

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Hearing

October 27, 2003
Jefferson City, Missouri
Volume 2

In the Matter of Southwestern Bell)
Telephone Company, d/b/a SBC)
Missouri's Proposed Revised Tariff)
Sheet Intended to Increase by Eight) Case No. IT-2004-0015
Percent the Rates for Line Status)
Verification and Busy Line Interrupt)
as Authorized by Section 392.245,)
RSMo., the Price Cap Statute.)

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Public Service Commission*

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714 West High Street • Jefferson City, MO 65109
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KEVIN A. THOMPSON, Presiding,
DEPUTY CHIEF REGULATORY LAW JUDGE.
KELVIN SIMMONS, Chair,
STEVE GAW,
ROBERT M. CLAYTON, III,
COMMISSIONERS.

REPORTED BY:

KELLENE K. FEDDERSEN, CSR, RPR, CCR
ASSOCIATED COURT REPORTERS

1 APPEARANCES:

2 PAUL G. LANE, General Counsel-Missouri

SBC Missouri

3 One SBC Center, Room 3520

St. Louis, Missouri 63101

4 (314)235-4300

5 FOR: Southwestern Bell Telephone, L.P.
d/b/a SBC Missouri.

6 LISA CREIGHTON HENDRICKS, Attorney at Law

7 Sprint Communications Company

6450 Sprint Parkway

8 Overland Park, Kansas 66208

(913)315-9363

9 FOR: Sprint Missouri, Inc.

10 JAMES M. FISCHER, Attorney at Law

11 Fischer & Dority

101 Madison, Suite 400

12 Jefferson City, Missouri 65101

(573)636-6758

13 FOR: Spectra Communications.

14 CenturyTel of Missouri.

15 MICHAEL DANDINO, Senior Public Counsel

P.O. Box 7800

16 Jefferson City, Missouri 65102-780

(573)751-4857

17 FOR: Office of the Public Counsel
18 and the Public.

19 DAVID A. MEYER, Associate General Counsel

P.O. Box 360

20 Jefferson City, Missouri 65102

(573)751-3234

21 FOR: Staff of the Missouri Public
22 Service Commission.
23
24
25

P R O C E E D I N G S

JUDGE THOMPSON: Good morning. We're here in the matter of Southwestern Bell Telephone Company, doing business as SBC Missouri's proposed revised tariff sheet intended to increase by eight percent the rates for line status verification and busy line interrupt as authorized by Section 392.245 RSMo, the price cap statute, Case No. IT-2004-0015.

My name is Kevin Thompson. I'm the Regulatory Law Judge assigned to preside over this hearing.

We will take oral entries of appearance at this time. Why don't we begin with Southwestern Bell?

MR. LANE: Thank you, your Honor. My name is Paul Lane. I represent Southwestern Bell Telephone, LP, doing business as SBC Missouri. My address is One SBC Center, Room 3520, St. Louis, Missouri 63101.

JUDGE THOMPSON: Thank you, Mr. Lane. CenturyTel?

MR. FISCHER: Thank you, your Honor. James M. Fischer, Fischer & Dority, PC, 101 Madison Street, Suite 400, Jefferson City, Missouri, appearing today on behalf of Intervenor Sprint Communications Group, LLC, doing business as CenturyTel, and CenturyTel of Missouri, LLC. Collectively I'll refer to these as just CenturyTel today.

JUDGE THOMPSON: Thank you, Mr. Fischer. I

1 see Mr. Dority back there. Is he going to be participating
2 today as well?

3 MR. FISCHER: Not that I know of, your Honor.

4 JUDGE THOMPSON: Very well. Sprint?

5 MS. HENDRICKS: Your Honor, Lisa Creighton
6 Hendricks appearing on behalf of Sprint Missouri, Inc., and
7 my address is 6450 Sprint Parkway, Overland Park, Kansas
8 66251.

9 JUDGE THOMPSON: Thank you.

10 Staff?

11 MR. MEYER: Good morning, your Honor. David
12 Meyer on behalf of the Staff of the Missouri Public Service
13 Commission, and our address is P.O. Box 360, Jefferson City,
14 Missouri 65102.

15 JUDGE THOMPSON: Thank you.

16 Public Counsel?

17 MR. DANDINO: Good morning, your Honor.
18 Michael Dandino, Office of the Public Counsel, Post Office
19 Box 7800, Jefferson City, Missouri 65102, representing the
20 Office of the Public Counsel and the Public.

