

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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| In the Matter of the Local Exchange Rate |) | |
| Tariff Filing of BPS Telephone Company |) | <u>File No. IT-2012-0374</u> |
| To Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0708 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |
| | | |
| In the Matter of the Request of Alma |) | <u>File No. IT-2012-0375</u> |
| Telephone Company for Expedited |) | Tracking No. JI-2012-0739 |
| Treatment of Local Rate Increase |) | Effective: June 15, 2012 |
| | | |
| In the Matter of the Revised Tariff Filing of |) | |
| Citizens Telephone Company of Higginsville, |) | <u>File No. IT-2012-0377</u> |
| MO to Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0709 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |
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| In the Matter of the Revised Tariff Filing |) | |
| of Ellington Telephone Company to |) | <u>File No. IT-2012-0378</u> |
| Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0710 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |
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| In the Matter of the Revised Tariff Filing |) | |
| of Farber Telephone Company to |) | <u>File No. IT-2012-0379</u> |
| Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0711 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |
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| In the Matter of the Revised Tariff Filing |) | |
| of Goodman Telephone Company to |) | <u>File No. IT-2012-0380</u> |
| Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0725 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |
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| In the Matter of the Revised Tariff Filing |) | |
| of Granby Telephone Company to |) | <u>File No. IT-2012-0381</u> |
| Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0728 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |
| | | |
| In the Matter of the Revised Tariff Filing |) | |
| of K.L.M. Telephone Company to |) | <u>File No. IT-2012-0382</u> |
| Comply with the FCC's Nov. 18, 2011 |) | Tracking No. JI-2012-0712 |
| Order Establishing a Local Rate Floor |) | Effective: July 1, 2012 |

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| In the Matter of the Revised Tariff Filing of Miller Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0383</u> Tracking No. JI-2012-0719 Effective: July 1, 2012 |
| In the Matter of the Revised Tariff Filing of Oregon Farmers Mutual Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0384</u> Tracking No. JI-2012-0713 Effective: July 1, 2012 |
| In the Matter of the Revised Tariff Filing of Ozark Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0385</u> Tracking No. JI-2012-0726 Effective: July 1, 2012 |
| In the Matter of the Revised Tariff Filing of Peace Valley Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0386</u> Tracking No. JI-2012-0715 Effective: July 1, 2012 |
| In the Matter of the Revised Tariff Filing of Seneca Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0387</u> Tracking No. JI-2012-0727 Effective: July 1, 2012 |
| In the Matter of the Revised Tariff Filing of Steelville Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0388</u> Tracking No. JI-2012-0721 Effective: July 1, 2012 |
| In the Matter of the Revised Tariff Filing of Stoutland Telephone Company to Comply with the FCC's Nov. 18, 2011 Order Establishing a Local Rate Floor |)))) | <u>File No. IT-2012-0389</u> Tracking No. JI-2012-0714 Effective: June 28, 2012 |
| In the Matter of the Revised Tariff Filing of FairPoint Communications Missouri, Inc. d/b/a FairPoint Communications |))) | <u>File No. IT-2012-0390</u> Tracking No. JI-2012-0720 Effective: July 1, 2012 |

ORDER APPROVING TARIFFS AND GRANTING MOTIONS FOR EXPEDITED TREATMENT

Issue Date: May 24, 2012

Effective Date: June 1, 2012

Background

The tariff filings from the above captioned telephone companies (collectively “Companies”) have been necessitated by an order issued on November 18, 2011, by the Federal Communications Commission (FCC). On that date, the FCC issued its *USF/ICC Transformation Order* (FCC *USF/ICC Order*).¹ Among other things, the FCC’s *USF/ICC Order* set a minimum \$10.00 local rate floor for residential service that all incumbent local exchange companies (ILECs) must meet or else lose federal High Cost Loop (HCL) Universal Service Fund (USF) support in the amount by which the rate floors exceed the company’s local rates. The plain language of the FCC’s *USF/ICC Order* appeared to require the local rates to be in effect on July 1, 2012 when it stated: “We will phase in this rate floor in three steps, **beginning with an initial rate floor of \$10 for the period July 1, 2012 through June 30, 2013.**” (Emphasis added).² The Companies reasonably relied on this language as they prepared their rate increase tariffs and customer notices to make the rates effective on July 1, 2012.

