by arbitration should be decided issue-by-issue. Thus, final offer arbitration should be issue-by-issue final arbitration, unless the parties choose to employ entire package final arbitration. Subsection (5)(A) of the rule will be changed.



COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that subsection (5)(B) should be modified to allow a settlement to go to the arbitrator rather than the commission as the settlement is likely to be partial rather than a total settlement and that parties should be allowed to amend their final offers with the consent of the other parties. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company propose modifying subsection (5)(B) to prohibit negotiations of provisions that would affect third party carriers unless those carriers agree to any settlements reached and submitted to the commission. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC support limiting the participants in the arbitration to the parties to the negotiation. Southwestern Bell Telephone, LP also takes the position that only parties to the negotiation should participate in the arbitration and, further, suggests that allowing third parties to participate in the arbitration would violate section 252 of the Act. Southwestern Bell Telephone, LP correctly paraphrases section 252(b)(4)(A) which provides: "The State commission shall limit its consideration of any petition filed under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the appropriate point in the proceedings at which a non-party to the negotiation should be heard is when the negotiated agreement is being presented to the commission for approval, not earlier.

RESPONSE AND EXPLANATION OF CHANGE: The rule should be changed to state that settlements may be submitted to the arbitrator after final arbitration offers are submitted. Section (5) of the rule will be changed in response to this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that subsection (5)(D) is duplicative of subsection (5)(E) and that subsections (5)(D), (5)(E) and (5)(F) should refer to the Federal Communication Commission's rules in addition to the commission's rules. The staff of the Public Service Commission recommends expanding paragraph (5)(E)2. to include terms and conditions as well as rates. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company propose modifying subsection (5)(F) to authorize the arbitrator to adopt a result submitted by an intervening carrier that is not a party to the negotiation. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC support limiting the participants in the arbitration to the parties to the negotiation. Southwestern Bell Telephone, LP also takes the position that only parties to the negotiation should participate in the arbitration and, further, suggests that allowing third parties to participate in the arbitration would violate section 252 of the Act. Southwestern Bell Telephone, LP correctly paraphrases section 252(b)(4)(A) which provides: "The State commission shall limit its consideration of any petition filed under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the appropriate point in the proceedings at which a non-party to the negotiation should be heard is when the negotiated agreement is being presented to the commission for approval, not earlier.

RESPONSE AND EXPLANATION OF CHANGE: The rule should be changed to eliminate duplication, state that the final offer must comply with the applicable rules of the Federal Communications Commission and clarify that rates are not the only issue for interconnection. Section (5) of the rule will be changed in response to this comment.

COMMENT: Sprint, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the section (7) requirement that direct testimony supporting the respondent's positions be filed with the response to the petition be deleted. In support of their position MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that individuals involved in negotiations also tend to be the witnesses in arbitrations, that similar activities may be taking place in multiple jurisdictions at the same time and that it would be better for the parties and arbitrator to develop a schedule for filing testimony in each arbitration.

RESPONSE AND EXPLANATION OF CHANGE: Section 252(b)(3) of the Telecommunications Act of 1996 directs that a party responding to a petition may provide to the commission such additional information that it wishes to provide. Rather than requiring the filing of testimony, section (7) will be changed to require the filing of all relevant documentation that supports the responding party's position on each unresolved issue.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that cost studies upon which the incumbent local exchange carrier relies for rates should be made available to the other party(ies) to the negotiation, subject to any applicable protective order or nondisclosure agreement, immediately upon the filing of the petition for arbitration. Southwestern Bell Telephone, LP responds that such a requirement would violate section 252(b)(3) of the Telecommunications Act of 1996 which allows twenty-five (25) days for response to a petition for arbitration.

RESPONSE: Ideally, where rates are involved, the parties will be exchanging cost study information during their negotiations and long before the filing of a petition for arbitration. The Public Service Commission notes that 47 CFR section 51.505(e)(2) requires that where the commission considers a cost study for purposes of establishing rates, the cost study be in the record before the commission; thus, cost studies upon which the parties want the commission to rely should be included in the documentation filed with the petition or response. No changes to the rule have been made as a result of this comment.

