

**ANDERECK, EVANS, MILNE, PEACE & JOHNSON, L.L.C.**

ATTORNEYS AT LAW

700 EAST CAPITOL AVENUE

COL. DARWIN MARMADUKE HOUSE

P.O. BOX 1438

JEFFERSON CITY, MISSOURI 65102-1438

TELEPHONE 573-634-3422

FAX 573-634-7822

EUGENE E. ANDERECK  
TERRY M. EVANS  
ERWIN L. MILNE  
JACK PEACE  
CRAIG S. JOHNSON  
RODRIC A. WIDGER  
GEORGE M. JOHNSON  
BEVERLY J. FIGG  
WILLIAM S. LEWIS  
VICTOR S. SCOTT  
COREY K. HERRON

MATTHEW M. KROHN  
LANETTE R. GOOCH  
SHAWN BATTAGLER  
ROB TROWBRIDGE  
JOSEPH M. PAGE  
LISA C. CHASE  
JUDITH E. KOEHLER  
ANDREW J. SPORLEDER

July 13, 2005

**FILED<sup>2</sup>**

JUL 13 2005

Missouri Public  
Service Commission

OF COUNSEL  
MARVIN J. SHARP  
PATRICK A. BAUMHOER  
GREGORY C. STOCKARD (1904-1993)  
PHIL HAUCK (1924-1991)

Secretary/Chief Administrative Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

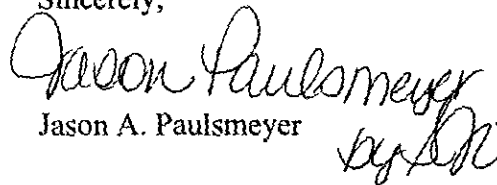
**Re: In the Matter of the Application of Se-Ma-No Technologies, LLC to  
withdraw and have cancelled all Certificates of Service Authority.  
Case No. XD-2005-0440.**

Dear Secretary:

Enclosed for filing please find an original and eight (8) copies of the Response to Staff Recommendation.

Thank you for seeing this filed.

Sincerely,

  
Jason A. Paulsmeyer

JAP:sjo

Enclosure

CC: PSC General Counsel  
OPC General Counsel

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>  
JUL 13 2005

Missouri Public  
Service Commission

In the Matter of the Application of )  
Se-Ma-No Technologies, LLC to )  
withdraw and have cancelled all ) Case No. XD-2005-0440  
Certificates of Service Authority. ) (consolidated)

RESPONSE TO STAFF RECOMMENDATION

COMES NOW Applicants in these consolidated proceedings, by and through their counsel of record, Andreck, Evans, Milne, Peace, & Johnson, L.L.C., and for their response to Staff's Recommendation, states as follows:

**Summary**

There is a matter of legal interpretation at the heart of Applicants' disagreement with Staff's Recommendations. Although there as yet is not factual stipulation or scheduled hearing, Applicants are confident there is no factual dispute that precludes an answer to this key legal question.

Applicants lease unlit fiber to regulated carriers. These regulated carriers offer and provide telecommunications service to the end users pursuant to certificate and tariff. Applicants have not, and do not now offer any telecommunications service to the public. Applicants do plan to continue to lease unlit fiber to certificated carriers. Applicants have no plans to offer service to the public. Therefore, they wish to relinquish their certificates of service authority granted several years ago.

Staff recommends that Applicants' request to withdraw their certificates be denied. Staff's Recommendation is premised upon the words "for hire" contained in the § 386.020(51) RSMo definition of "Telecommunications Company". Staff suggests that the words "for hire" mean entities providing private facilities for use by a regulated

carrier must have a certificate. Applicants suggest that the words “for hire” mean only entities offering telecommunications service to public end users are required to possess a certificate.

If Staff’s interpretation is correct, every private landowner granting easement rights to a regulated telecommunications carrier must also have a certificate. Every electric utility providing joint use of poles for telephone facilities to attach to would also have to have a telephone certificate of service authority. This is not right.

