

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

In the Matter of Great Plains Energy)	Case No. EM-2016-0324
Incorporated's Acquisition of Westar)	
Energy, Inc. and Related Matters)	

**SUPPLEMENT TO GREAT PLAINS ENERGY INCORPORATED'S JUNE 15, 2016
REPLY TO STAFF'S RESPONSE TO VERIFIED MOTION FOR RECONSIDERATION**

Great Plains Energy Incorporated ("GPE" or "Company"), pursuant to 4 CSR 240-2.080(18), respectfully supplements its Reply to Staff's Response to GPE's Motion for Reconsideration which was filed by GPE on June 15, 2016 ("Reply") as follows:

1. In paragraph 12 of GPE's Reply, the Company cited six cases in which the question of the Commission's jurisdictional authority to approve certain specific merger and/or acquisition transactions was raised by the Office of the Public Counsel ("OPC") in much the same fashion as in this proceeding. The Commission declined to exercise jurisdiction to approve the transactions in each case, three of which asserted Section 393.190 authority.

2. Several of the cited cases were decided in the late 1990's or early 2000's before the decisions were easily available in the Commission's Electronic Filing and Information System ("EFIS"). Since these decisions are not readily available in EFIS or are otherwise more difficult to locate, GPE respectfully supplements its June 15 Reply by providing copies of the decisions for the convenience of the Commissioners and Regulatory Law Judge.

3. Attached to this pleading are the following orders from the Commission:

(1) Order Closing Case, In re Proposed Acquisition of Cilcorp, Inc. by Ameren Corp., No. EO-2002-1082 (2002) (declining §393.190 jurisdiction)(hereafter *Ameren/Cilco* matter);

- (2) Order Closing Case, In re Proposed Acquisition of Mo.-Am. Water Co. and Am. Water Works Co. by the German Corp. RWE AG, No. WO-2002-206 (2001) (declining §393.190 jurisdiction)(hereafter *Missouri-American Water/RWE* matter);
- (3) Report & Order, In re Merger of American Water Works Co. with Nat'l Enterprises Inc. and the Indirect Acquisition by American Water Works Co. of St. Louis Water Co., No. WM-99-224 (1999) (declining §393.190 jurisdiction)(hereafter *American Water Works/National Enterprises* matter);
- (4) Report & Order, In re Merger of SBC Commun. Inc. and Ameritech Corp., No. TM-96-76 (1998)(hereafter *SBC/Ameritech* matter);
- (5) Order Denying Motion to Reconsider Order Closing Case, In re Proposed Merger between GTE Corp. and Bell Atlantic, No. TM-99-261 (1999)(hereafter *GTE/Bell Atlantic* matter);
- (6) Order Closing Case, In re Proposed Acquisition of AT&T Corp. by SBC Commun., Inc., No. TM-2005-0355 (2005)(hereafter *AT&T/SBC* matter).

4. In the *Ameren/Cilco* matter, OPC filed a Motion to Review Proposed Acquisition of Cilcorp by Ameren Corporation” on May 20, 2002. On May 28, 2002, the Staff of the Commission filed a response to OPC’s motion stating that the Commission does not have jurisdiction to approve or disapprove the transaction, but that it could nonetheless investigate the effects of the transaction on AmerenUE’s customers. (Order Closing Case, Case No. EO-2002-1081, p. 2)

5. In the *Missouri-American Water/RWE* matter, OPC filed a “Motion to Review Proposed Acquisition of Missouri-American Water Company and American Water Works Company by RWE AG, a German Corporation” on October 25, 2001. The Staff filed a pleading

concurring with the position taken by Missouri-American that the Commission did not have jurisdiction to review the transaction on December 7, 2001. The Commission denied the OPC's motion to review the transaction on December 13, 2001. (Report And Order, Case No. WM-99-224, p. 7)

6. In the *American Water Works/National Enterprises* matter, OPC requested that the Commission open a docket to consider the proposed merger of American Water Works Company and National Enterprises, Inc. on November 18, 1998. On December 8, 1998, the Staff filed a response to Public Counsel's motion concurring in the position of American Water Works, and stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case in the pending merger. (Report and Order, Case No. WM-99-224, p. 4). On March 23, 1999, the Commission denied the Motion to Open a Docket filed by the OPC. (*Id.* at 7)

7. In the *SBC/Ameritech* matter, the OPC filed a Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing on August 21, 1998. On August 31, 1998, the Staff filed a response to OPC's motion concurring in the position of SBC which stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case in the pending merger. (Report and Order, TM-99-76, 7 Mo.P.S.C.3d 528, 530 (Oct. 8, 1998). After oral argument, the Commission determined "that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies." (*Id.* at 532)

8. In the *GTE/Bell Atlantic* matter, OPC filed a motion to establish a case for the purpose of investigating the proposed merger between Bell Atlantic Corporation and GTE Corporation, the parent of GTE Midwest Incorporated. GTE filed a response in which it requested that the Commission summarily deny Public Counsel's motion to establish a case, citing the similarities between its proposed merger and the merger that was the subject of Case No. TM-99-76 (involving SBC and Ameritech). On December 31, 1998, the Commission issued an order that expressly stated that the OPC should explain the reasons why OPC believed the Commission's decision in the case should be different than the Commission's decision in Case No. TM-99-76. Public Counsel chose not to file a response, and the Commission issued an order dismissing and closing the case for failure to prosecute. Subsequently it also denied OPC's Motion to Reconsider Closing Case. (Order Denying Motion To Reconsider Order Closing Case, pp. 1-3)

9. In the *AT&T/SBC* matter, OPC filed a pleading that requested that the Commission conduct an investigation, including evidentiary hearings and public hearings into the proposed merger of AT&T Corp. and SBC Communications Inc. AT&T and SBC argued that it would be inappropriate to conduct the investigation requested by OPC because the Commission did not have the authority to approve the proposed merger under Missouri statutes. The Commission agreed, stating: "The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level, and it will adhere to that position here." (Order Closing Case, Case No. TM-2005-0355, p. 3). The Commission further concluded that "the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise. The

Commission will not conduct an investigation into the proposed transaction, and will close this case.” (*Id.* at 3)

10. The currently pending matter involving GPE and Westar Energy is very similar to each of the above-cited cases. The existence of the 2001 Stipulation, and specifically section II(7) thereof, does not warrant a different result in the instant proceeding because no public utility under Missouri law is either acquiring Westar or being acquired by GPE and, as Staff has acknowledged, the lawful jurisdiction of the Commission cannot be expanded by agreement.¹ In this case, the Commission does not have the statutory authority to assert jurisdiction to approve or disapprove the transaction. However, the Commission does have the authority to review the impact of the transaction upon the public utilities within its jurisdiction, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company.

