

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

|   |   |                       |
|---|---|-----------------------|
| In the Matter of a Proposed Rule to     | ) |                       |
| Require all Missouri Telecommunications | ) |                       |
| Companies to Implement an Enhanced      | ) |                       |
| Record Exchange Process to Identify the | ) | Case No. TX-2003-0301 |
| Origin of intraLATA Calls Terminated by | ) |                       |
| Local Exchange Carriers.                | ) |                       |

**STAFF'S RESPONSE TO  
SBC MISSOURI'S APPLICATION FOR REHEARING  
AND ALTERNATIVE REQUEST FOR TEMPORARY VARIANCE OR WAIVER  
AND  
RESPONSE TO MOTION FOR EXPEDITED TREATMENT**

**COMES NOW** the Staff of the Missouri Public Service Commission and, for its Response to SBC Missouri's Application for Rehearing and Alternative Request for Temporary Variance or Waiver, states to the Missouri Public Service Commission as follows.

**Procedural Background**

1. On November 30, 2004, the Commission filed 16 Notices of Proposed Rulemaking with the Missouri Secretary of State, by which it proposed to adopt a chapter of new rules to be known as the Enhanced Records Exchange Rules. After the Notices of Proposed Rulemaking were published in the *Missouri Register*, comments on the proposed rules were received and a public hearing was held. On May 5, 2005, the Commission authorized the Secretary of the Commission to file 16 Orders of Rulemaking with the Secretary of State. The said Orders of Rulemaking were filed with the Secretary of State on May 6, 2005, and copies of the file-stamped Orders of Rulemaking were entered in the EFIS case file for this case on May 11, 2005. The said Orders of Rulemaking were published in the *Missouri Register* on June 15, 2005, and in

the *Code of State Regulations* on July 1, 2005. The subject rules comprising Chapter 29 become effective on July 31, 2005.

2. SBC Missouri (“SBC”) filed its Application for Rehearing, and Alternative Request for Temporary Variance or Waiver on July 14, 2005. Five days later, on July 19, 2005, SBC filed its Motion for Expedited Treatment. Missouri Independent Telephone Company Group (“MITG”) filed its Opposition to SBC Motion for Expedited Treatment on July 21, 2005.

### **The Application for Rehearing**

3. In *State ex rel. Atmos Energy Corporation v. Public Service Commission of the State of Missouri*, 103 S.W.2d 753 (Mo. banc 2003), the Supreme Court held that judicial review of Commission rulemaking is governed by the provisions of Chapter 386, RSMo,<sup>1</sup> and not by the provisions of Chapter 536. The court stated: “[w]hen confronted with a challenge to a rule promulgated by the PSC, a circuit court is vested with jurisdiction to review the rule if the challenging parties have complied with the rehearing procedures set forth in section 386.510.” *Atmos, supra*, at 758.

4. A party that wants to seek judicial review pursuant to § 386.510 must first comply with § 386.500, which governs the procedure for seeking a rehearing before the Commission. Subsection 2 of that statute provides, in part: “No cause or action arising out of any *order or decision* of the commission shall accrue to any corporation or the public counsel or person or public utility unless that party shall have made, *before the effective date of such order or decision*, application to the commission for a rehearing.” (Emphases supplied.)

5. The Staff submits that SBC’s application to the Commission for rehearing is not timely, because SBC did not file the application “before the effective date” of the Commission’s order or decision in this case, as required by § 386.510.2.

6. As mentioned in Paragraph 1, above, the Commission authorized the Secretary of the Commission to file the Orders of Rulemaking with the Secretary of State on May 5, 2005. A copy of this authorization is attached hereto as “Exhibit A.” Although this authorization was not denominated an “order,” it is clear that this is, in fact, the “decision” of the Commission that SBC is challenging in its Application for Rehearing, because the Commission has not issued any other order or decision in the case since it issued this authorization on May 5, 2005. As noted above, the Orders of Rulemaking were filed with the Secretary of State the following day and filed on May 11, 2005 in the EFIS case established for this rulemaking. On May 9, 2005, counsel for the Staff of the Commission forwarded an electronic copy of the Orders of Rulemaking to SBC’s counsel, who acknowledged receipt thereof the same day. SBC had actual notice of the Orders of Rulemaking on May 9, 2005. See Exhibit B, attached.

