

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission
held at its office in Jefferson City on
the 27th day of March, 2007.

In the Matter of a Proposed Rulemaking
to Create Chapter 37 - Number Pooling
and Number Conservation Efforts

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Case No. TX-2007-0086

ORDER DENYING REHEARING

Issue Date: March 27, 2007

Effective Date: April 6, 2007

On August 24, 2006, the PSC Staff requested that the Commission adopt the following rules: 4 CSR 240-37.010, 4 CSR 240-37.020, 4 CSR 240-37.030, 4 CSR 240-37.030, 4 CSR 240-37.040, 4 CSR 240-37.050, and 4 CSR 240-37.060. The subject rules pertain to number pooling and number conservation efforts, and are necessary for the Commission to effectuate the use of additional authority delegated by the Federal Communications Commission. The additional authority allows the Commission to implement mandatory thousand-block number pooling and other numbering conservation measures to delay the need for additional area code assignments in Missouri.

Based on Staff's request, the Commission found, on September 26, 2006, that the subject rules were necessary. Proposed rules were published in the Missouri Register on November 1, 2006, which included an invitation to comment and notice for public hearing on December 4, 2006. That hearing was held. Based on the comments received, certain changes were made to the proposed rules and the Commission voted a Final Order of Rulemaking on December 12, 2006, at its Agenda Session. The Order and docket number were posted in the Agenda notice

and the vote was duly recorded in the minutes. On December 13, 2006, the Final Order of Rulemaking was delivered to the Joint Committee on Administrative Rules (“JCAR”). After the mandatory thirty-day JCAR review period, the Final Order of Rulemaking was submitted to the Secretary of State (“SOS”) on January 16, 2007. It was published in the Missouri Register on February 15, 2007 and was published in the Code of State Regulations on February 28, to become effective on March 30, 2007. On January 16, the rulemaking packet was posted to the Commission’s Electronic Filing and Information System (“EFIS”). On February 14, 2007, an Application for Rehearing was filed by T-Mobile Central LLC, d/b/a T-Mobile, Verizon Wireless, Cingular Wireless, and Sprint Nextel Corporation (collectively, “the Wireless Carriers”).

Procedural Matters

Statutes governing rehearing before the Commission, §§386.490 and .500 RSMo 2000, are difficult to apply to rulemaking proceedings, which are generally governed by Chapter 536, the Missouri Administrative Procedures Act. Case law pertaining to the review of Commission cases instructs the Commission to apply both chapters in harmony to the extent possible.¹

In years past, there has been no meaningful opportunity for rehearing of a rulemaking because once the filing of a final order is made at the SOS, it is not possible to retract thirty days later. In such instances, the Commission’s only recourse has been to treat the request for rehearing as a request to amend the rule and to establish a new case in which to accomplish that. As of August of 2006, the Commission is now required to submit its Final Orders of Rulemaking to JCAR thirty days prior to submission to the SOS, which does afford a meaningful opportunity to rehear or reconsider, in that the rule could be pulled back from JCAR, fixed, and resubmitted under a new thirty-day period.

¹ *Atmos Energy Corp v. PSC*, 103 SW3d 753 (2003).

In this case, the thirty-day period in which to request rehearing began on December 12, 2006, the date on which the Order was issued by the Commission. January 11, 2007 was the last day on which rehearing could have been timely requested.

While this seems relatively straightforward, it is not. Although the matter was noticed up on the posted Agenda and the vote was recorded in the minutes (which were also posted), it seems unreasonable to require those who might seek rehearing to continually scrutinize those postings to be aware of actions that may affect them. It is certainly not in the spirit of §386.490, which requires delivery of every order to all persons who may be affected thereby. In a rulemaking, literal compliance with this provision is not possible. However, it is possible to post an order to EFIS much sooner than was done in this case. In this case, the Commission's Secretary made the administrative decision to file the Order in EFIS when all of the date stamps necessary for effectiveness were placed on the Order, so that it would not be submitted multiple times. That decision was wrong. The need for timely notice to persons affected by the Order outweighed the administrative efficiency of submitting the Order only once. In the future, Final Orders of Rulemaking will be posted to EFIS on the day they are voted.