21 JUDGE THOMPSON: Thank you.

22 Is there anyone else that I missed?

23 Mr. Fischer?

24 MR. FISCHER: Your Honor, I need to correct
25 the record. I think I was reading from a pleading. I may

1 have said Sprint Communications. It's CenturyTel, or
2 Spectra.

3 JUDGE THOMPSON: I was wondering how you were
4 going to resolve that conflict. I figured that learned
5 counsel knows better than I.

6 Anyone else? Okay. I think we have everyone
7 here. Is there anything to bring to my attention at this
8 time? There's not.

9 We'll go ahead and do opening statements. I
10 will send an e-mail to the Commissioners to tell them that
11 it's time to come down. We will go off the record then,
12 Kellene, and start back up when the Commissioners are here.

13 (AN OFF-THE-RECORD DISCUSSION WAS HELD.)

14 (EXHIBIT NOS. 1 THROUGH 5 WERE MARKED FOR
15 IDENTIFICATION.)

16 JUDGE THOMPSON: We will take opening
17 statements at this time, and I believe our first opening
18 statement is going to be from Bell.

19 MR. LANE: Thank you, your Honor. My name is
20 Paul Lane, and I represent Southwestern Bell Telephone,
21 doing business as SBC Missouri.

22 This case involves tariffs that were filed by
23 SBC Missouri to increase rates for two operator services.
24 The first service involves what's called line status
25 verification. Under that service, a customer can call one

1 of our operators and have a line checked to see if there's
2 conversation on it and it's otherwise in service. SBC
3 Missouri proposes a 12 cent increase on this tariff service
4 to \$1.62.

5 The second service is called busy line
6 interrupt. That involves a customer calling an operator to
7 ask that the operator interrupt a conversation that's in
8 place on another line to ask one of those customers to hang
9 up to accept another call. SBC Missouri proposes an 18 cent
10 increase in this rate to \$2.49.

11 Both of these tariffs involve both a local and
12 a toll component. You can use it to interrupt on a local
13 call or on a toll call.

14 These services are included in the definition
15 of non-basic service as included in the price cap statute,
16 which is Section 392.245. Under subsection 11 of that
17 statute, prices for non-basic services can be increased by
18 up to 8 percent annually. The increase here does not exceed
19 the 8 percent and no party contends otherwise.

20 Instead, the question is raised as to whether
21 the Commission can override the price cap statute and
22 preclude SBC Missouri from implementing these price changes.

23 The price cap statute was a part of Senate
24 Bill 507, which was passed by the Legislature in 1996.
25 There were two major components of that piece of

1 legislation. The first was a change in terms of allowing
2 competition for local exchange service that was consistent
3 with what the federal government had just passed in the same
4 year. The second was to establish price caps for large
5 ILECs, a different method of regulation.

6 In 1997, SBC Missouri was determined to be
7 subject to price cap regulation, and since that time we have
8 implemented some increases in non-basic services without
9 controversy. Since that time, the Commission has either
10 approved in most cases or allowed to go into effect in a few
11 cases price increases for non-basic services.

12 The price cap statute hasn't changed at all
13 since 1997. It was clear -- I'm sorry. 1996. It was clear
14 then and it remains clear today. If there were any
15 legitimate dispute about the application of the statute, it
16 would have been raised long before today.

17 Every party in this case before you, save one,
18 is telling you that the Commission does not have the legal
19 authority to preclude these price changes. Only the Office
20 of the Public Counsel contends that the Commission has the
21 legal authority, but that attempt should not be allowed to
22 succeed here.

23 If Office of the Public Counsel wants to
24 change the law, the place to take that is to the
25 Legislature. Despite the Public Counsel's urging, it's not

1 the Commission's role to rewrite the law, it's the
2 Legislature's role, and the Commission should resist that
3 effort.

4 The price cap statute Section 392.245.11 makes
5 it clear that an ILEC may increase their maximum allowable
6 prices by up to 8 percent a year, upon providing notice and
7 filing a tariff. To quote from that, quote, thereafter, the
8 maximum allowable prices for non-basic telecommunications
9 services of an incumbent local exchange telecommunications
10 company may be annually increased by up to 8 percent for
11 each of the following 12-month periods upon providing notice
12 to the Commission and filing tariffs establishing the rates
13 for such services in such exchanges at such maximum
14 allowable prices.