7. The critical issue in determining whether SBC’s application is timely is the determination of the “effective date” of the Commission’s decision. The Commission’s decision (Exhibit A) does not specify its “effective date.” However § 386.500 does not require it to do so. With respect to Commission orders that do bear an effective date, the Commission loses jurisdiction to withdraw, modify, or amend its decision on the day that the order becomes effective. The Staff submits that it is the general rule that the effective date is the date that the Commission loses jurisdiction.

8. In this case, TX-2003-0301, the Commission lost jurisdiction to take any action to withdraw, modify, or amend its Orders of Rulemaking no later than June 15, 2005, the date on which the Orders of Rulemaking were published in the *Missouri Register*. This is because there is no provision in either Chapter 386 or Chapter 536 that authorizes the Commission to amend an Order of Rulemaking after it has been published in the *Missouri Register*. If the Commission

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<sup>1</sup> Unless otherwise indicated, all statutory references herein are to RSMo 2000, as currently supplemented.

subsequently determines that the provisions of a rule should be changed in some way, the only way to effect such a change is to initiate a new rulemaking proceeding. In this case, the futility of SBC's application is further exacerbated by the fact that it comes after the Orders of Rulemaking have been published in not only the *Missouri Register*, but also in the *Code of State Regulations*. The Commission is therefore simply powerless to grant the application for rehearing that SBC seeks, and the application should therefore be denied.

### **The Application for Variance or Waiver**

9. In the second portion of its July 14 pleading, SBC submitted an alternative request for variance or waiver. The Staff states that it does not presently oppose SBC's alternative request.

### **The Motion for Expedited Treatment**

10. Rule 4 CSR 240-2.080 (16) (C) provides that any party seeking expedited treatment in any case shall include in its pleading a statement that the pleading was filed as soon as it could have been or an explanation why it was not. In this case, SBC made no attempt to comply with this rule. Furthermore, the facts make clear that SBC did not file the pleading "as soon as it could have." SBC knew the contents of the Orders of Rulemaking on May 9, 2005, but did not file its application for rehearing until July 14, 2005 – more than two months later. Even then, it did not file its Motion for Expedited Treatment until another five days had passed. The Motion for Expedited Treatment was not filed as soon as it could have been, and SBC Missouri's motion should be denied.

**WHEREFORE**, the Staff respectfully requests that the Commission overrule SBC's application for rehearing, that it overrule SBC's motion for expedited treatment, and that it grant SBC's request for variance or waiver only if authority can be found that authorizes the Commission to take such action.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

/s/ Keith R. Krueger

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Missouri Bar No. 23857

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 25<sup>th</sup> day of July 2005.

/s/ Keith R. Krueger

## MEMORANDUM

**TO:** Dale Hardy Roberts, Secretary

**DATE:** May 5, 2005

**RE:** Authorization to File Final Orders of Rulemaking with the Secretary of State  
Enhanced Records Exchange Rules  
4 CSR 240-29.010 through 4 CSR 240-29.160

**CASE NO.:** TX-2003-0301

The undersigned Commissioners hereby authorize the Secretary of the Missouri Public Service Commission to file with the Office of the Secretary of State 16 Orders of Rulemaking, to-wit:

4 CSR 240-29.010 – The LEC-to-LEC Network

4 CSR 240-29.020 – Definitions

4 CSR 240-29.030 – General Provisions

4 CSR 240-29.040 – Identification of Originating Carrier for Traffic Transmitted over the LEC-to-LEC Network

4 CSR 240-29.050 – Option to Establish Separate Trunk Groups for LEC-to-LEC Telecommunications Traffic

4 CSR 240-29.060 – Special Privacy Provisions for End Users Who Block Their Originating Telephone Number

4 CSR 240-29.070 – Special Provisions for Wireless-Originated Traffic Transmitted over the LEC-to-LEC Network

4 CSR 240-29.080 – Use of Terminating Record Creation for LEC-to-LEC Telecommunications Traffic

4 CSR 240-29.090 – Time Frame for the Exchange of Records, Invoices, and Payments for LEC-to-LEC Network Traffic

4 CSR 240-29.100 – Objections to Payment Invoices

4 CSR 240-29.110 – Duty to File Tariffs for Compensable Telecommunications Traffic in the Absence of Commission-Approved Interconnection Agreements