On May 14, 2012, the FCC released its *Third Order on Clarification*, (“*Third Order*”) addressing various effective dates and changing certain reporting dates and requirements.³ Among other things, the *Third Order* established **June 1, 2012** as the reporting date for purposes of reporting whether the Companies’ basic local rates meet the FCC’s \$10.00

¹ *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 et al., FCC 11-161. The FCC’s order determined that many rural telephone companies have been using Federal Universal Service funding to subsidize artificially low end-user rates. For that reason, the FCC ordered that it would “reduce, on a dollar for dollar basis, high cost loop support to the extent that a carrier’s local rates are below a specified urban local rate floor.” *Id.* at ¶ 197. The FCC’s order set that local rate floor at \$10 per month for the period of July 1, 2012 through June 30, 2013. The rate floor will rise to \$14 per month on July 1, 2013, and may be further increased in subsequent years. *Id.* at ¶ 239.

² *Id.* at ¶ 239.

³ *Third Order on Reconsideration*, WC Docket No. 10-90 et al., FCC 12-52.

benchmark. As a result, the Companies will lose six months of USF HCL support if their local rates do not meet the \$10.00 rate floor by June 1, 2012 rather than July 1, 2012.

By the time the *Third Order* was issued on May 14, 2012, some of the Companies had already filed their FCC compliance tariffs with the Commission, while others were in the process of preparing those tariffs, believing they would have until the end of May to issue them with the required 30-day effective dates.⁴ Subsequent to the issuance of the *Third Order*, on May 16 and 17, 2012, the Companies that needed to completed their tariff filings. All of the effective dates for the tariffs submitted by the Companies extend beyond the June 1, 2012 FCC requirement, and all of the Companies now seek to expedite the approval of their tariffs and expedite the effective date of their tariffs so they will become effective on June 1, 2012.

On May 23, 2012, the Commission's Staff filed its verified recommendation and memorandum addressing all of the motions and associated tariffs. Staff recommends the tariffs be approved for setting just and reasonable rates, and that the motions for expedited treatment be granted.

Jurisdiction and Discretionary Authority

The Companies' requests for expedited treatment on their proposed tariffs are within the Commission's jurisdiction to decide pursuant to Chapter 392, RSMo 2000.⁵ Because no law requires a hearing on these tariffs or the motions for expedited treatment these are non-contested cases.⁶ Non-contested cases do not require formal proceedings or hearings

⁴ See Sections 392.220.2 and 392.230.5, RSMo Supp. 2010.

⁵ See in particular Sections 392.200, 392.220.2 and 392.230.5, RSMo Supp. 2010.

⁶ Section 536.010(4), RSMo Supp. 2010, defines a "contested case" as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing."

before the Commission,⁷ and as such, there is no contested case evidentiary record.⁸ Being non-contested cases, the Commission “acts on discretion or on evidence not formally adduced and preserved.”⁹ The competent and substantial evidence standard of Article V, Section 18, Mo. Const., does not apply to administrative cases in which a hearing is not required by law.¹⁰ Consequently, the Commission will exercise its discretion based upon the parties’ verified filings. There is no requirement for the Commission to make findings of fact when it exercises its discretion in a non-contested case.¹¹

Tariff Approval

The Commission has recently dealt with two other cases facing similar if not identical circumstances: (1) File Number TR-2012-0298: In the Matter of the Revised Tariff Filing of

⁷ “The term “hearing” presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... ‘Hearing’ involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... “ The term has been held synonymous with ‘opportunity to be heard’. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm’n of State of Mo.*, 776 S.W.2d 494, 495 -496 (Mo. App. 1989). The requirement for a hearing is met when the opportunity for hearing was provided and no proper party requested the opportunity to present evidence. *Id.*