Therefore, although the instant request for rehearing was technically untimely, the Commission will address the substantive merits of the request.

Issues Raised in the Application for Rehearing

As mentioned above, on February 14, 2007, the Wireless Carriers raised certain points in their Application for rehearing, to which the Staff of the Commission filed a response on March 2, 2007. The Wireless Carriers specifically objected to 4 CSR 240-37.030(4)(C) and 4 CSR 240-37.060(2). In addition, the Wireless Carriers object to certain statements contained in the Order of Rulemaking. While such statements may clarify the Commission's intent, as they have no force and effect, objections thereto will not be addressed.

The Wireless Carriers assert that the Commission exceeded its delegated authority when it imposed new and additional reporting requirements concerning the monitoring of compliance with sequential numbering in 4 CSR 240-37.030(4)(C) and in monitoring and verifying utilization and forecasting data historical trends data and numbering applications in 4 CSR 240-37.060(2).

The FCC has exclusive authority over the North American Numbering Plan (NANP) that pertains to the United States, but may delegate to the states any portion of such authority. The FCC has delegated number conservation authority to this Commission in a broad fashion.² In its Order in CC Docket 99-200 adopted July 20, 2000, the FCC stated:

Thus, the state commissions, to the extent they act under the authority delegated herein, must ensure that numbers are made available on an equitable basis; that numbering resources are made available on an efficient and timely basis; that whatever policies the state commissions institute with regard to numbering administration not unduly favor or disfavor any particular telecommunications industry segment or group of telecommunications consumers; and that the state commissions not unduly favor one telecommunications technology over another. (Order at 7, ¶ 10)

It is appropriate for the Commission's numbering rules to apply to all entities subject to the federal authority that was delegated. Federal regulations concerning numbering resources are applicable to "service providers." "Service provider" is defined as a telecommunications carrier or other entity that receives numbering resources from the North American Numbering Pool Administrator, the Pooling Administrator or a telecommunications carrier for the purpose of providing or establishing a telecommunications service [as that service is defined in 47 U.S.C.

² The FCC further stated that "[n]umbering resource optimization measures are necessary to address the considerable burdens imposed on society by the inefficient use of numbers; thus, we have enlisted the state regulatory commissions to assist the FCC in these efforts by delegating significant authority to them to implement certain measures within their local jurisdictions." See also the Order and Fifth Further Notice of Proposed Rulemaking adopted February 17, 2006 in *In the Matter of Numbering Resource Optimization and Petition of the Missouri Public Service Commission for Additional Delegated Authority to Implement Number Conservation Measures*, CC Docket No. 99-200 (FCC 06-14), where the FCC granted this commission authority to implement mandatory thousands-block number pooling in the 417, 573, 636 and 660 NPAs.

153]. The Staff notes that the proposed rule will apply to all telecommunications carriers operating in the state of Missouri that request numbering resources from the North American Numbering Plan Administrator or the Thousands-Block Pooling Administrator (collectively, “Administrator”), even to carriers such as wireless providers and certain VoIP providers that do not typically operate under the jurisdiction of the Commission, but receive numbering resources directly from the Administrator.