15 It's clear and unequivocal. There's a
16 subsequent sentence two sentences down that talks about what
17 happens when you want to change under that maximum allowable
18 price, and it says, an incumbent local exchange
19 telecommunications company may change the rates for its
20 services consistent with the provisions of Section 392.200,
21 but not to exceed the maximum allowable prices by filing
22 tariffs which shall be approved by the Commission within 30
23 days, provided that such rate is not in excess of the
24 maximum allowable price established for this service or such
25 service under this section.

1 So it's that section that Public Counsel seeks
2 to rely on to say the Commission has the authority to reject
3 a price increase on the basis that it's not just and
4 reasonable.

5 The sentence that I read that Public Counsel
6 relies upon is secondary to the one that we read first, the
7 one that gives clear authority to impose a rate change if
8 the ILEC chooses. The purpose of that other change is if
9 you want to change some of the rates but not all for some
10 customers within the price cap statute.

11 So in this case, if we had proposed to change
12 the rates for busy line interrupt or line status
13 verification for just a certain segment of our customers,
14 the Commission could have looked at that to determine
15 whether it's discriminatory under Section 392.200, whether
16 it segmented the market or was otherwise discriminatory.
17 That's when you look at Section 392.200.

18 But here these tariffs apply on a statewide
19 basis to all of our customers, and there's no question of
20 discrimination, and the Commission needs to approve the
21 tariffs on that basis.

22 One of the problems with giving the Commission
23 authority to determine if rates which comply with the price
24 cap statute are otherwise just and reasonable is that it
25 would create an amorphous standard that would lead to

1 arbitrary and capricious decisions.

2 To explore this, we need to step back and look
3 at the regulatory framework that the Legislature was faced
4 with when it passed the price cap statute in 1996.

5 Prior to Senate Bill 507, SBC Missouri was
6 regulated under what's called rate of return regulation, and
7 in that either when we filed for increases in all of our
8 rates, a general rate increase, or the Commission
9 implemented or instituted a complaint proceeding to look at
10 rates, the Commission would first determine our revenue
11 requirement. And what that means is the Commission would
12 examine and determine a total allowable amount of expenses,
13 investment and a rate of return for the company.

14 And then the Commission would proceed to the
15 second step, which was a rate design application, and in
16 that the Commission would set particular rates for all of
17 our services in order to ultimately yield the opportunity to
18 earn the revenue requirement that the Commission found.

19 Some might assume that the rate design phase
20 meant that you'd look at the cost of each individual service
21 and set rates for that service equal to the cost, but that
22 assumption would be wrong. As Mr. Unruh discusses in his
23 testimony, prices for SBC Missouri were set pursuant to this
24 Commission's decision in a 1977 case numbered 18-309.

25 Under the principles of 18-309, the Commission

1 undertook a conscious policy to raise rates for competitive
2 and for discretionary services above cost in order to keep
3 basic rates low. Competitive services like long distance
4 were priced above their long-run incremental cost to extract
5 the maximum contribution to basic local rates.

6 Discretionary services like call waiting were
7 priced above their cost, factoring social and economic
8 factors in in order to derive contribution again for basic
9 local service. It led to things like an \$8 rate for call
10 waiting, which at the time was the highest rate charged by
11 any ILEC in the country.

12 Basic services were then priced on a residual
13 basis. Whatever part of the revenue requirement was not
14 collected from competitive and discretionary services was
15 left to be collected from basic service.

16 And within the category of basic service the
17 Commission also engaged in social engineering. It set
18 business rates two to three times higher than residential
19 rates in each exchange, not based on cost, but based on
20 value of service. It was considered that service was more
21 valuable to a business customer than to a residential
22 customer.

23 In addition, the Commission set rates for
24 urban customers substantially higher than rates for rural
25 customers, and they did that even though the inverse was

1 true with regard to cost. It costs less in urban areas to
2 provide service than in the rural areas. But again, the
3 Commission priced based on value of service on the theory
4 that customers in urban areas could make and receive calls
5 from more people than those in rural areas and it was okay
6 for them to pay more.

7 All of this what I've told you was recognized
8 by the Commission recently in their decision in TR-2001-65.
9 On page 12 of the Report and Order in that case, which was
10 issued on August 26th of this year, the Commission said,
11 historically state commissions and the federal government
12 have acted to keep residential telephone service rates low
13 in order to encourage a high level of participation in the
14 local telephone network by residential customers. As a
15 result, business rates, toll rates and access rates have
16 historically been set high in order to produce sufficient
17 revenues to support the low residential rates, and Missouri
18 urban areas provide such support to rural areas, business
19 customers support residential customers and heavy users of
20 toll services support light users. Additionally, high
21 access rates provide important support in high-cost rural
22 areas.