COMMENT: The staff of the Public Service Commission states that section (7) requires the respondent to file a proposed agreement that identifies resolved issues and unresolved issues in duplication of the document that the petitioner is required to file under section (3).

RESPONSE: Under section (3) the petitioner is to file a proposed agreement that identifies resolved issues with the agreed to language and unresolved issues with the petitioner's proposed language. Under section (7) the respondent is to file a proposed agreement that identifies the language the parties have agreed to (resolved issues) and both the petitioner's and the respondent's proposed language for unresolved issues. No changes to the rule have been made as a result of this comment.

COMMENT: Sprint suggests that section (9) be modified to eliminate references to the filing of rebuttal testimony consistent with its view that the dates for filing of all testimony should be set after the initial meeting referred to in section (9). MCI WorldCom

Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that the holding of an initial conference be mandatory, not optional.

**RESPONSE AND EXPLANATION OF CHANGE:** Because the Public Service Commission has revised sections (3) and (7) of the rule from requiring "direct testimony" to requiring "all relevant documentation" be filed with the petition and response, the modifier "rebuttal" should not be used with the word "testimony" in this section. Section (9) of the rule will be changed.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest that sections (10) and (13) be modified to give the arbitrator more flexibility in the timing of conferences. Southwestern Bell Telephone, LP raises a concern that the language of section (10) leaves it to the arbitrator's discretion to determine which issues are factual and require evidentiary hearings and the apparent inflexibility of the arbitrator to vary the timing under which conferences and hearings are to begin.

**RESPONSE AND EXPLANATION OF CHANGE:** Sections (10) and (13) will be revised to clarify the commission's intent that identification of factual issues will be a collaborative process and that the arbitrator has discretion in the scheduling of the conferences and hearings.

**COMMENT:** Sprint suggests that the unresolved issues should be limited to those framed by the petition and response, and suggests modifying section (11) to eliminate the reference to the revised statement of unresolved issues.

**RESPONSE:** The revised statement of unresolved issues is limited in section (8) of the rule to a listing of issues raised in the petition and response. No changes to the rule have been made as a result of this comment.

**COMMENT:** Sprint expressed concern with the use by the arbitrator of outside experts contemplated in section (12). In particular Sprint noted the time required to retain such an expert and the likelihood of one or more parties questioning the neutrality of the expert. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. comment that outside experts, regardless of whether on advisory staff, should not be affiliated with the parties, including in the recent past. Southwestern Bell Telephone, LP objects to section (12) in its entirety asserting the section apparently contemplates that advisory staff will provide information to the arbitrator that is not shared with the parties implicating due process as expressed in both the state and federal constitutions, and in Southwestern Bell Telephone, LP's view, sections 386.420(1), 435.370(2), 491.070 and 536.070(2) of the *Revised Statutes of Missouri*. Southwestern Bell Telephone, LP asserts that if the commission employs advisory staff under a rule, then the rule must specifically limit the permissible scope of activities and must specifically prohibit the advisory staff from providing input regarding any factual or mixed factual/legal issues before the arbitrator for resolution. The staff of the Public Service Commission suggests that the list of those with whom advisory staff is prohibited from having *ex parte* contacts during the arbitration be expanded to include staff or outside individuals who provide responses to questions in the arbitration.