⁸ *Sapp v. City of St. Louis*, 320 S.W.3d 159, 163 (Mo. App. 2010). “The key to the classification of a case as contested or noncontested is the requirement of a hearing. The term “hearing,” as used in section 536.010(4) means a proceeding at which a ‘measure of procedural formality’ is followed. Procedural formalities in contested cases generally include: notice of the issues (section 536.067); oral evidence taken upon oath or affirmation and the cross-examination of witnesses (section 536.070); the making of a record (section 536.070); adherence to evidentiary rules (section 536.070); and written decisions including findings of fact and conclusions of law (section 536.090).” (Internal citations omitted). *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 507 (Mo. banc 2009). Being a non-contested case, there is no evidence, no record, and no written and separately stated findings of fact. *State ex rel. Public Counsel v. Public Service Comm’n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006); Section 536.090. The decision reached by the Commission is totally a matter of the exercise of its discretion. *Id.* In a non-contested case, judicial review is restricted to determining only whether or not the Commission abused its discretion in denying a hearing (if a hearing was denied) and whether or not the commission’s order was lawful. *Id.*

⁹ *Public Counsel*, 210 S.W.3d at 353.

¹⁰ *Id.* Moreover, the Companies are the only parties holding a substantive right that could be affected by the Commission’s decision. Thus, no other party has a substantive due process right requiring a pre-deprivation evidentiary hearing. Utility customers have no vested property rights in utility rates that are protected by the Fifth and Fourteenth Amendments. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 31 -32 (Mo. banc 1975).

¹¹ *Public Counsel*, 210 S.W.3d at 355.

Choctaw Telephone Company; and, (2) File Number TR-2012-0299: In the Matter of the Revised Tariff Filing of MoKan Dial, Inc. A similar analysis for approval of the FCC compliance tariffs in an expedited fashion in these matters applies to the current cases that are the subject of this order.

Section 392.200.1, RSMo Supp. 2010, requires that every telecommunications company impose “just and reasonable” charges on its customers. Under the old system of regulation, Section 392.240.1, RSMo 2000, gave the Commission authority to review a telephone company’s earnings and expenses to determine whether the company was indeed charging “just and reasonable” rates. However, in 2008, the legislature modified Section 392.420, RSMo Supp. 2010, to allow an incumbent local exchange companies to waive application of specified statutory provisions if the company was subject to competition within the exchange it serves. The statute specifically allows the Companies to waive application of the earnings review provision of Section 392.240.1, RSMo 2000.¹² The Companies have exercised their right to waive the application of Section 392.240.1;¹³ however, the Companies cannot, waive the “just and reasonable” requirements of Section

¹² Section 392.420, RSMo Supp. 2010, provides in pertinent part:

Notwithstanding any other provision of law in this chapter and chapter 386, where an alternative local exchange telecommunications company is authorized to provide local exchange telecommunications services in an incumbent local exchange telecommunications company’s authorized service area, the incumbent local exchange telecommunications company may opt into all or some of the above listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. In addition, where an interconnected voice over Internet protocol service provider is registered to provide service in an incumbent local exchange telecommunications company’s authorized service area under section 392.550, the incumbent local exchange telecommunications company may opt into all or some of the above-listed statutory and commission rule waivers by filing a notice of election with the commission that specifies which waivers are elected. ...

The preceding paragraph in Section 392.420 specifically lists 392.240.1 as a subsection that may be waived.

¹³ Staff Recommendation Page 4.

392.200.1. Thus, the Commission still must determine whether the revised rates the Companies would charge under its revised tariffs are “just and reasonable”.

There is sufficient information available to the Commission to conclude that the Companies’ revised tariff filings will result in “just and reasonable” rates. As the FCC found in its order, the local rates currently charged by the Companies are far below the local rates charged by urban telephone companies. The FCC’s order requires the Companies to raise those rates to an amount closer to average or lose USF funding. Additionally, Staff has completed an analysis and comparisons demonstrating that the tariff rates proposed are reasonable in light of the rates charged for local telephone service by other small, rural, incumbent local telephone companies. It is reasonable to conclude that average and comparable rates are “just and reasonable” rates.¹⁴

After reviewing Staff’s verified recommendation and memorandum, the Companies’ filings, and the FCC’s ordered changes, the Commission independently and impartially finds and concludes that the tariffs filed by the Companies set just and reasonable rates.