23 There was much dissatisfaction with basic rate
24 of return regulation. It didn't provide the proper
25 incentives for efficiency and investment, and across the

1 nation legislature looked at it, and many of them authorized
2 their commissions to utilize price cap regulation to govern
3 rates.

4 And under price cap regulation in Missouri,
5 the Commission -- or the Legislature imposed strict limits
6 on price changes for basic local and for access services,
7 but provides significant flexibility for non-basic services.

8 For basic and for access services, there was a
9 price change that was tied to the CPI for telephone service.
10 Under that, prices today are lower than they were in 1997
11 when we went under price cap. For non-basic services, we
12 were allowed to increase each service up to 8 percent per
13 year.

14 So what does this history lesson tell us about
15 this case before us? I think a few things. First, we have
16 to look at the broader picture. You can't look at a
17 non-basic rate increase of 8 percent by itself and say
18 that's too much.

19 You have to recognize that basic service and
20 access services are lower today than they were in 1997. In
21 fact, they're lower than they were in 1984, and you have to
22 recognize that we do not have the ability to increase those
23 rates to get them close to cost.

24 Our expenses have increased and our revenues
25 have gone down, and the only area we have available to us to

1 generate additional revenues is in the area of non-basic
2 services, and even there, we're constrained by customer
3 willingness to pay and competition. In fact, we have not
4 increased most non-basic services 8 percent a year since the
5 price cap statute came into effect.

6 Mr. Unruh can tell you that we have increased
7 non-basic service rates only a very, very small percentage
8 of what we could have under what the Legislature authorized.

9 Second, you can't evaluate non-basic service
10 prices in relation to cost. These rates were always set
11 above cost in order to keep local rates low. The
12 Legislature understood this and the Commission understood
13 this, as I just mentioned to you, in their decision in Case
14 No. TR-2001-65.

15 Third, you can't look at inflation factors to
16 determine if an 8 percent increase is reasonable. The
17 Legislature specifically chose to use inflation factors when
18 they told us how we could price basic service and access
19 service. The fact that they didn't authorize the use of
20 inflation factors for non-basic services is telling.

21 It's because of this history that the
22 Legislature made it clear that the 8 percent increase is at
23 the discretion of the ILEC, not of the Commission. It's
24 because of this history that no party has offered any
25 rational basis consistent with the statute that would permit

1 the Commission to reject these tariffs.

2 Section 392.200.1 upon which the Public
3 Counsel relies is not part of the price cap statute. It is
4 a general statute that's applicable to all
5 telecommunications services offered by all
6 telecommunications companies. If the rates have to be just
7 and reasonable, that is true for all telecommunications
8 services of all telecommunications companies.

9 There's no principled way for the Commission
10 to say that just and reasonable means we cannot have a rate
11 of \$2.49 for busy line interrupt, while at the same time the
12 Commission allows companies like AT&T Long Distance and
13 CenturyTel Long Distance to charge \$19.98 for the same
14 service, some eight times higher than what we propose to
15 charge.

16 Somewhat similar, we have one CLEC called ZTel
17 that operates in Southwestern Bell's territory and charges
18 \$3 for busy line interrupt. Again, if that rate is just and
19 reasonable, the Commission can't look to this rate of \$2.49
20 and say it's not just and reasonable.

21 Nor can the Commission compare this to what
22 other ILECs charge and say because Southwestern Bell charges
23 higher rates for these two services than some other ILECs,
24 that the rates are not just and reasonable. You have to
25 turn and look at the full equation.

1 Most of the small ILECs, at least many of
2 them, charge rates higher than ours. We see companies like
3 Sprint and CenturyTel here whose basic local rates are
4 higher than what SBC Missouri charges. That doesn't make
5 their local rates unjust or unreasonable simply because
6 they're higher than ours in one particular category.

7 You'd have to look at all of the rates charged
8 by all of the companies, all of the services by any one
9 particular company to determine whether in the whole the
10 rates are just and reasonable. And the only way you could
11 do that is by looking at in a rate of return type
12 environment, which is specifically prohibited by the price
13 cap statute.

14 The balance that's been struck by the
15 Legislature by strictly limiting price increases for basic
16 local and access and giving flexibility for non-basic
17 services needs to be maintained.