**RESPONSE AND EXPLANATION OF CHANGE:** As proposed, the rule limits the role of advisory staff to providing legal advice and other analysis, not to creating extra-record evidence. Nothing in the rule requires that outside experts not be retained until after the filing of a petition for arbitration. Nothing in the rule would require biased

outside experts. While there are legitimate concerns raised as to how advisory staff and outside experts may be utilized, nothing in the proposed rule itself is a violation of due process embodied in state or federal constitution, or law. Unlike the identity of parties, who are known at the outset of the arbitration, the identity of commission staff or outside individuals who will provide responses to questions likely will not be known until the arbitration process is well underway. Rather than establishing by rule a blanket prohibition on *ex parte* contacts by the arbitrator's advisory staff with commission staff and outside individuals who answer questions, the commission will leave it to the arbitrator's discretion to conduct the proceedings in a fashion that avoids any appearance of impropriety and comports with due process. However, changes will be made to the rule to emphasize and clarify that questions and responses to questions posed to commission staff members and outside experts will be part of the record of the arbitration, and that these persons will be subject to cross-examination by parties on their responses. Further, changes will be made to emphasize and clarify that the arbitrator's advisory staff is not the commission's advisory staff allowed by Missouri statute and that the role of the arbitrator's advisory staff is to provide legal advice and analysis, not to provide evidence, extra-record or otherwise. Section (12) of the rule will be changed.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest specifying that "here" in section (15) refers to "this rule 36.040."

**RESPONSE AND EXPLANATION OF CHANGE:** Clarity will be enhanced by making the reference in the second clause of the second sentence of section (15) from "here" to "in this rule." Section (15) of the rule will be changed.

**COMMENT:** The staff of the Public Service Commission suggests modifying section (16) to clarify that commission staff or outside individuals may participate in arbitration conferences or hearings to the extent required for them to provide answers to questions posed to them by the arbitrator as contemplated in section (12). MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. echo the staff's concern and state that those not parties to a negotiation should raise their concerns when the agreement is being presented to the commission for approval, not before. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company assert that section (16) of the rule should be modified to allow participation in the arbitration proceedings of carriers to which traffic addressed in the negotiation is destined. Southwestern Bell Telephone, LP objects to the use of advisory staff out of a concern that due process will be violated and requests the reference to advisory staff be stricken from section (16). CenturyTel of Missouri, LLC and Spectra Communications Group, LLP oppose participation in the arbitration of those not parties to the negotiation. Public Counsel points out its statutory role and requests modification of the rule to include it as a party to arbitrations.

**RESPONSE AND EXPLANATION OF CHANGE:** As indicated in its response to proposed changes to section (12), the use of advisory staff as contemplated in the rule is not a violation of due process embodied in state or federal constitution, or law. Only those parties to the negotiation should participate in arbitration conferences and hearings. Section (16) of the rule will be changed to clarify that commission staff and outside experts may participate in arbitration conferences or hearing, but only to the extent required to provide answers to questions posed by the arbitrator as contemplated in section (12) of the rule.



COMMENT: Southwestern Bell Telephone, LP objects to the requirement in section (17) that arbitration hearings be held in an open forum and requires the arbitrator to consult with the commission to close proceedings from the public.

RESPONSE: Section (17) provides that requests to close proceedings from the public shall be made in writing and that the arbitrator will consult with the commission in acting on such a request. Although Southwestern Bell Telephone, LP's comment is drafted on the apparent premise that such requests will be made during the conferences and hearings, nothing in the rule prohibits such a request from being made in advance of such proceedings and, given the time constraints to which the commenter alludes, the rule contemplates that such requests typically will be made in advance. No changes to the rule have been made as a result of this comment.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. suggest modification of section (18) to expressly state that the arbitrator has discretion to extend the time within which post-hearing briefs may be filed.

RESPONSE AND EXPLANATION OF CHANGE: The arbitrator's authority to extend the time within which post-hearing briefs should be more explicitly stated in the rule. Section (18) of the rule will be changed.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission assert that restrictions on *ex parte* communications should attach upon the filing of the petition.

RESPONSE AND EXPLANATION OF CHANGE: In 2003 the Missouri Legislature enacted House Bill 208, now codified at section 386.210 of the *Revised Statutes of Missouri*. That bill establishes when appropriate *ex parte* communications may take place and how disclosure of *ex parte* communications is to occur. The same timing and process should be followed in arbitrations under the Act. The reference to Rule 4 CSR 240-4.020 in section (22) will be changed to refer to section 386.210, RSMo. Section (22) of the rule will be revised.