Motions for Expedited Treatment

All of the Companies have sought expedited treatment on their FCC compliance tariffs noting that they are responding as quickly as possible in relation to the issuance of the FCC’s *USF/ICC Order*. Because the Companies have already begun the billing process, June bills and the customer notice are already being processed and may in some

¹⁴ As the Commission noted in File Number TR-2012-0298(Choctaw) and File Number TR-2012-0299 (MoKan Dial), even if an earnings review were undertaken, such a review would be unlikely to yield reliable information at this time. The problem is that the FCC’s order does not just affect the small telephone companies’ local rates. Another portion of that order requires the Companies to reduce their intra-state access rates by July 1, 2012 and to move to a bill and keep regime for intra-MTA wireless traffic. These changes will have an impact on the revenue earned by the Companies and would make a historical review of the companies’ earnings essentially meaningless for determining their likely future earnings.

cases have already gone out to customers. Consequently, the Companies requested that the Commission issue an order no later than May 23, 2012 approving the Company's tariffs to be effective June 1, 2012, with the understanding that the proposed rate changes will not be implemented until July 1, 2012.

The Companies assert that expedited relief will prevent harm to both the Companies and their customers. Specifically the Companies state that expedited relief will: (1) allow the Companies to comply with the FCC's *USF/ICC Order*; (2) prevent the company from losing six months of USF HCL resulting in substantial harm and revenue losses to the Companies that can impair their ability to continue providing service in high-cost, low-density rural areas; (3) the Companies' customers will see no rate changes on their bills until July 1, 2012 as originally intended; and (4) the Companies' customers will receive 30 days customer notice of the changes without the need for a confusing second customer notice.

Section 392.220.2, RSMo Supp. 2012, provides, in pertinent part: "The Commission for good cause shown may allow changes in rates, charges or rentals without requiring thirty days' notice, under such circumstances as it may prescribe." "Good cause," is defined as showing a "legally sufficient ground or reason" under the circumstances.¹⁵ Good cause means a good faith request for reasonable relief.¹⁶ To constitute good cause, the reason "must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical, and good faith is an essential element."¹⁷ Commission Rule 4 CSR 240-

¹⁵ *Wilson v. Morris*, 369 S.W.2d 402, 407 (Mo.1963); *Black's Law Dictionary*, 6th ed., West Group, 1990, p. 692.

¹⁶ *American Family Ins. Co. v. Hilden*, 936 S.W.2d 207 (Mo. App. 1996).

¹⁷ *Schuenemann v. Route 66 Rail Haven, Ltd.*, 353 S.W.3d 691, 696 (Mo. App. 2011), *citing to*, *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. 1977).

2.080(14) lists additional requirements when a utility requests expedited treatment and it provides:

(14) Any request for expedited treatment shall include the words “Motion for Expedited Treatment” in the title of the pleading. The pleading shall also set out with particularity the following:

(A) The date by which the party desires the commission to act;

(B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party’s customers or the general public, if the commission acts by the date desired by the party; and

(C) That the pleading was filed as soon as it could have been or an explanation why it was not.

The unique circumstances created by the *FCC’s Third Order* constitute good cause to approve the Companies’ tariffs and direct that they become effective on an expedited basis. The Commission independently and impartially finds and concludes that the Companies have satisfied all of the statutory and rule requirements to received expedited treatment on their proposed tariffs. The Commission also independently and impartially finds and concludes that good cause has been shown to waive the thirty-day notice requirements of Sections 392.220.2 and 392.230.5, RSMo, Supp. 2012 and to direct the tariffs to become effective on an expedited basis.