If Applicants’ interpretation is correct, only those entities holding themselves out as “common carriers” or “public utilities” offering or providing telecommunications services to the public are required to have a certificate. Applicants have not done so and have no current plans to do so. Their certificates can be cancelled or withdrawn. If Applicants ever decide to offer service to the public, they will have to be certificated at that time.

### **Suggestions**

1. Applicants in these eight consolidated proceedings are all subsidiaries of Rural Electric Cooperatives (RECs).

2. Several years ago, many electrical utilities, at the direction of the FCC, removed themselves from microwave bandwidth being used in their private communications systems. These were replaced with fiber-based systems. Since then their unlit fibers have been leased by regulated telecommunications carriers, primarily Sho Me Technologies, LLC. Applicants’ unlit fibers, as leased by Sho-Me, have been successfully used in providing fiber-based services to MORENET, the Office of the State

Court Administrator, the Missouri courts, public schools, libraries, medical services providers, and to private commercial enterprises in rural areas of Missouri.

3. Applicants and Sho-Me originally obtained certificates of service authority because it was uncertain as to what business structure would develop. It was not originally known whether Applicants, Sho-Me, or both, would be providing service to end users. The business structure has since matured and it is only Sho-Me that contracts with, and provides service to the end user customers. Applicants merely lease unlit fiber to Sho-Me.

4. Sho-Me is not requesting withdrawal of its certificate, because it will continue to hold itself out to provide the services authorized in its certificate and tariffs. Sho-Me will continue to file reports, will continue to pay Commission operational assessments, and will report its net Missouri end-user revenues to the Missouri Universal Service Fund.

5. Granting Applicants' withdrawals poses no threat to the interests of end users, whether public or private, because Applicants serve no end users.

6. Applicants disagree with Staff's conclusion that any entity providing facilities "for hire" to another certificated carrier must also be certificated. Present day realities suggest otherwise.

7. There are many public and private electrical utilities that provide poles and crossarms "for hire" to telephone companies. Poles and crossarms are within the statutory definition of telecommunications facilities, as are lines and cables. To

Applicants' knowledge, neither Ameren UE nor Springfield Municipal Utilities is required to have a certificate to provide telecommunications service.

8. There are hundreds of thousands of private property owners in the state that provide real estate easements to certificated telecommunications companies. Real estate and easements are within the statutory definition of telecommunications facilities "for hire," as are lines and cables. It defies reason to suggest that all such citizens are required to obtain certificates.

9. There are other present realities at odds with Staff's interpretation of the words "for hire". If Staff's "for hire" interpretation were correct, there would be no basis to exempt commercial radio service providers from Commission jurisdiction. They too make their facilities "for hire" in the carriage of telecommunications traffic.

10. Staff's analysis is flawed. The definition of telecommunications facilities is premised upon the final clause of §386.020(52), which limits the definition of telecommunication facilities to those operated, controlled or owned by a telecommunications company. The mere ownership of such property does not make the owner subject to Commission certification.

11. It is the devotion of private property to the "public" use that is essential to Commission certification. The fiber facilities of Applicants are private property. Use is only "public" requiring certification under Missouri law if its use is available to the public. Staff's analysis is incomplete because the words "for hire" contemplates the situation where the telecommunications company makes telecommunication services generally available to members of the public on generally available terms and conditions.

Owners of private property not making it available for public use have no obligation to be certificated.

12. The following legal authorities lend credence to Applicants' interpretation.

**Applicants do not fall under the intended definition of a telecommunications company, as Applicants "Services" and "Facilities" are not "for hire" by the General Public**

The statutory jurisdiction of the Public Service Commission extends to all telecommunications facilities and telecommunications services only to the extent that the owner or provider offers telecommunications service between one point and another within this state. §386.250(2) R.S. Mo. (2000).

The jurisdiction of the Commission is limited. It is well-settled Missouri law that "state regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly dependent upon the devotion of private property to public use." *State ex rel. M.O. Danciger & Co. v. Public Service Commission*, 205 S.W. 36, 40 (Mo. 1918). The regulation and control of business of a private nature is sustained by reference to the police power, and even then is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare. *Id.* at 41.