COMMENT: MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission suggest that rejection of the arbitrator's report as an option of the commission in section (24) should not be allowed as the commission must make a decision, or that if the report is rejected that the commission must make its own decisions. Southwestern Bell Telephone, LP objects to section (24) and asserts that it should be modified to permit the parties to conduct oral argument and present evidence on any objection to the final arbitrator's report.

RESPONSE AND EXPLANATION OF CHANGE: The rule should be changed to emphasize that it is the commission that makes the final determinations on the unresolved issues. Parties will have had ample opportunity to present their positions on the disputed issues in a record that the commission can review; therefore, the opportunity for oral argument and to present evidence to the commission on objections to the arbitrator's report need not be mandatory. Section (24) of the rule will be changed.

#### 4 CSR 240-36.040 Arbitration

(1) Who May Petition for Arbitration—A party to a negotiation entered into pursuant to sections 251 and 252 of the Act may file a petition for arbitration.

(3) Content—A petition for arbitration must contain:

(E) All relevant documentation that supports the petitioner's position on each unresolved issue; and

(F) Documentation that the petition complies with the time requirements of 4 CSR 240-36.040(2).

(5) Style of Arbitration—An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:

(A) Final offer arbitration shall take the form of issue-by-issue final offer arbitration, unless all of the parties agree to the use of entire package final offer arbitration. The arbitrator in the initial arbitration meeting shall set time limits for submission of final offers and time limits for subsequent final offers, which shall precede the date of a limited evidentiary hearing.

(B) Negotiations among the parties may continue, with or without the assistance of the arbitrator, after final arbitration offers are submitted. Parties may submit to the arbitrator or commission, as appropriate, any settlements reached following such negotiations.

(D) Each final offer submitted by the parties to the arbitrator shall:

1. Meet the requirements of section 251 of the Act, including the rules prescribed by the commission and the Federal Communications Commission pursuant to that section;

2. Establish interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the commission and the Federal Communications Commission pursuant to that section; and

3. Provide a schedule for implementation of the agreement.

(E) If a final offer submitted by one (1) or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section.

(7) Opportunity to Respond—Pursuant to subsection 252(b)(3) of the Act, any party to a negotiation, which did not file a petition for arbitration ("respondent"), shall file with the commission, within twenty-five (25) days of the date the petition for arbitration is filed with the commission, a response to the petition for arbitration. For each issue listed in the petition, the respondent shall restate the issue followed by the respondent's position on that issue. The respondent shall also identify and present any additional issues for which the respondent seeks resolution and provide such additional information and evidence necessary for the commission's review. The respondent shall include, in the response, a document containing the language upon which the parties agree and, show where the parties disagree, and provide both the petitioner's proposed language (bolded) and the respondent's proposed language (underscored). Finally, the response must contain all relevant documentation that supports the respondent's position on each issue identified in the response that remains unresolved. On the same day that the respondent files a response with the commission, the respondent must serve a copy of the response, and all supporting documentation, on each other party to the negotiation.

(9) Initial Arbitration Meeting—The arbitrator may call a mandatory initial meeting for purposes such as setting a procedural schedule, establishing a time limit for submission of final offers, allowing the filing of testimony, setting times by which testimony may be filed, simplifying issues, or resolving the scope and timing of discovery.

(10) Arbitration Conferences and Hearings—The arbitration shall consist of markup conferences and limited evidentiary hearings. At the markup conferences, the arbitrator shall hear the concerns of the

parties, determine whether the parties can further resolve their differences, and, with the parties, identify factual issues that may require limited evidentiary hearings. The arbitrator shall also announce rulings at the conferences as the issues are resolved. The conduct of the conferences and hearings shall be noticed on the commission's hearings calendar and notice shall be provided to all parties on the service list. Parties are expected to respond to questions from the arbitrator, and the arbitrator's advisory staff. The parties shall be given the opportunity to present witnesses at an on-the-record evidentiary hearing, and to cross-examine the witnesses of the other party(ies) to the arbitration. These conferences and hearings shall commence as soon as possible after all responses to the petition for arbitration are filed with the commission.