11. GPE has presented no new argument in this supplemental filing and thus no responsive pleadings are warranted. However, to the extent that Staff and/or OPC desire to file a responsive pleading, GPE asks that the Commission direct that any such responsive pleadings be filed on an expedited basis such that the Commission can issue its order on the legal question of its jurisdictional authority to approve GPE’s acquisition of Westar no later than July 1, 2016.

WHEREFORE, GPE respectfully submits this supplement to its Reply to Staff’s Response to Great Plains Energy Incorporated’s Verified Motion for Reconsideration.

¹ See Staff’s Reply to Great Plains Energy, paragraph 9, p. 8 filed herein on June 7, 2016.

/s/ Robert J. Hack

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Attorneys for Great Plains Energy Incorporated

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the below named parties by email or U.S. mail, postage prepaid, this 21st day of June 2016.

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/s/ Robert J. Hack

Attorney for Great Plains Energy Incorporated

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service
Commission held at its office in
Jefferson City on the 13th day of
June, 2002.

In the Matter of the Proposed Acquisition
of Cilcorp, Inc. by Ameren Corporation,
Parent Company of Union Electric Co.
d/b/a AmerenUE

)
)
)
)

Case No. EO-2002-1082

ORDER CLOSING CASE

This case was opened when the Office of the Public Counsel, on May 20, 2002, filed a "Motion to Review Proposed Acquisition of Cilcorp by Ameren Corporation." In that motion, Public Counsel requested that the Commission open a case to review the proposed acquisition of Cilcorp, Inc. by Ameren Corporation. Public Counsel asserts that the Commission has jurisdiction:

The Commission has jurisdiction over the proposed transaction pursuant to §§386.250 and 393.190 RSMo (2000). The Commission's authority to regulate the sale, transfer, or disposition of a utility's system or assets is broad. State ex rel. Marigney Creek v. PSC, 537 S.W.2d 388 (Mo. banc 1988). In addition, §386.250 RSMo provides the Commission with jurisdiction and supervision over "all public utility corporations and persons whatsoever subject to the provisions of this chapter." §386.250(5). §386.250(1) RSMo grants the Commission jurisdiction over the "manufacture, sale or distribution of . . . electricity for light, heat or power, within the state, and to persons or corporations owning, leasing, operating or controlling the same...."

Cilcorp, Inc. is not a regulated electric corporation or public utility, nor is Ameren Corporation. Ameren Corporation is the parent of Union Electric Company d/b/a AmerenUE, which is a regulated electric corporation and a public utility. Public

Counsel stated that it has concerns about the cost of the acquisition and about a report that Cilcorp is “short on power.”

Public Counsel makes no attempt to distinguish the circumstances in this case from those in Case No. TM-96-76, Case No. WM-99-224, Case No. WM-2000-318, Case No. WO-2002-206, or any of a number of recent cases in which the Commission has determined that “there is nothing in the statutes that confers jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company.”

On May 28, the Staff of the Commission filed a response to Public Counsel’s motion to review the transaction. Staff stated that the Commission does not have jurisdiction to approve or disapprove the transaction, but that it could nonetheless investigate the effects of the transaction on AmerenUE’s customers. Staff asserted that these effects could be deleterious, and raised concerns about the effect of the acquisition on the joint dispatch agreement between AmerenUE and its affiliates. Staff points out that in a Stipulation and Agreement filed by the parties and approved by the Commission in Case No. EA-2000-37, AmerenUE agreed that proposed changes to the joint dispatch agreement which either the Staff or Public Counsel deem to be substantive must be submitted to the Commission for approval, and that all proposed changes to the joint dispatch agreement which AmerenUE asserts to be non-substantive must be submitted to the Staff and Public Counsel before being filed with the Federal Energy Regulatory Commission.

In a pleading filed on June 5, AmerenUE replied to Staff's response. AmerenUE stated that it has no plans to change the joint dispatch agreement, nor does it expect to propose any changes to it, as a result of Ameren Corporation's acquisition of Cilcorp. AmerenUE stated that it fully intends to abide by the commitments it made as set forth in the stipulation in Case No. EO-2000-37, and that it will submit to the Staff and Public Counsel all proposed changes to the joint dispatch agreement.

The Commission has reviewed the pleadings, the cases and the Missouri statutes cited by parties, and the structure of the proposed transaction. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company. The Commission's past approach to transactions of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction, it will close this case.

IT IS THEREFORE ORDERED:

1. That the motion to review the proposed transaction filed by the Office of the Public Counsel on May 20, 2002, is denied.
2. That this order shall become effective on June 23, 2002.

3. That this case may be closed on June 24, 2002.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Simmons, Ch., Murray, Lumpe and Forbis, CC., concur
Gaw, C., dissents

Mills, Deputy Chief Regulatory Law Judge

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
December 13, 2001**

CASE NO: WO-2002-206

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

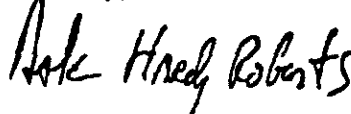
General Counsel
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James F. Mauze'
The Midvale Building
112 South Hanley
St. Louis, Mo 63105-3418

Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service
Commission held at its office in
Jefferson City on the 13th day of
December, 2001.

In the Matter of the Proposed Acquisition)	
of Missouri-American Water Company and)	<u>Case No. WO-2002-206</u>
American Water Works Company by the)	
German Corporation RWE AG)	

ORDER CLOSING CASE

This case was opened when the Office of the Public Counsel, on October 25, 2001, filed a "Motion to Review Proposed Acquisition of Missouri-American Water Company and American Water Works Company, by RWE AG, a German Corporation." In that motion, Public Counsel requested that the Commission open a case to review the proposed acquisition of Missouri-American Water Company and its parent American Water Works Company by the German corporation RWE AG.

American Water Works Company owns Missouri-American Water Company, a Missouri corporation that operates as a regulated water utility in Missouri. American Water Works is not a regulated water corporation or public utility, nor is RWE.