18 There's certainly aspects of the price cap
19 statute that SBC Missouri doesn't like, we would change if
20 we had the ability to do so, but neither SBC nor Public
21 Counsel has that authority, and neither does the Commission.
22 It's the Legislature which has the authority to revise the
23 statute if there were any appropriate changes to be made.

24 We would respectfully request the Commission
25 to approve these tariffs. Thank you.

1 JUDGE THOMPSON: Thank you, Mr. Lane. Any
2 questions from the Bench for Mr. Lane?

3 COMMISSIONER GAW: No. Thank you for asking.

4 JUDGE THOMPSON: Thank you. Our next speaker
5 today is Mr. Fischer.

6 MR. FISCHER: Good morning, your Honor. May
7 it please the Commission? My name is Jim Fischer, and today
8 I'm representing Spectra Communications Group and CenturyTel
9 of Missouri, and I'll refer to those as just CenturyTel.

10 CenturyTel appreciates the opportunity to
11 participate in this proceeding since we believe that the
12 issues that are being raised in this case are fundamental
13 and important to every price cap regulated company,
14 including CenturyTel.

15 The first issue that's listed in the issues
16 list says, does the Commission have the authority to reject
17 price changes for non-basic telecommunications services that
18 do not exceed the maximum allowable prices under 392.245
19 subsection 11?

20 Your decision on this particular issue is
21 going to affect the entire industry, especially as it
22 relates to price cap regulated companies. Even though these
23 are only 12 cent increases and 18 cent increases for SBC,
24 it's a very important issue for the rest of us as well.

25 All of the parties, as Mr. Lane has already

1 mentioned, with the exception of the Office of the Public
2 Counsel are in agreement that the Commission does not have
3 the lawful authority to reject the price changes for
4 non-basic services that do not exceed the maximum allowable
5 rates as determined by those price cap formulas.

6 In particular, though, I would suggest that
7 you review the General Counsel's recommendations in this
8 case, which are straightforward and consistent with the
9 analysis of the price cap companies.

10 The General Counsel has filed legal memorandum
11 that offer the Commissioners clear and unequivocal guidance
12 regarding the Commission's statutory authority to reject
13 price cap regulated companies' proposed rate increases for
14 non-basic services.

15 The General Counsel clearly states in one of
16 his Briefs, as a matter of law, it appears the Legislature
17 has preempted a Commission determination of justness and
18 reasonableness beyond mathematical verification based upon
19 the language in the price cap statute.

20 And then Mr. Meyer goes on to mention, by
21 relieving the Commission of this duty -- and here he's
22 referring to the duty to determine whether the rates are
23 unjust and unreasonable -- by relieving the Commission of
24 this duty with respect to price cap companies, the
25 Legislature appears to have consistently indicated that the

1 rates charged through the price cap mechanism are by
2 definition just and reasonable.

3 In other words, the Commission's General
4 Counsel has concluded that the Commission has been preempted
5 by the Legislature from any determination that rates that
6 are at or below the maximum price cap rates are somehow
7 unjust or unreasonable. And certainly CenturyTel agrees.

8 The Office of Public Counsel is the only party
9 that has taken a different view and has suggested that the
10 Commission has the authority to disapprove tariffs that are
11 less than 8 percent increases in the non-basic category in
12 any 12-month period.

13 Unfortunately, the Office of Public Counsel
14 has largely glossed over some specific provisions of
15 392.245.11 that provide, in our opinion, clear and
16 unambiguous terms that a price cap regulated company may
17 increase its non-basic rates by up to 8 percent in any
18 12-month period.

19 Instead, I think if you look at the Briefs
20 that have been filed, the Public Counsel's urging the
21 Commission to take a broad view of the telecommunications
22 statutes. However, that broad view approach seems to turn
23 fundamental principles of statutory construction on their
24 head, since it would have the general purpose provisions of
25 Chapter 392 somehow controlling over the specific statutory

1 provisions that directly relate to non-basic service
2 increases for price cap companies.

3 In the Public Counsel's initial memorandum,
4 he's argued that the Commission has authority and the duty
5 to determine whether the 8 percent rate increases are just
6 and reasonable. But does that statute mean -- or what does
7 that mean when it says the rates need to be consistent with
8 just and reasonable rates? Does that statute mean that the
9 Commission can apply traditional rate base rate of return
10 regulation to analyze that proposed rate?

11 Clearly the answer is, because subsection 6 of
12 the price cap statute specifically says that a company
13 regulated under this section shall not be subject to
14 regulation under subsection 1 of 392.240.