As stated more recently by the Southern District, "To constitute a public utility and be subject to regulation by the Commission, a service must be devoted to public use." *Osage Water Company v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 574 (Mo.App.S.D. 1997). The Southern District went on to quote, with approval, the Ohio Supreme Court on the issue, stating, "an entity may be characterized as a public utility if the nature of its operation is a matter of public concern and membership is

indiscriminately and reasonably made available to the general public.” *Id.* quoting *Marano v. Gibbs*, 45 Ohio St.3d 310, 544 N.E.2d 635, 637 (1989). As the Missouri Supreme Court stated, quoting Baron Alderson’s opinion in *Ingate v. Christie*, 3 C.& K. 61: “Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you and me only, that is a matter of special contract.” *Danciger*, 205 S.W. at 42.

Staff’s interpretation of the words “for hire” would expand the certification requirement beyond public use to include private use. Staff’s interpretation ignores that it is *public use* which is essential to certification. Staff fails to acknowledge the case law suggesting that the words “for hire” must be interpreted to mean for hire *by the general public*.

**Applicants do not provide telecommunications service and should not fall under the jurisdiction of the Commission as a public utility**

Applicants own and lease to Sho-Me dark or “un-lit” fibers<sup>1</sup>. Sho-Me provides the necessary facilities to “light” the fibers, thereby making them capable of transmitting telecommunications. Pursuant to its certificate and tariffs, Sho-Me then offers services to, and contracts with, end users.

**Cancellation of Applicants’ Certificate of Service Authority is not contrary to the public interest**

It is noted that the Supreme Court’s recent “Brand X” decision suggests that the FCC may soon be considering the deregulation of broadband fiber services. If CATV companies can offer VOIP to the public over fiber or coaxial cables, without certification,

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<sup>1</sup> In some situations the fibers are actually owned by Sho-Me.

what sense does it to require Applicants to continue to be certificated when they offer no service to the public?

Refusing to allow Applicants to surrender their certificates constitutes a barrier to exit. Such a barrier may not be lawful.

Under Staff's interpretation, Applicants would never be allowed to withdraw their certificates. This interpretation is unwarranted because it ignores that there is a procedure, and there is a standard, for certificates of *basic local* telecommunications service authority to be withdrawn. §392.460 RSMo provides:

"No telecommunications company authorized by the commission to provide or offer basic local or basic interexchange telecommunications service within the state of Missouri on January 1, 1984, shall abandon such service until and unless it shall demonstrate, and the commission finds, after notice and hearing, that such abandonment *will not deprive any customers of basic local or basic interexchange telecommunications service or access thereto* and is not contrary to the public interest.

The legislature has allowed even basic local providers to exit if they establish no customers will be deprived of service. Applicants already meet this statutory condition because they serve no customers. As Applicants serve no customers, cancellation of their Certificate of Service Authority is not contrary to the public interest.


#### **Conclusion**

As Applicants are not required to maintain a Certificate of Service Authority, and as cancellation of their Certificates of Service Authority is not contrary to the public interest in that no customer would be deprived of any telecommunications service, Staff's Recommendation should be denied and Applicants' Applications to have their



Certificates of Service Authority and related tariffs cancelled should be granted by this Commission.

ANDERECK, EVANS, MILNE, PEACE  
& JOHNSON, L.L.C.

By   
Craig S. Johnson MO Bar No. 28179  
Jason A. Paulsmeyer, MO Bar No. 52899  
The Col. Darwin Marmaduke House  
700 East Capitol  
P.O. Box 1438  
Jefferson City, MO 65102-1438  
Telephone: (573) 634-3422  
Fax: (573) 634-7822  
ATTORNEYS FOR PETITIONER

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a true and accurate copy of the foregoing was hand delivered or mailed, via U.S. Mail, postage prepaid, this 13th day of July, 2005, to the following representatives of Staff and OPC:

Bob Berlin  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

Lewis Mills, Jr.  
Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

  
Jason A. Paulsmeyer, MO Bar No. 52899