(12) Arbitrator's Reliance on Experts—The arbitrator may rely upon:

(A) An arbitrator advisory staff to assist the arbitrator in the decision-making process. The arbitrator shall appoint the members of the arbitrator advisory staff from either or both commission staff and retained outside experts. The arbitrator shall inform the parties of the names of the members of the arbitrator advisory staff. Arbitrator advisory staff shall not have *ex parte* contacts with any of the parties individually regarding the issues in the negotiation. The arbitrator advisory staff's role is limited to providing legal advice and other analysis to the arbitrator, not to provide evidence. Persons that advised a mediator regarding the same negotiation are ineligible to serve as members of the arbitrator advisory staff.

(B) Responses to questions posed by the arbitrator that are made by commission staff members or outside individuals who are not members of advisory staff. Upon the arbitrator's request, and after notice to the parties to the arbitration, the arbitrator may pose questions to commission staff members or outside individuals who are not advisory staff. These questions shall be answered either in written form or at an arbitration session attended by the parties. The parties may submit written responses to answers to technical questions in a timely manner as determined by the arbitrator and shall be entitled to cross-examine any commission staff member or outside individual regarding the answer he, or she, provides in response to a question posed by the arbitrator. These questions and responses shall be included in the record before the arbitrator and commission.

(13) Close of Arbitration—The conference and hearing process is to conclude within ten (10) days of the commencement of the first hearing, unless the arbitrator determines otherwise.

(15) Authority of the Arbitrator—In addition to authority granted elsewhere in this rule, the arbitrator shall have the same authority in conducting the arbitration as a presiding officer, as defined in 4 CSR 240-2.120, has in conducting hearings under the commission's rules of practice and procedure. Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out in this rule; however, the arbitrator's procedures must substantially comply with the procedures listed herein. The arbitrator may vary from the schedule in this rule as long as the arbitrator complies with the deadlines contained in the Act.

(16) Participation in the Arbitration Conferences and Hearings—Participation in the arbitration conferences and hearings is strictly limited to the parties in a negotiation pursuant to sections 251 and 252 of the Act, the arbitrator, the arbitrator's advisory staff and, only to the extent needed to provide the answer(s) to a question(s) posed by the arbitrator under the procedure of section (12), commission staff and outside experts. Only those parties involved in the negotiation shall be parties in the arbitration. Others that formally request to be kept apprised of the arbitration proceeding will be placed on the "Information Only" portion of the service list.

(18) Filing of Post-Hearing Briefs—Each party to the arbitration may file a post-hearing brief within seven (7) days of the end of the

markup conferences and hearings, unless the arbitrator extends the due date. Post-hearing briefs shall present, for each disputed issue, the party's argument in support of adopting its recommended position, with all supporting evidence and legal authorities cited therein. The arbitrator may limit the length of post-hearing briefs. The arbitrator shall also establish a time for the filing of reply briefs. The arbitrator may also permit or require the parties to file proposed arbitrator's reports or decisions.

(22) *Ex Parte* Rules Applicable to Arbitration Proceedings—the restrictions on *ex parte* communications contained in 386.210, RSMo apply to arbitration proceedings held under this rule.

(24) Commission's Decision—The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred seventieth day following the request for negotiation. The commission may adopt, modify or reject the arbitrator's final report, in whole or in part.

## Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT

### Division 240—Public Service Commission

#### Chapter 36—Alternative Dispute Resolution Procedural Rules Governing Filings Made Pursuant to the Telecommunications Act of 1996

#### ORDER OF RULEMAKING

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-36.050 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 202). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom

Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

**COMMENT:** The staff of the Public Service Commission suggests that because of the use of commission resources in conducting arbitrations, the parties to them should not be able to agree to a different result than that reached by the commission after the commission makes its decision. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC, AT&T of the Southwest, Inc. and Southwestern Bell Telephone, LLP disagree with the commission's staff and suggest that the parties should always be free to negotiate an agreement.