THE COMMISSION ORDERS THAT:

1. The tariff filed by BPS Telephone Company in File Number IT-2012-0374, assigned Tariff Tracking Number JI-2012-0708, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. BPS Telephone Company’s motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

2. The tariff filed by Alma Telephone Company in File Number IT-2012-0375, assigned Tariff Tracking Number JI-2012-0739, bearing an issue date of May 16, 2012 and an effective date of June 15, 2012 is approved. Alma Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

3. The tariff filed by Citizens Telephone Company of Higginsville, Missouri in File Number IT-2012-0377, assigned Tariff Tracking Number JI-2012-0709, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Citizens Telephone Company of Higginsville, Missouri's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

4. The tariff filed by Ellington Telephone Company in File Number IT-2012-0378, assigned Tariff Tracking Number JI-2012-0710, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Ellington Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

5. The tariff filed by Farber Telephone Company in File Number IT-2012-0379, assigned Tariff Tracking Number JI-2012-0711, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. Farber Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

6. The tariff filed by Goodman Telephone Company in File Number IT-2012-0380, assigned Tariff Tracking Number JI-2012-0725, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Goodman Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

7. The tariff filed by Granby Telephone Company in File Number IT-2012-0381, assigned Tariff Tracking Number JI-2012-0728, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Granby Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

8. The tariff filed by K.L.M. Telephone Company in File Number IT-2012-0382, assigned Tariff Tracking Number JI-2012-0712, bearing an issue date of May 9, 2012 and an effective date of July 1, 2012 is approved. K.L.M. Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

9. The tariff filed by Miller Telephone Company in File Number IT-2012-0383, assigned Tariff Tracking Number JI-2012-0719, bearing an issue date of May 10, 2012 and an effective date of July 1, 2012 is approved. Miller Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

10. The tariff filed by Oregon Farmers Mutual Telephone Company in File Number IT-2012-0384, assigned Tariff Tracking Number JI-2012-0713, bearing an issue date of May 11, 2012 and an effective date of July 1, 2012 is approved. Oregon Farmers Mutual Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

11. The tariff filed by Ozark Telephone Company in File Number IT-2012-0385, assigned Tariff Tracking Number JI-2012-0726, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Ozark Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

12. The tariff filed by Peace Valley Telephone Company in File Number IT-2012-0386, assigned Tariff Tracking Number JI-2012-0715, bearing an issue date of May 9, 2012

and an effective date of July 1, 2012 is approved. Peace Valley Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

13. The tariff filed by Seneca Telephone Company in File Number IT-2012-0387, assigned Tariff Tracking Number JI-2012-0727, bearing an issue date of May 15, 2012 and an effective date of July 1, 2012 is approved. Seneca Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

14. The tariff filed by Steelville Telephone Company in File Number IT-2012-0388, assigned Tariff Tracking Number JI-2012-0721, bearing an issue date of May 11, 2012 and an effective date of July 1, 2012 is approved. Steelville Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

15. The tariff filed by Stoutland Telephone Company in File Number IT-2012-0389, assigned Tariff Tracking Number JI-2012-0714, bearing an issue date of May 9, 2012 and an effective date of June 28, 2012 is approved. Stoutland Telephone Company's motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

16. The tariff filed by FairPoint Communications Missouri, Inc. d/b/a FairPoint Communications in File Number IT-2012-0390, assigned Tariff Tracking Number JI-2012-0720, bearing an issue date of May 11, 2012 and an effective date of July 1, 2012 is approved. FairPoint Communications Missouri, Inc. d/b/a FairPoint Communications' motion for expedited treatment is granted and the tariff shall become effective on June 1, 2012.

17. The thirty-day notice requirements of Sections 392.220.2 and 392.230.5, RSMo Supp. 2012, are waived with respect to all tariffs approved in paragraphs 1 through 16 above, and as delineated in the body of this order.

18. The Staff of the Missouri Public Service Commission's May 23, 2012 verified Recommendation and Memorandum, as amended on May 24, 2012, is attached to this order as Attachment A.

19. This order shall become effective on June 1, 2012.

20. These files shall be closed on June 2, 2012.

BY THE COMMISSION



Steven C. Reed
Secretary

(SEAL)

Harold Stearley, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri
on this 24th day of May, 2012.