On November 20, Missouri-American, American Water Works, and RWE filed a joint response opposing Public Counsel's motion. They asserted that the transaction is between the parent company of Missouri-American and a non-regulated German corporation, and that the Commission does not have jurisdiction to review the transaction. They noted that when the transaction is complete, Missouri-American will

remain a wholly owned subsidiary of American Water Works, and that the transaction will be transparent to its customers.

On November 28, Public Counsel filed a pleading responding to Missouri-American, American Water Works, and RWE. On December 4, Missouri-American, American Water Works, and RWE responded to Public Counsel's November 28 reply. On December 7, the Staff of the Commission filed a pleading concurring with the position taken by Missouri-American, American Water Works, and RWE.

The Commission has reviewed the pleadings, the cases and the Missouri statutes cited by parties, and the structure of the proposed transaction. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine the acquisition of a non-regulated corporation by another non-regulated corporation, even though one of them may own a Missouri-regulated utility company. The Commission's past approach to transactions of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction, it will close this case.

IT IS THEREFORE ORDERED:

1. That the motion to review the proposed transaction filed by the Office of the Public Counsel on October 25, 2001, is denied.
2. That this order shall become effective on December 23, 2001.

3. That this case may be closed on December 24, 2001.

BY THE COMMISSION

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(S E A L)

Simmons, Ch., Murray, Gaw and Forbis, CC., concur
Lumpe, C., absent

Mills, Deputy Chief Regulatory Law Judge

ALJ/Secretary:

Mills/Doyce

12-11

Date Circulated

40-2002-206
CASE NO.

KS

Simmons, Chair

CM
Murray, Commissioner

West
Lumpe, Commissioner

7/16
Gaw, Commissioner

Forbis
Forbis, Commissioner

12-13

Agenda Date

Action taken:

4-0 AS

Must Vote Not Later Than

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

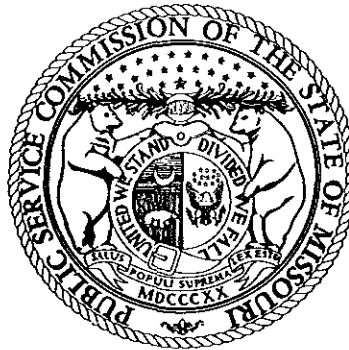
WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 13th day of Dec. 2001.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge



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



In the Matter of the Merger of)
American Water Works Company)
with National Enterprises, Inc.)
and the Indirect Acquisition by)
American Water Works Company of)
the Total Capital Stock of)
St. Louis County Water Company)

Case No. WM-99-224

REPORT AND ORDER

Issue Date: March 23, 1999

Effective Date: April 2, 1999

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Merger of)	
American Water Works Company)	
with National Enterprises, Inc.)	
and the Indirect Acquisition by)	<u>Case No. WM-99-224</u>
American Water Works Company of)	
the Total Capital Stock of)	
St. Louis County Water Company)	

APPEARANCES

Paul Boudreau, Attorney at Law, and W.R. England, III, Attorney at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for Missouri-American Water Company.

James M. Fischer, Attorney at Law, James M. Fischer, P.C., 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County.

Richard T. Clottone, Attorney at Law, 535 North New Ballas Road, St. Louis, Missouri 63141, for St. Louis County Water Company

Shannon Cook, Assistant Public Counsel, and John B. Coffman, Deputy Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

William K. Haas, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

DEPUTY CHIEF REGULATORY LAW JUDGE: Lewis R. Mills, Jr.

REPORT AND ORDER

Procedural History

This case was opened to receive a Motion to Open a Docket filed by the Office of the Public Counsel (Public Counsel) on November 18, 1998. In that motion, Public Counsel requested that the Commission open a docket to consider the proposed merger of American Water Works Company (American Water) and National Enterprises, Inc. (National). American Water owns Missouri-American Water Company (MAWC), a Missouri corporation that operates as a regulated water utility in Missouri. National owns Continental Water Company (Continental), which in turns owns St. Louis County Water Company (SLCWC), a Missouri corporation that operates as a regulated water utility in Missouri. Pursuant to the agreement, American will acquire all of the common stock of National, and after the merger is effected, MAWC and Continental will be first-tier subsidiaries of American and SLCWC will be a second-tier subsidiary. Public Counsel noted that SLCWC and MAWC are the largest water utilities in Missouri. Public Counsel asserted that it is in the public interest for the Commission to give the proposed merger close scrutiny to assure that that the merger does not have anti-competitive results. Public Counsel believes that the Commission has jurisdiction pursuant to Sections 386.250(3), 386.330(1), and 393.190(1)¹.

¹All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated. At the oral argument, Public Counsel also argued that Section 393.190(2) gives the Commission jurisdiction.

On December 8, SLCWC and MAWC filed a joint response opposing Public Counsel's motion. The water companies assert that the merger is one of parent companies, and that the Commission does not have jurisdiction to review the merger. In essence, their argument was that, since each of the regulated companies will maintain its current corporate existence, the statutes cited by Public Counsel do not confer jurisdiction. Also on December 8, Staff filed a response to Public Counsel's motion. Staff stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger. Staff asserted that the Commission should follow this practice now, and decline to assert jurisdiction. The Staff and the water companies urge the Commission to follow its recent decision in Case No. TM-99-76 in which the Commission declined to open a case to consider the proposed merger of Ameritech Corporation into SBC Delaware, Inc., a subsidiary of SBC Communications, Inc.

On December 7, 1998, Utility Workers of America Local 335, AFL-CIO (the Union) filed an Application to Intervene. On December 9, Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County (the Water Districts) jointly filed an Application to Intervene.

On December 23, Public Counsel filed a pleading responding to the Staff and SLCWC and MAWC. By order dated February 4, 1999, the Commission set for oral argument the question of its jurisdiction.

Oral Argument

On March 2, Public Counsel, Staff, SLCWC and MAWC presented their arguments on the question of the Commission's jurisdiction². Public Counsel argued that 386.250(3) gives the Commission jurisdiction over all water corporations and their operations in Missouri. Public Counsel also argued that 393.190(2) gives the Commission the responsibility to oversee mergers and consolidations involving regulated water systems. Public Counsel interpreted the definition of water corporation to include parent companies of regulated water utilities. Public Counsel attempted to distinguish this case from TM-99-76 on the basis that there is no federal proceeding in which this merger will be examined.