15 Of course, if you go to that statute, that's
16 the section that applies traditional rate of return
17 regulation to other telephone companies that are not price
18 cap regulated. Its provisions are very similar to the
19 provisions that are in 393 that allow the Commission to
20 apply rate base rate of return regulation to all of the
21 other public utilities in the state.

22 Subsection 5 of the price cap statute also, I
23 think, supports the suggestions of the General Counsel and
24 the price cap regulated companies. Under that section, if
25 the Commission determines that effective competition exists

1 in any exchange, the local telephone company may thereafter
2 adjust the rates for the competitive market conditions that
3 are facing that particular service. It can take the rates
4 up or it could take them down without any approval by the
5 Commission. It's simply flexible pricing, market-based
6 pricing. In other words, the ILEC in that situation if it
7 faces effectively competitive conditions has complete
8 pricing flexibility.

9 However, if the Commission later determines
10 under that statute that effective competition no longer
11 exists, then the Commission is directed by the statute to
12 reimpose the provisions of subsection 4 and subsection 11 of
13 the price cap statute, and go back and recalculate what the
14 index prices would have been had they stayed under price cap
15 regulation for all those years.

16 Now, it would make no sense to interpret these
17 particular provisions to mean that instead of reverting back
18 to the price cap formulas, the indexes that are incorporated
19 in the price cap statute, that what that statute really
20 means is that you go back and reimpose traditional rate base
21 rate of return regulation.

22 The only way to make sense out of that statute
23 is that the Legislature has basically determined there are
24 going to be three levels of regulation in Missouri. First
25 there's going to be traditional rate based regulation which

1 applies to a number of the small independence yet today.
2 Second, there's price cap regulation, and part of price cap
3 regulation, price cap companies can raise rates by up to
4 8 percent a year for non-basic rates. Or third, once you
5 have effective competition, you get complete pricing
6 flexibility.

7 Now, subsection 11 of this section relating to
8 allowing the 8 percent increases for non-basic, that would
9 be totally superfluous and meaningless if whenever you
10 determined that there was no longer effective competition,
11 instead of reverting back to the price cap formulas, instead
12 what you did was you reverted back to traditional rate base
13 rate of return regulation. That doesn't make sense, and I
14 don't think that's what the Legislature intended.

15 As the General Counsel has pointed out, the
16 very first sentence of the price cap statute states, the
17 Commission shall have the authority to ensure that rates,
18 charges, tolls and rentals for telecommunications services
19 are just, reasonable and lawful by employing price cap
20 regulation.

21 Clearly from our perspective the Legislature
22 has already declared that the rates established using
23 statutorily mandated price cap formulas are deemed to be
24 just, reasonable and lawful, and we don't think the
25 Commission has the authority to amend that statutory

1 provision.

2 Since the General Assembly has specifically
3 found that rates based upon price cap formulas are just,
4 reasonable and lawful, CenturyTel believes that it would be
5 improper and unlawful for the Commission to reject a
6 non-basic increase of 8 percent or less in a year.

7 In conclusion, we respectfully request the
8 Commission to follow the clear and unambiguous mandates of
9 Section 392.245 subsection 11 and permit Southwestern Bell
10 in this proceeding, SBC Missouri in this proceeding and
11 other price cap companies in the future to increase
12 non-basic telecommunications rates by up to 8 percent
13 annually as permitted by law.

14 CenturyTel does not have a witness in this
15 proceeding, and we believe most of the issues are largely
16 legal in nature. I'd be happy to try to answer any
17 questions you might have from a legal perspective. Thank
18 you very much.

19 JUDGE THOMPSON: Thank you, Mr. Fischer.
20 Questions from the Bench?

21 CHAIRMAN SIMMONS: I do.

22 JUDGE THOMPSON: Chair Simmons.

23 CHAIRMAN SIMMONS: Good morning, Mr. Fischer.

24 MR. FISCHER: Good morning.

25 CHAIRMAN SIMMONS: How are you, sir?

1 MR. FISCHER: I'm doing very well. Thank you.

2 CHAIRMAN SIMMONS: Good. Your last statement,
3 I was going to basically talk about the fact that you don't
4 have a witness today, so it looks like I get to ask you the
5 questions.