**RESPONSE:** A goal of the Telecommunications Act of 1996 is for parties to voluntarily enter into agreements. No changes have been made to the rule as a result of this comment.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc., suggest that section (1) should be changed to state that the commission will establish the date for the filing of the agreement when it makes its arbitration decision rather than establishing a time frame of seven (7) days. Sprint proposes the time frame be extended from seven (7) days to ten (10) days.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees that it should be explicitly clear that the commission can vary from the seven (7) days established in the rule. Section (1) of the rule will be changed.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. point out that the reference in section (2) to section 36.050(3) should instead be to section 36.050(4), the section that references standards for review. Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company argue that the time frame in this section as well as the thirty (30) days for commission action in section (3) is inadequate to frame and decide issues regarding traffic that is the subject of the agreement that is destined to a carrier that is not a party to the agreement. MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. assert that those not parties to a negotiation should raise their concerns when the agreement is being presented to the commission for approval. CenturyTel of Missouri, LLC and Spectra Communications Group, LLC oppose that such issues be raised during the arbitration process, i.e., before the arbitrated agreement is presented to the commission for approval.

**RESPONSE AND EXPLANATION OF CHANGE:** The reference in section (2) to section 36.050(3) will be corrected to refer to section 4 CSR 240-36.050(4). Additionally, since section 4 CSR 240-36.050(4) references the standards rather than providing them, the word "provided" in the last clause of the first sentence of section (2) will be revised to "referenced."

**COMMENT:** Sprint, Southwestern Bell Telephone, LLP raise a concern regarding the approval of an arbitrated agreement in the absence of commission action within thirty (30) days of the filing of the arbitrated agreement.

**RESPONSE AND EXPLANATION OF CHANGE:** Section 252(e)(4) of the Telecommunications Act of 1996 provides that an arbitrated agreement is deemed approved if the commission does not

act upon the submitted agreement within thirty (30) days of the submission. Section (3) will be revised to reflect that, in the absence of commission action within thirty (30) days of submission, the agreement is deemed approved.

**COMMENT:** Sprint argues that meeting quality of service standards should be outside the scope of an interconnection agreement and proposes deletion of the last three (3) clauses of the last sentence of section (4).

**RESPONSE:** Section 252(e)(3) of the Telecommunications Act of 1996 specifically reserves to state commissions the right to establish and enforce other requirements of state law that do not conflict with those of the federal act and rules including "compliance with intrastate telecommunications service quality standards or requirements." No changes have been made to the rule as a result of this comment.

**COMMENT:** MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. questions both the title and content of section (6) asserting the section should be rewritten to conform to section 252(e)(6) of the Telecommunications Act of 1996.

**RESPONSE AND EXPLANATION OF CHANGE:** The section will be revised to conform to the requirement of section 252(e)(6) of the Telecommunications Act of 1996 that review of state commission action will be by a federal district court.

#### **4 CSR 240-36.050 Commission Approval of Agreements Reached by Arbitration**

(1) Filing of Conformed Agreement—Unless the commission orders otherwise, within seven (7) days of the filing of a commission order approving, rejecting or modifying the arbitrator's final report, the parties shall file with the commission the entire agreement that was the subject of the negotiation. The agreement shall conform in all respects to the commission's order. Concurrently with the filing of the conformed agreement, the parties shall each file statements that indicate whether the agreement complies with the requirements of sections 251 and 252 of the Act, Missouri statutes, and the commission's rules.

(2) Within ten (10) days of the filing of the agreement, anyone may file comments concerning the agreement; however, such comments shall be limited to the standards for review referenced in section 4 CSR 240-36.050(4) of this chapter. The commission, upon its own motion, may hold additional informal hearings and may hear oral argument from the parties to the arbitration.