Staff addressed each of the statutory sections that Public Counsel asserted give the Commission jurisdiction over this transaction. Staff stated that 386.330(1) deals with telecommunications companies and does not apply to water companies. Staff argued that 386.250(3) is merely a general grant of jurisdiction to regulate water corporations, and that neither of the entities involved in this transaction are water corporations. The last statutes cited by Public Counsel are 393.190(1) and (2) which provide that a water corporation must first obtain Commission approval prior to entering into a merger or consolidation, or transferring or mortgaging its works or system. Staff stated that the

² The Water Districts were represented by counsel, but did not participate. The Union was not represented by counsel.

instant transaction does not involve water corporations, so these statutes do not apply.

MAWC argued generally that the sections of the statutes cited by Public Counsel do not apply to this proposed merger. Its arguments on the statutes were very similar to those advanced by Staff. MAWC also discussed a number of Missouri cases that it believed demonstrate that the Commission has no jurisdiction over the instant merger. MAWC compared this case with others the Commission has recently considered, including TM-99-76, and concluded that the Commission has been correct in its conclusion that it has no jurisdiction to examine mergers of non-regulated parent corporations even though they may own Missouri-regulated utility companies.

SLCWC adopted MAWC's arguments. SLCWC pointed out that when Continental was formed and acquired the stock of water corporations, Commission approval was sought and received, but that when National was formed as the parent of Continental, no Commission approval was sought.

Discussion

The Commission has reviewed the arguments of the parties, the cases and the Missouri statutes cited by parties, and the structure of the proposed merger. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated utility companies. The Commission's past approach to mergers of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction over this merger, it will close this case. The applications to intervene will be denied.

IT IS THEREFORE ORDERED:

1. That the Motion to Open a Docket filed by the Office of the Public Counsel on November 18, 1998 is denied.
2. That the applications to intervene of Utility Workers of America Local 335, AFL-CIO, Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County are denied.
3. That this order shall become effective on April 2, 1999.
4. That this case may be closed on April 3, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray,
and Drainer, CC., concur and
certify compliance with the
provisions of Section 536.080,
RSMo 1994.
Schemenauer, C., dissents with opinion

Dated at Jefferson City, Missouri,
on this 23rd day of March, 1999.

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

In the Matter of the Merger of American Water Works)	
Company with National Enterprises, Inc. and the Indirect)	<u>Case No. WM-99-224</u>
Acquisition by American Water Works Company of the)	
Total Capital Stock of St. Louis County Water Company.)	

Dissenting Opinion of Commissioner Robert G. Schemenauer

I respectfully dissent with the majority opinion "that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated utility companies". The Commission is required by statute to review and approve or deny these types of transactions for the public good. I am not persuaded by Staff's argument that "the instant transaction does not involve water corporations, so these statutes", (386.250(3) and 393.190(1), "do not apply".

There is no clean or unfettered separation between the ownership of American Water Works Company, Inc. (AWW) and St. Louis County Water Company (County Water) after the merger. AWW has replaced National Enterprise, Inc. (NEI) as the owner of County Water. These two corporations have merged as recited in their Summary Description of Transaction and their testimony. Each "NEI common share issued and outstanding at the effective time of the merger ..." (which constitute 100% ownership of County Water), "will be canceled and converted ... to 15.5022106 shares of AWW common stock. All shares of AWW common stock issued and outstanding immediately prior to the effective time of the merger, taken together with AWW common stock issued in accordance with the merger agreement, will immediately thereafter constitute all of the issued and outstanding shares of the capital stock of the surviving corporation." This clearly shows the intent of the merger transaction is to assimilate the ownership of County Water into AWW. One share of AWW stock represents some ownership

of County Water and there is no ownership of County Water by any other entity other than AWW.

A clear reading of 393.190(1), "No ... water corporation ... shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, **nor by any means, direct or indirect, merge or consolidate** such works or system, or franchises, or any part thereof, with any other corporation, person or public utility without having first secured from the commission an order authorizing it ...", requires a review of this transaction by the commission.

The drafters of this statute clearly foresaw the possible corporate manipulations that could circumvent the intent of this statute and therefore inserted such phrases as "**nor by any means, direct or indirect, merge or consolidate**" to prevent such corporate gerrymandering.

If this transaction is not a "direct" merger of a water company corporation with another corporation it surely is an "indirect" merger as contemplated by the statute. My opinion is that the Commission has erred in abdicating its responsibility to review and either approve or deny this merger. This abdication may set a fatal precedent that undermines the authority of future commissions to review similar transactions.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert G. Schemenauer", written in a cursive style.

Robert G. Schemenauer
Commissioner

Dated at Jefferson City, Missouri,
on this 23rd day of March, 1999.

RECEIVED

MAR 23 1999

COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

1998 WL 996180 (Mo.P.S.C.)
PUR Slip Copy

Re SBC Communications, Inc.

Case No. **TM-99-76**

Missouri Public Service Commission

October 20, 1998

APPEARANCES: *Paul G. Lane*, General Attorney-Missouri, and *Anthony K. Conroy*, Attorney at Law, One Bell Center, Room 3520, St. Louis, Missouri 63101, for Southwestern Bell Telephone Company. *David L. Woodsmall* and *Rachel Lipman*, Attorneys at Law, 8140 Ward Parkway, 5E, Kansas City, Missouri 64114, for Sprint Communications Company L.P. *Mary Ann Young*, Attorney at Law, William D. Steinmeier, P.C., P.O. Box 104595, Jefferson City, Missouri 65110, for McLeodUSA Telecommunications Services, Inc. and Telecommunications Resellers Association. *Michael F. Dandino*, Senior Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the Public. *Dan K. Joyce*, General Counsel, and *Cynthia R. Bryant*, Assistant General Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

Before Lumpe, chairman, and Crumpton, Murray and Drainer (all concurring), Commissioners, and Mills, regulatory law judge.