It is clear that the Commission does not normally have jurisdiction over wireless carriers, which are specifically excluded from the Commission’s general jurisdiction by §386.020(53)(c). However, as Staff notes in its Response, the Commission’s jurisdiction over numbering resources does not stem from general state authority, but from authority delegated to it by the Federal Communications Commission. Section 386.210.2 confers jurisdiction on the Commission to act under delegated authority, providing that the “commission may. . . act as an agent or licensee for the United States of America, or any official, agency or instrumentality thereof. . . or the purpose of carrying out its duties under section 386.250 as limited and supplemented by section 386.030. . .” Section 386.030 provides that the provisions of Chapter 386 may be applied to interstate commerce should an act of Congress so permit. Congress acted to explicitly authorize the Federal Communications Commission to delegate “to State commissions or other entities all or any portion of” its “exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.” 47 U.S.C. 251(e)(1). This Commission has received authority to act under its own statute at Section 386.210 from the Federal Communications Commission, which in turn activated the provisions of Section 386.030 by exercise of federal law. Therefore, it is clear that the Commission has jurisdiction, where numbering matters are concerned, over those carriers over whom the FCC exerts jurisdiction for the fair and reasonable distribution of numbering resources, including wireless carriers.

The Wireless Carriers' second contention is that the Commission does not have the authority to require the provision of certain information in addition to the Numbering Resource Utilization and Forecast ("NRUF") report except in the context of an FCC-initiated audit.

In its Third Report and Order, the FCC stated:

The [FCC] values input from the states and considers coordination with them to be vitally important to advancing our shared policy goals of administering numbering resources efficiently. We reaffirm that states continue to have authority to conduct audits to the extent permitted under state law. Moreover, in recognition that states can serve a valuable role in helping the [FCC] to monitor carriers' number use, we clarify that states may conduct audits, at their own expense, to determine whether a particular carrier is in compliance with the [FCC]'s numbering rules to discharge their own responsibilities.

For example, state audits that seek to gather information needed to facilitate area code relief decisions would be appropriate to the extent that the information sought is not available through another source, such as NRUF data reports. This ability, coupled with the states' right to request "for cause" audits under the national auditing program, should provide states with sufficient and effective tools for carrying out their area code relief responsibilities.³

Clearly, the Commission is not limited to review of NRUF. However, it would not be appropriate to require any carriers to create records to comply with these rules when the same information is already gathered and reported in the NRUF. The rule language at issue provides:

(2) Consistent with federal audit authority, a carrier shall report, upon request by the commission staff, certain information to ensure compliance with commission and Federal Communications Commission numbering rules and to monitor and verify the validity and accuracy of carrier utilization data. Such information includes, but is not limited to, all number utilization, number utilization forecast and historical trend documentation and applications. In response to such requests, a carrier shall make the requested information available at the commission's office in Jefferson City.

As the Staff noted in its response:

Staff acknowledges that any requests for information under the second type of audit cannot be duplicative of federal efforts or duplicative of information already provided

³ Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, *In the Matter of Numbering Resource Optimization Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Telephone Number Portability*. CC Docket Nos. 99-200, 96-98 and 95-116, released December 28, 2001, ¶101.

through another source such as the NRUF. However, it became clear during the comment and hearing process that not all service providers complete NRUF information consistently. Staff recommends the language in 47 CSR 240-37.060(2) remain unmodified, again recognizing that information readily available from another source may not be requested. Should Staff request information that is inconsistent with federal audit authority, the wireless carriers may request relief from the Commission at that time.

We agree with the Staff's interpretation of the rule as it is presently written. Although the rule does not specifically require the NRUF format, it is not prohibited. Therefore, provision of NRUF reports in response to specific information requests should be sufficient. If the Staff believes more information is required and the carrier disagrees, then the carrier should seek a determination from the Commission as to whether the additional information is consistent with federal law, relevant, necessary, and not unduly burdensome.

As the rule, on its face, requires compliance only as far as is consistent with federal law and as the carriers retain the ability they always have had to request waiver or variance, the Commission concludes that the rule need not be changed and that rehearing or reconsideration⁴ shall not be granted in this matter.

The Application for Rehearing is denied.

IT IS ORDERED THAT:

1. The Application for Rehearing is denied.

⁴ Rehearing or reconsideration of the rule at this point would take the form of a new docket to amend the rule.

2. This order shall become effective on April 6, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Dale, Chief Regulatory Law Judge