(3) Commission Review of Arbitrated Agreement—Within thirty (30) days following the filing of the arbitrated agreement, the commission shall issue a decision approving or rejecting the arbitrated agreement (including those parts arrived at through negotiations) pursuant to subsection 252(e) of the Act and all its subparts. In the event the commission fails to act on the arbitrated agreement within thirty (30) days of when the agreement is filed, the agreement shall be deemed approved.

(6) Review of Commission Decision—Any party aggrieved by a commission decision made under this rule may seek relief in an appropriate federal district court pursuant to section 252(e)(6) of the Act.



**Title 4—DEPARTMENT OF ECONOMIC  
DEVELOPMENT**

**Division 240—Public Service Commission  
Chapter 36—Alternative Dispute Resolution Procedural  
Rules Governing Filings Made Pursuant to the  
Telecommunications Act of 1996**

**ORDER OF RULEMAKING**

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission withdraws a rule as follows:

**4 CSR 240-36.060** Commission Approval of Agreements Reached by Mediation or Negotiation is **withdrawn**.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 203). This proposed rule is withdrawn.

**SUMMARY OF COMMENTS:** A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

**COMMENT:** Those who appeared at the public hearing generally endorsed this proposed rule as part of the group of rules proposed for Chapter 36; however, the commission's staff noted that the subject of this rule is also the subject of another rulemaking this commission is undertaking and that, as worded, this rule would conflict with that pending rulemaking.

**RESPONSE:** This proposed rule is withdrawn because the subject of the rule is also the subject of another rulemaking this commission is undertaking and this proposed rule conflicts with the language being considered for that rule.

**Title 4—DEPARTMENT OF ECONOMIC  
DEVELOPMENT**

**Division 240—Public Service Commission  
Chapter 36—Alternative Dispute Resolution Procedural  
Rules Governing Filings Made Pursuant to the  
Telecommunications Act of 1996**

**ORDER OF RULEMAKING**

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission withdraws a rule as follows:

**4 CSR 240-36.070** Commission Notice of Adoption of Previously Approved Agreement is **withdrawn**.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 203-204). This proposed rule is withdrawn.

**SUMMARY OF COMMENTS:** A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

**COMMENT:** Those who appeared at the public hearing generally endorsed this proposed rule as part of the group of rules proposed for Chapter 36; however, the commission's staff noted that the subject of this rule is also the subject of another rulemaking this commission is undertaking and that, as worded, this rule would conflict with that pending rulemaking.

**RESPONSE:** This proposed rule is withdrawn because the subject of the rule is also the subject of another rulemaking this commission is undertaking and this proposed rule conflicts with the language being considered for that rule.

**Title 4—DEPARTMENT OF ECONOMIC  
DEVELOPMENT**

**Division 240—Public Service Commission  
Chapter 36—Alternative Dispute Resolution Procedural  
Rules Governing Filings Made Pursuant to the  
Telecommunications Act of 1996**

**ORDER OF RULEMAKING**

By the authority vested in the Public Service Commission under section 386.410, RSMo 2000, the commission withdraws a rule as follows:

**4 CSR 240-36.080** Commission Approval of Amendments to Existing Commission-Approved Agreements **is withdrawn.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 2, 2004 (29 MoReg 204). This proposed rule is withdrawn.

**SUMMARY OF COMMENTS:** A public hearing on this and associated proposed rules was held March 12, 2004, and the public comment period ended March 5, 2004. At the public hearing, Nathan Williams, Senior Counsel in General Counsel's Office of the Public Service Commission of Missouri, Natelle Dietrich, Regulatory Economist III of the Public Service Commission of Missouri provided oral responses to written comments. In addition, orally at the public hearing, Mike Dandino provided comments for the Office of the Public Counsel; Mimi McDonald, Senior Counsel for Southwestern Bell Telephone, LP, provided comments for Southwestern Bell Telephone, LP; Carl Lumley of Curtis, Oetting, Heinz, Garrett & O'Keefe, PC, provided comments for MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc.; Larry Dority of Fisher and Dority, PC, provided comments for CenturyTel of Missouri, LLC and Spectra Communications Group, LLC; and Lisa Chase of Andereck, Evans, Milne, Peace and Johnson, LLP, provided comments for Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company.