6 MR. FISCHER: I think that's how my client
7 would like it.

8 CHAIRMAN SIMMONS: Yeah. I'll tell you what,
9 I was struck by some of the statements that you made, and it
10 just triggered a few thoughts, and maybe my thoughts are not
11 legal in nature. I'm the non-lawyer here right now on the
12 Bench, so I'll have to just give you layperson's questions,
13 so to speak.

14 It's your contention and your position, your
15 company's position that this commission does not have
16 authority to reject anything dealing with non-basic
17 telecommunications services. The Legislature took that
18 authority away from us, correct? Is that what you think?

19 MR. FISCHER: Yes, your Honor. I think
20 they've established a broader perspective on regulation that
21 includes these three levels of regulation, and if you're
22 under that price cap formula, then as far as non-basic rates
23 go, it's clear that you have the opportunity to raise it up
24 to 8 percent. You don't have to do that every year, and
25 certainly the companies have not exercised that every year.

1 But that's correct.

2 CHAIRMAN SIMMONS: So understanding that, then
3 I always wonder why these issues are before me, because if I
4 don't have the opportunity to deal with it and the
5 Legislature took that away from me, have you ever thought
6 about why I have to either say yea or nay in terms of the
7 process? Because I always get a little confused on this
8 issue.

9 On one side -- you may have been in my shoes.
10 On one side I have a media that tells me every time I've
11 raised a rate, this Commission has raised a rate. And I may
12 say, no, I didn't. I don't have the ability to do that.
13 The Legislature took that away from me. But there's
14 confusion there. So from that perspective, it's your
15 contention that this Commission absolutely does not have
16 that authority; that was taken away by the Legislature.

17 And, therefore, if an increase were to go into
18 effect on non-basic service, this Commission really didn't
19 do that, did we?

20 MR. FISCHER: Your Honor, I think there still
21 is the requirement that these rates be tariffed rates and
22 that there is notice to the general public about what those
23 rates are.

24 As I would interpret this, your basic function
25 here is to look at the proposed rate increase, make sure

1 that it is within those maximum allowable rates, just like
2 you would on basic local for a price cap company or access
3 rates, to make sure that the formulas are being applied
4 correctly.

5 It's not -- you're not determining any rate of
6 return like you would in a public utility that's
7 traditionally rate base regulated, but are you making a --
8 you are looking at the facts to make sure that those
9 formulas are being applied properly, and I think that's your
10 basic function here.

11 You're not -- I would not suggest to the media
12 that you're making a decision that somehow -- like you would
13 in other public utilities where you're looking at the
14 overall earnings. You're just simply looking at whether the
15 rates do meet the statutorily mandated formulas in the
16 statute.

17 CHAIRMAN SIMMONS: Now, talk to me a little
18 bit about just and reasonable, when it comes to just and
19 reasonable. Is this Commission, does it make any decisions
20 as it relates to just and reasonable within the context of
21 the statutes? I mean, do we still have the ability, in your
22 opinion, to say whether or not this 8 percent increase in
23 non-basic service is just and reasonable?

24 MR. FISCHER: With relation-- if you're
25 talking about non-basic services, that determination has

1 already been made by the Legislature, and it has been
2 mandated by law that that is a just and reasonable rate.
3 And, therefore, if you're looking to make a contrary
4 decision, I don't think you have that authority.

5 CHAIRMAN SIMMONS: So again, with respect to
6 just and reasonable, even that's not in my jurisdiction or
7 that's -- I don't have the ability to impact that situation
8 either, do I, from what you just said?

9 MR. FISCHER: You don't have the discretion in
10 my opinion to refuse to allow a rate that meets the
11 statutory formula to not go into effect, that's right.

12 CHAIRMAN SIMMONS: Okay. That's what I've got
13 right now, and I'm sure I'll have other questions for others
14 when they become available. Thank you, sir. Thank you,
15 Judge.

16 JUDGE THOMPSON: Thank you, sir. Other
17 questions from the Bench? Commissioner Gaw? Commissioner
18 Clayton?

19 COMMISSIONER CLAYTON: I just have a few
20 questions. The Chairman brought up a good point, since for
21 CenturyTel you're the only one, then keep you on the hot
22 seat just for a second.

23 MR. FISCHER: I appreciate that opportunity.

24 COMMISSIONER CLAYTON: And you may not have
25 the information to answer these questions. These are kind

1 of factual in nature. But do you know the amount of
2 revenue, the amount of income that CenturyTel receives based
3 on these two types of non-basic services?