BY THE COMMISSION:

REPORT AND ORDER

Procedural History

*1 This case was opened to receive a Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing filed by the Office of the Public Counsel (Public Counsel) on August 21, 1998. In that motion, Public Counsel requested that the Commission open a docket to consider the proposed merger of SBC Communications, Inc. (SBC), SBC Delaware, Inc. (SBC Delaware), and Ameritech Corporation (Ameritech). Pursuant to the merger agreement, SBC Delaware, a wholly-owned subsidiary of SBC, will merge into Ameritech with Ameritech being the surviving entity. After the merger is effected, both Ameritech and Southwestern Bell Telephone Company (SWBT) will be first-tier subsidiaries of SBC. Public Counsel noted that SWBT is the largest local exchange company in Missouri, and asserted that Ameritech is certificated in Missouri as a competitive local exchange company. Public Counsel asserted that it is in the public interest for the Commission to give the proposed merger close scrutiny to assure that it provides positive benefits directly to consumers and that it promotes competition in Missouri's local telecommunications market. Public Counsel believed that the Commission has jurisdiction pursuant to Sections 386.250(2), 386.320, and 392.300¹.

On August 31, SWBT filed a response opposing Public Counsel's motion. SWBT asserted that the merger will have no impact on its operations or the services it provides in Missouri, and that the Commission does not have jurisdiction to review the merger. In essence, SWBT's argument was that since the merger will have no effect on SWBT's plant or the services it offers in Missouri, that the statutes cited by Public Counsel do not confer jurisdiction. Also on August 31, Staff filed a response to Public Counsel's motion. Staff stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger. Staff asserted that the Commission should follow this practice now, and decline to assert jurisdiction. On September 2, Public Counsel filed a pleading responding to the Staff and SWBT. By order dated September 8, the Commission set for oral argument the questions of jurisdiction and the content of its comments to the Federal Communications Commission (FCC).

On September 14, Sprint Communications Company L.P. (Sprint) filed an Application to Intervene and a Motion to Change Date of Oral Argument, and on September 15, Sprint filed suggestions supporting Public Counsel's position. On September

18, SWBT filed a pleading opposing Sprint's intervention. By order of September 23, the Commission denied Sprint's motion to change the date of oral argument and expressly reserved ruling on Sprint's intervention.

On September 25, McLeodUSA Telecommunications Services, Inc. (McLeod) filed an Application to Intervene. On September 29, Public Counsel filed additional suggestions in support of its position. On September 30, the Telecommunications Resellers Association filed an Application to Participate without Intervention, and comments generally supporting Public Counsel's position.

Oral Argument

***2** On September 30, Public Counsel, Staff, and SWBT presented their arguments on the questions of the Commission's jurisdiction and the content of its comments to the FCC. Sprint and McLeod, although they had not been granted intervention, were allowed to address the issue of the contents of the Commission's comments to the FCC. The Telecommunications Resellers Association, although offered the opportunity at oral argument to address this issue, did not do so.

Public Counsel argued that 386.250 gives the Commission jurisdiction over all telecommunications facilities, telecommunication services, and telecommunications companies. Public Counsel also argued that 386.320.1 gives the Commission general supervision over all telephone corporations and telephone lines and the manner in which their lines and property are owned, leased, controlled or operated not only with respect to adequacy, security and accommodation offered by those services, but also with respect to their compliance with all provisions of law, orders, decisions of the Commission and charter and franchise requirements. Public Counsel noted that, pursuant to 386.610 and case law, Chapter 386 should be construed broadly with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. Public Counsel argued that 392.185 sets out the framework that should guide the Commission's consideration of its jurisdiction, and stated that merging companies should not be able to structure the corporate form of mergers in such a way to defeat the Commission's jurisdiction.

Staff stated that 392.300 provides that a telecommunications company certificated in Missouri must first obtain Commission approval prior to entering into a merger or consolidation. Staff stated that, based upon its review of past Commission cases and actions, the SBC/Ameritech merger does not fall within the Commission's jurisdiction. Staff reiterated its belief that the FCC proceeding is the appropriate forum in which to examine the merger.

SWBT argued generally that the sections of the statutes cited by Public Counsel do not apply to this proposed merger. SWBT stated that 386.250 makes no mention of mergers, and confers no jurisdiction on the Commission over mergers. SWBT also claimed that Ameritech, SBC Communications, and SBC Delaware are not covered by this section, as none are telecommunications companies operating in this state or certificated by this Commission.

SWBT made the same arguments about 386.320, pointing out that this section gives the Commission general supervisory powers, and power to inspect property, books, and records of corporations subject to the Commission's jurisdiction.

SWBT then discussed 393.200, which it claimed gives the Commission explicit authority over mergers and thus controls and overrides any general authority given by the other two statutory sections. SWBT argued that this section also does not apply to the SBC/Ameritech merger. SWBT noted that the merger does not involve the sale, assignment, lease or transfer of franchises, facilities or systems of Missouri-regulated telecommunication companies, nor a merger or consolidation, direct or indirect, of the lines, systems or franchises of Missouri-regulated telecommunication companies.

***3** SWBT also pointed, as did Staff, to the Commission's consistent treatment of mergers of this type, particularly the Commission's decision in Case No. TM-96- 268². SWBT argued that the Commission's past treatment was appropriate, and should be followed in this merger.

SWBT argued that the decisions made with respect to this and similar mergers by regulatory commissions in other states should not control this Commission's determination of whether it has jurisdiction, and that Public Counsel's citation of those decisions should not be relied upon. SWBT asserted that the statutes defining the jurisdiction over mergers of those other commissions are not identical to Missouri's.

Discussion

The Commission has reviewed the arguments of the parties, the Missouri statutes cited by parties, and the structure of the proposed merger. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies. The Commission's past approach to mergers of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction over this merger, it will close this case. The applications to intervene, and the application to participate without intervention will be denied.

The Commission will not address, in this order, the suggestions presented at the oral argument about the Commission's comments to the FCC. The Commission appreciates the remarks of those entities that addressed this topic, and will bear them in mind as it deliberates what comments, if any, it should make to the FCC concerning this merger.

IT IS THEREFORE ORDERED:

- 1. That the Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing filed by the Office of the Public Counsel on August 21, 1998 is denied.**
- 2. That the applications to intervene of Sprint Communications Company L.P. and McLeodUSA Telecommunications Services, Inc. are denied.**
- 3. That the applications to participate without intervention of the Telecommunications Resellers Association is denied.**
- 4. That this order shall become effective on October 20, 1998.**
- 5. That this case may be closed on October 21, 1998.**

(SEAL)

Dated at Jefferson City, Missouri, on this 8th day of October, 1998.