The staff of the Public Service Commission of Missouri, Southwestern Bell Telephone, LP, Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc. and Northeast Missouri Rural Telephone Company, MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., Intermedia Communications, Inc., MCImetro Access Transmission Services, LLC and AT&T of the Southwest, Inc. and Sprint filed written comments.

**COMMENT:** Those who appeared at the public hearing generally endorsed this proposed rule as part of the group of rules proposed for Chapter 36; however, the commission's staff noted that the subject of this rule is also the subject of another rulemaking this commission is undertaking and that, as worded, this rule would conflict with that pending rulemaking.

**RESPONSE:** This proposed rule is withdrawn because the subject of the rule is also the subject of another rulemaking this commission is undertaking and this proposed rule conflicts with the language being considered for that rule.

**Title 7—DEPARTMENT OF TRANSPORTATION**  
**Division 10—Missouri Highways and**  
**Transportation Commission**  
**Chapter 1—Organization; General Provisions**

**ORDER OF RULEMAKING**

By the authority vested in the Missouri Highways and Transportation Commission under sections 226.008, RSMo Supp. 2003 and 226.130 and 536.016, RSMo 2000, the commission adopts a rule as follows:

**7 CSR 10-1.020 Subpoenas is adopted.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on March 1, 2004 (29 MoReg 384-389). No changes have been made to the text of the pro-

posed rule, so it is not reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** No comments were received.

**Title 13—DEPARTMENT OF SOCIAL SERVICES**  
**Division 35—Children's Division**  
**Chapter 80—Payment of Residential Facilities**

**ORDER OF RULEMAKING**

By the authority vested in the Children's Division under section 207.020, RSMo 2000, the director adopts a rule as follows:

**13 CSR 35-80.010 is adopted.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 17, 2004 (29 MoReg 311-313). The sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after the publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** The order of rulemaking was amended pursuant to a hearing held by Joint Committee on Administrative Rules on June 8, 2004. Section (5) was added to include a termination date. The Children's Division received one hundred forty (140) letters of comment. One hundred fourteen (114) letters were from board members or otherwise represented sixteen (16) providers affected by the regulations. Substantially all letters requested that comments be considered for both regulation 13 CSR 35-80.010 and 13 CSR 35-80.020 although the specific comments may only be applicable to one of the regulations. We have therefore addressed all comments under both regulations.

**COMMENT:** One letter expressed concern that the foster care maintenance costs which would be "priced" under the methodology would affect the current and future POS contracts.

**RESPONSE:** The litigation brought by the Missouri Child Care Association specifically challenged the previous methodology on the grounds it did not comply with the requirements regarding Title IV-E foster care maintenance payments to residential care providers. The Child Welfare Act strictly limits the services that may be provided and claimed as foster care maintenance. The proposed regulations were designed to identify all foster care maintenance costs that may be claimed under Title V-E and develop a reasonable reimbursement level. We are similarly concerned that the ability to leverage federal funds or recognize the cost for other services provided in the residential setting has been limited and have reviewed payment methodologies approved in other states. The reporting requirements will provide an opportunity to identify the full scope of costs and revenue streams for residential providers. As that information becomes available and we move beyond the current litigation, the division looks forward to working with residential treatment providers to develop favorable reimbursement contracts and ensure adequate services are provided.

**COMMENT:** Multiple comments objected to the proposed wording in 13 CSR 35-80.010(2)(E) which outlines the statutory process the Children's Division must follow in order to obtain funding. The comments stated that the proposed methodology was budget based and would be in violation of the Child Welfare Act and ruling by the Western District Court in the matter brought by the Missouri Child Care Association d/b/a Missouri Coalition of Children's Agencies. **RESPONSE:** Although the issues raised could be resolved by removing subsection (2)(E), the Children's Division believes it is important to include a summary of the state budgetary process in the General Principles section in order to inform the public and affected