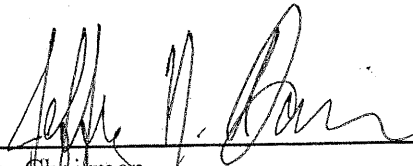
4 CSR 240-29.120 – Blocking Traffic of Originating Carriers and/or Traffic Aggregators by Transiting Carriers

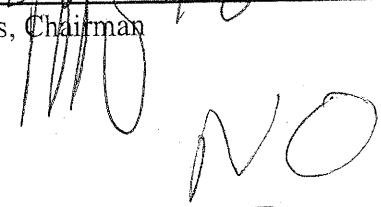
4 CSR 240-29.130 – Requests of Terminating Carriers for Originating Tandem Carriers to Block Traffic of Originating Carriers and/or Traffic Aggregators

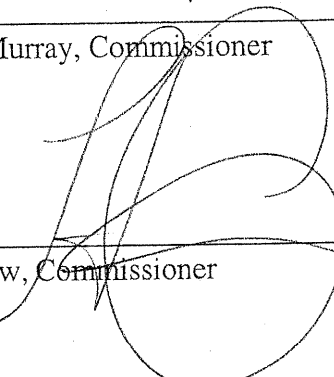
4 CSR 240-29.140 – Blocking Traffic of Transiting Carriers by Terminating Carriers

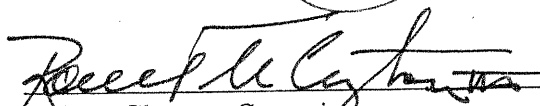
4 CSR 240-29.150 – Confidentiality

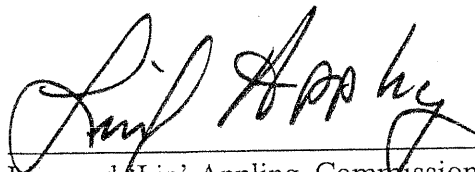
4 CSR 240-29.160 – Audit Provisions

  
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Jeff Davis, Chairman

  
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Connie Murray, Commissioner

  
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Steve Gaw, Commissioner

  
\_\_\_\_\_  
Robert Clayton, Commissioner

  
\_\_\_\_\_  
Linward Lin' Appling, Commissioner

**From:** BUB, LEO J (Legal) [mailto:lb7809@sbcc.com]  
**Sent:** Monday, May 09, 2005 9:36 AM  
**To:** keith.krueger@psc.mo.gov  
**Subject:** RE: Enhanced Records Exchange Rules

Thanks Keith.

What are you doing in the office today? Isn't it a state holiday today (Truman's Birthday).

-----Original Message-----

**From:** keith.krueger@psc.mo.gov [mailto:keith.krueger@psc.mo.gov]  
**Sent:** Monday, May 09, 2005 9:22 AM  
**To:** BUB, LEO J (Legal)  
**Subject:** FW: Enhanced Records Exchange Rules

Here is an electronic copy of the Orders of Rulemaking, which we were just getting ready to file with the Secretary of State's office. I think we did make two minor typographical changes to this document before we filed it. On the very first page, we corrected the spelling of the name of Jim Fischer's law firm. And on page 17 of the Order of Rulemaking for 4 CSR 240-29.010, we deleted a space in the spelling of the phrase "LEC-to-LEC Network," which appears in underscored bold-face type near the bottom of the page. Please let me know if you need to see anything else.

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**From:** Schnieders, Carla  
**Sent:** Friday, May 06, 2005 10:55 AM  
**To:** Krueger, Keith  
**Subject:** RE: Enhanced Records Exchange Rules

<<ERE Rules -- Final Orders of Rulemaking. pdf.pdf>>

Exhibit B