FOOTNOTES

Footnotes

- 1 All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated.
- 2 In the Matter of the Joint Petition of Communications Central of Georgia, Inc. and Davel Communications Group, Inc. for Approval of Merger and Transfer of Control.

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In the Matter of the Proposed Merger)
between GTE Corporation and Bell Atlantic.)

Case No. TM-99-261

ORDER DENYING MOTION TO RECONSIDER ORDER CLOSING CASE

On December 9, 1998, the Office of the Public Counsel (Public Counsel) filed a motion to establish a case for the purpose of investigating the proposed merger between Bell Atlantic Corporation and GTE Corporation, the parent of GTE Midwest Incorporated (GTE). On December 18, GTE filed a response in which it requested that the Commission summarily deny Public Counsel's motion to establish a case, citing the similarities between its proposed merger and the merger that was the subject of Case No. TM-99-76. In Case No. TM-99-76, after oral argument, the Commission found that it did not have jurisdiction to examine a merger of two non-regulated parent corporations even though they owned Missouri-regulated telecommunications companies, and denied Public Counsel's motion to open a docket.

On December 31, the Commission notified Public Counsel that it could respond to GTE Midwest Incorporated's response no later than January 7, 1999. The Commission expressly stated that the response should explain the reasons why Public Counsel believes the Commission's decision in this

case should be different than the one it reached in Case No. TM-99-76 just two months earlier. Public Counsel chose not to file a response.

On April 9, 1999, the Commission issued an order dismissing this case for failure to prosecute pursuant to 4 CSR 240-2.116(2). On April 12, 1999, Public Counsel filed a motion asking the Commission to reconsider that order. Public Counsel asserts that it was not required to respond to the Commission's December 31, 1998 order, but it does not explain why it declined to respond to that order, nor does it explain why the question of the Commission's jurisdiction should be resolved any differently in this case than it was in Case No. TM-99-76. Public Counsel states that it believed that the case awaited the Commission's decision.

On April 16, GTE filed a memorandum in opposition to Public Counsel's motion for reconsideration. GTE notes that ". . . Public Counsel continues to ignore this Commission's request for an explanation why the decision in this case should be different than the one reached in Case No. TM-99-76."

Public Counsel is technically correct that it was not expressly "required" to file a responsive pleading by the terms of the Commission's December 31, 1998, order. Section 386.710, RSMo 1994, gives Public Counsel virtually unlimited discretion in choosing which proceedings to actively pursue. As a result, the Commission cannot require Public Counsel to prosecute an action that it has filed. Nonetheless, when

Public Counsel is given an opportunity to prosecute its case and declines to do so, it is subject to dismissal for failure to prosecute.

IT IS THEREFORE ORDERED:

1. That the Motion to Reconsider Order Closing Case filed on April 12, 1999, by the Office of the Public Counsel is denied.
2. That this order shall become effective on April 22, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Schemenauer
and Drainer, CC., concur
Crumpton, C., absent

Mills, Deputy Chief Regulatory Law Judge

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 19th day of
April, 2005.

In the Matter of the Proposed Acquisition of)	<u>Case No. TM-2005-0355</u>
AT&T Corporation by SBC Communications, Inc.)	

ORDER CLOSING CASE

Syllabus: The Commission finds that it has no jurisdiction over a merger between SBC Communications, Inc. and AT&T Corporation. In light of its lack of jurisdiction, the Commission rejects a request by the Office of the Public Counsel to conduct an investigation into the transaction.

On April 6, 2005, the Office of the Public Counsel filed a document entitled "Comments of the Office of the Public Counsel." Public Counsel asks the Commission to "conduct an investigation, including evidentiary hearings and public hearings, into the proposed merger of AT&T Corp. and SBC Communications Inc." Public Counsel does not allege that the Commission has authority to approve or disapprove the merger, but instead urges the Commission to investigate the merger and convey the results of that investigation to the Federal Communications Commission and the Department of Justice – entities that do have authority to approve or disapprove the merger.

On April 12, 2005, the Commission issued an order making AT&T Communications of the Southwest, Inc. and Southwestern Bell Telephone, L.P. d/b/a SBC Missouri parties

to this case, and directing them and the Commission's Staff to respond to Public Counsel's comments.

On April 12, 2005, AT&T and SBC Missouri, along with TCG St. Louis and TCG Kansas City, jointly filed a response. AT&T, SBC and TCG argue that it would be inappropriate to conduct the investigation requested by Public Counsel because the Commission does not have the authority to approve the proposed merger under any Missouri statute. AT&T, SBC and TCG describe the subject transaction as follows:

Pursuant to the Parties' agreement, a wholly owned subsidiary of SBC Communications, Inc., Tau Merger Sub Corporation ("Tau"), will be created specifically for the purpose of consummating the transaction. Tau will merge with and into AT&T Corp., with AT&T Corp. being the surviving entity. At the time of the SBC/AT&T merger, shareholders of AT&T Corp. will exchange their stock for SBC stock. Following the merger, AT&T Corp. will become a wholly owned subsidiary of SBC. There is no change in the ownership structure of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, as a result of the transaction, nor is there a change in the ownership of SBC Long Distance or SBC Advanced Solutions, Inc., the other SBC-affiliated entities subject to the Commission's regulatory authority. Similarly, the transaction will not result in a change in ownership of those entities affiliated with AT&T Corp., which are subject to the Commission's authority. The AT&T affiliated entities operating in Missouri, which are comprised of AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City, will continue to be owned by the same entities after the transaction is completed as they are today.

AT&T, SBC and TCG argue that the statute (Section 392.300.2, RSMo 2000) that might otherwise give the Commission jurisdiction over telecommunications companies is not applicable to this merger for three reasons. First, the statute only applies to domestic telephone companies and none of the entities involved in the proposed merger are Missouri corporations. Second, the statute does not confer jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-

regulated telecommunications companies. Third, for AT&T and TCG, the Commission waived the applicability of Section 392.200.2 when it granted them certificates of service authority.

The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level, and it will adhere to that position here. Thus the only question is whether the Commission, despite its lack of direct authority over the transaction, should nonetheless conduct an investigation of its possible effects. Public Counsel has not alleged that those entities that do have jurisdiction over the transaction will be lax in their oversight, and the Commission has no reason to believe they will be. The Commission concludes that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise. The Commission will not conduct an investigation into the proposed transaction, and will close this case.

IT IS THEREFORE ORDERED:

1. That this case is closed.
2. That all motions not previously ruled upon are denied.
3. That this order shall become effective on April 19, 2005.

BY THE COMMISSION

(S E A L)

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Davis, Chm., and Appling, C., concur
Murray, C., concurs, concurring opinion attached
Gaw and Clayton, CC., dissent, dissenting opinion attached

Mills, Deputy Chief Regulatory Law Judge

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

In the Matter of the Proposed Acquisition of) Case No. TM-2005-0355
AT&T Corporation by SBC Communications, Inc.)

CONCURRING OPINION OF COMMISSIONER CONNIE MURRAY

In its order today, the Commission, by a simple majority, voted to close the case before them finding that it did not have jurisdiction to oversee the merger of the parent companies, SBC Communications, Inc., and AT&T Corporation that are not subject to Commission oversight. The Commission also found that an investigation was duplicative and unnecessary in light of the fact that the Commission did not find, and the Public Counsel failed to allege that the entities which do have jurisdiction over the transaction will be lax in their oversight.¹

While I voted in favor of the order closing the case, I believe the Commission should have addressed the Office of Public Counsel's allegation that the Commission had jurisdiction under section 386.330.1, RSMo 2000, to conduct a formal investigation into the merger of the parent companies and its effect on Missouri consumers. By failing to address this claim in a direct manner, the Commission has left open the question of its authority under this section. The inference now is that the Commission can open investigations under section 386.330.1, RSMo without concern for the threshold requirements established by law, whenever it questions the vigilance of the Federal Communications Commission ("FCC").

¹ The federal agencies with jurisdiction to review the merger between the parent companies are the Federal Communications Commission and the Department of Justice.

In paragraph 7 of its pleading, the Public Counsel stated, "the Commission under its general authority to conduct investigations in Section 386.330.1, RSMo should open a case to conduct an investigation into the impact the merger has on the telecommunications market, the ratepayers, and the public interest." The Public Counsel later makes several allegations that an investigation is needed to study the impact of the merger of the parent companies on the competitive markets of the Missouri-certified subsidiary companies.²

Section 386.330.1, RSMo provides as follows:

"The commission may, of its own motion, investigate or make inquiry, in a manner determined by it, as to any act or thing done or omitted to be done by any telecommunications company *subject to its jurisdiction*, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation *in violation of any provision of law or in violation of any order or decision of the commission.*"

(emphasis added).

The Public Counsel did not assert that SBC Communications Inc. or AT&T Corporation, the parent companies involved in the merger, are "subject to [the commission's] jurisdiction" under section 386.330.1, RSMo. Indeed, such an assertion would fail as there is nothing in the Commission's authorizing statutes that confers jurisdiction to investigate two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.³ Nor does the public counsel allege that the Missouri-regulated subsidiaries of these companies have done or omitted doing an act that is "in violation of any provision of law or in violation of any order or decision of the commission". Without such allegations or independent Commission

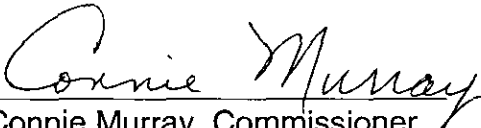
² See Comments of the Office of the Public Counsel, pp. 2-5.

³ See, e.g., *In the Matter of the Merger of SBC Communications Inc. and Ameritech Corporation*, 7 Mo. P.S.C.3d 528 (1998), for an analogous finding regarding the Commission's authority to oversee mergers of parent companies not regulated in Missouri.

findings that the Missouri-regulated subsidiaries have violated the law or a Commission order, I believe the Commission has no choice but to dismiss the Public Counsel's request for a hearing pursuant to section 386.330.1, RSMo for lack of jurisdiction.⁴

Despite having reached this conclusion regarding the Public Counsel's request for a formal investigation, I see no reason why the Commission's staff could not review the available information and discuss the impact of the merger on the Missouri-regulated subsidiaries. The staff could then provide a recommendation to the Commission regarding any necessary comments to be forwarded to the FCC and the Department of Justice. Our staff routinely handles matters before the FCC in this way without the expense and time-consuming prospect of opening a formal investigation. It is my opinion that we should continue to handle issues within the FCC's jurisdiction in this same manner.

Respectfully submitted,


Connie Murray, Commissioner

Dated at Jefferson City, Missouri
on this 19th day of April, 2005.

⁴ I would note that even if we had jurisdiction to open an investigation under section 386.330.1, RSMo, the timing of the Public Counsel's request would make this a near impossibility. A Public Interest Statement in this merger was filed at the FCC on February 22, 2005. The FCC issued a Public Notice on March 11, 2005, requesting comments from interested parties regarding the merger and setting April 25, 2005 as the deadline for such filings. (See Public Notice in WC Docket No. 05-65). The Public Counsel waited until April 6, 2005 to file its pleading before the Commission requesting an investigation – leaving the Commission less than three weeks to open a formal investigation into an extremely complex corporate merger in order to file comments with the FCC.

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

In the matter of the Proposed Acquisition of) Case No. TM-2005-0355
AT&T Corporation by SBC Communications, Inc.)

**DISSENTING OPINION OF COMMISSIONERS STEVE GAW
AND ROBERT M. CLAYTON III**

We respectfully dissent from the Order Closing Case issued by the majority in the above captioned proceeding. Through its Comments which initiated this docket, Public Counsel merely requests that the Commission undertake an investigation for the purpose of submitting “well-founded and informed recommendations” in the context of the reviews conducted by the Department of Justice and Federal Communications Commission.¹ As Public Counsel notes, “[t]he impact of the merger should be evaluated to gauge the extent to which it will reduce competitive pressures in SBC’s exchanges.”²

In its joint response to the OPC pleading, SBC & AT&T attempt to evade the purpose of OPC’s comments. As noted, OPC merely seeks an investigatory docket to analyze the effects of the proposed transaction on the Missouri local and interexchange telecommunications markets. In response, SBC / AT&T assert that it “would be inappropriate for the Commission to proceed with this case because the Commission does not have the authority to approve the proposed merger”.³ As such, SBC / AT&T request that the Commission “dismiss this case for lack of jurisdiction.”⁴

¹ *Comments of the Office of the Public Counsel*, Case No. TM-2005-0355, filed April 6, 2005, at page 5.

² *Id.* at 4.

³ *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City’s Response to the Comments of the Office of the Public Counsel*, Case No. TM-2005-0355, filed April 12, 2005, at page 1. In its “no action” letter to the Commission dated February 28, 2005, SBC & AT&T tout the advantages of the transaction. “The parties believe the merger will strengthen SBC’s ability to provide all of the advanced, innovative communications and entertainment services that our customers have come to expect.” Ultimately, SBC & AT&T conclude that “[t]he merger should result in benefits for Missouri and the country”. Given its claims of alleged benefits for Missouri, the Commission should take SBC / AT&T on its assertions and provide the analysis to our federal colleagues.

⁴ *Id.* at page 10.

In its Order Closing Case, the majority, like SBC & AT&T, misconstrue the intent of OPC's request. Despite its explicit recognition that "Public Counsel does not allege that the Commission has authority to approve or disapprove the merger", the majority nonetheless devotes the vast majority of its Order to a discussion regarding the Commission's lack of jurisdiction over a parent company transaction. In passing, the majority finds that Public Counsel has not alleged that the FCC and DOJ "will be lax in their oversight, and the Commission has no reason to believe they will be."⁵ As such, the majority concludes "that the investigation urged by Public Counsel would simply be redundant and duplicative, and given the Commission's lack of jurisdiction, a fruitless exercise."⁶

The Commission's position that such an investigation "would be redundant and duplicative" and, therefore, "a fruitless exercise", stands in stark contrast to its actions following the announcement of the SBC / Ameritech merger. Recognizing the obvious effect that the SBC / Ameritech merger would have on Missouri ratepayers, the Commission initiated a docket and held an on-the-record conference so that parties could "address what they believe[d] should be contained in the Commission's comments to the FCC regarding [the] merger."⁷ The Commission conducted this on-the-record conference despite SBC / Ameritech's claims that the Commission lacked jurisdiction to approve the transaction.

In addition to the SBC / Ameritech merger review, the Commission has routinely opened dockets or conducted investigations for the purpose of presenting well-informed comments and information to other agencies or the Missouri General Assembly. For instance, in February of 2004, the Commission issued an Order Establishing Case in Case No. TW-2004-0324 based upon an indication that the Federal Communications Commission would "soon issue a Notice of

⁵ *Order Closing Case*, Case No. TM-2005-0355, issued April 19, 2005.

⁶ *Id.*

⁷ *Order Setting Oral Argument*, Case No. TM-99-76, issued September 8, 1998

Proposed Rulemaking concerning Voice over Internet Protocol (VoIP) technology.”⁸ Immediately prior to the Commission issuing its Order Establishing Case, the U.S. District Court for the District of Minnesota issued a decision which held that VoIP “is an information service and therefore not subject to state regulation”.⁹ Despite the apparent lack of Missouri Commission jurisdiction, the Commission nonetheless found that the FCC rulemaking “will have an impact on telecommunications service in Missouri” and that a docket should be established under the Commission’s general supervisory powers (Section 386.250) to “further [the Commission’s] knowledge of VoIP technology and to assist in its preparation of comments to the FCC.”¹⁰

Additionally, the Commission initiated a docket to study the issue of electric restructuring. In its Order Establishing Docket and Creating Task Force, the Commission notes:

Any decision to implement electric retail competition statewide in Missouri, not merely on an experimental basis, will require amendments to existing state law. While that policy decision must be made by the General Assembly and the Governor, the time has come for the Commission to establish a formal means to identify the risks and benefits that would face the State of Missouri in the event that retail competition occurs.¹¹

Despite its recognition that it lacked any authority to unilaterally implement any suggested changes, the Commission established the restructuring docket in order to “compile a comprehensive plan for implementation of retail electric competition in the State of Missouri in the event legislation is enacted which authorizes it.”¹²

Without conceding any issue regarding Commission jurisdiction to review the proposed transaction, it seems apparent that the Commission should follow past precedent and conduct an investigation in order to more fully enlighten itself regarding the state of competition in the SBC exchanges and the degree to which competition in those exchanges will be impacted by SBC’s

⁸ *Order Establishing Case*, Case No. TW-2004-0324, issued February 3, 2004.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Order Establishing Docket and Creating Task Force*, Case No. EW-97-245, issued March 28, 1997.

¹² *Id.*

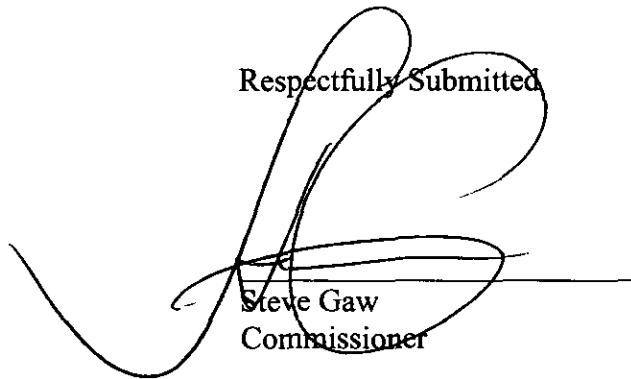
acquisition of AT&T. The mere establishment of such a docket would not contain an implicit finding that the FCC or DOJ would be "lax in their oversight", but instead would be a logical step in anticipation of filing comments as routinely requested by those agencies.

Because of its proximity to consumers in Missouri and its duties under the state and federal telecommunications statutes to examine the status of competition, this Commission has the ability to add valuable information and insight into the impact of this merger on Missouri consumers. Moreover, the Commission should be mindful of the apparent demise of interexchange service as a result of the pending acquisitions of both AT&T and MCI.¹³ Finally, the Missouri Commission has a responsibility to gather this information and to provide it, with critical analysis, to key elected policy makers. As the Missouri General Assembly prepares to modify state telecommunications laws and as Missouri's Congressional delegation contemplates re-writing the Telecommunications Act of 1996, this Commission owes them the Missouri-specific data retrieved and compiled by Commission staff to protect Missouri consumers.



Robert M. Clayton III
Commissioner

Respectfully Submitted



Steve Gaw
Commissioner

Dated at Jefferson City, Missouri,
on this 19th day of April, 2005.

¹³ See, Case No. TM-2005-0370 concerning the proposed acquisition of MCI by Verizon, Inc.