4 MR. FISCHER: I don't have that, but I can get
5 that for you, I'm sure.

6 COMMISSIONER CLAYTON: And do you know what
7 CenturyTel charges for these identical services in its area?

8 MR. FISCHER: Yeah. That's included in Craig
9 Unruh's testimony. They're not in those specific local
10 exchanges, but as far as our local exchange rates are
11 included in his testimony.

12 COMMISSIONER CLAYTON: And I think Staff has
13 listed also in the Staff testimony, but those are accurate
14 figures?

15 MR. FISCHER: Yes.

16 COMMISSIONER CLAYTON: And they're less than
17 what --

18 MR. FISCHER: They're less than what
19 Southwestern Bell happens to be charging, but they're more
20 than what others are.

21 COMMISSIONER CLAYTON: The last question --
22 well, it's not quite the last question. Would you agree or
23 disagree that these types of services generally are involved
24 in emergency-type basis?

25 MR. FISCHER: I would sure like to think that.

1 I've known a teenager or two that has used it for other
2 purposes, but they had to deal with their dad.

3 COMMISSIONER CLAYTON: Do you want to place
4 any specific teenagers on the record here today?

5 MR. FISCHER: No, I won't do that. I've got
6 three. They knew who they are.

7 COMMISSIONER CLAYTON: In case they're
8 listening at home, right?

9 MR. FISCHER: Your Honor, I would certainly --
10 that's right. I would certainly hope that they would be
11 used principally in more important situations than just
12 calling to see --

13 COMMISSIONER CLAYTON: I did not pull up the
14 CenturyTel tariff to examine under what circumstances these
15 two services can be used. Are you familiar with the
16 language in CenturyTel's tariff? Are there requirements
17 that an emergency or some suggestion of an emergency exist?

18 MR. FISCHER: I don't believe there are, no.

19 COMMISSIONER CLAYTON: In your opinion on
20 behalf of, I guess, CenturyTel, do you believe that these
21 non-basic services are any different than directory
22 assistance or an operator-type service or any other service?
23 Do you think these should be thrown in the same batch with
24 everything else or do you believe that they're different
25 because of that emergency-type scenario?

1 MR. FISCHER: Your Honor, in -- I happened to
2 be around long enough to have participated in that 18-309
3 docket, and in that docket there were three categories.
4 There were the basic, there were what later became
5 non-basic, and then there was a group in between where you
6 would apply social and economic considerations.

7 I would think that to the extent that
8 emergency service under that scenario might have fallen into
9 that third category where you would have the ability to look
10 at social and economic factors.

11 Of course, the Legislature has in the meantime
12 stepped in and passed the statute, and under the statute I
13 don't think you have any authority to reduce that merely
14 because they're emergency services or because the national
15 inflation rate might be lower than 8 percent.

16 COMMISSIONER CLAYTON: So you see no
17 difference according to state law?

18 MR. FISCHER: Not according to our state law
19 today.

20 COMMISSIONER CLAYTON: And I'm sure that you
21 covered this in your opening statement. I wrote down some
22 notes. But when the price cap statute, I believe that's
23 Section 245, makes reference to the price cap prices being
24 consistent with Section 200, what do you think that means?

25 MR. FISCHER: Well, I think the price cap

1 statute itself has said that they are just and reasonable
2 rates, and I don't --

3 COMMISSIONER CLAYTON: But what does it mean
4 when it makes reference to Section 200, the prices here
5 must -- I can find the exact language, but must be
6 consistent with the provisions of Section 392.200, what does
7 that mean, consistent with which provision?

8 MR. FISCHER: It does not mean that you go
9 back to traditional rate base rate of return regulation.
10 That's clear because there's 240, subsection 1. It's not
11 under that. And I think that basically says that it has to
12 be, it has to meet the price cap formulas, because we have
13 said, the price cap formulas, if you meet that, that is just
14 and reasonable.

15 Now, if we propose -- if a price cap company
16 comes in and says 10 percent is what it should be, that
17 would not be just and reasonable because the Legislature has
18 said it has to be 8 percent or less.

19 COMMISSIONER CLAYTON: Does Section 200 make
20 reference to the 8 percent?

21 MR. FISCHER: No. That predated the price cap
22 sections altogether. That goes back probably to 1913.

23 COMMISSIONER CLAYTON: Okay. So the
24 Section 200 doesn't relate -- in and of itself does not
25 relate to price cap regulation, correct?

1 MR. FISCHER: That's correct.

2 COMMISSIONER CLAYTON: So then why is that
3 reference in there?

4 MR. FISCHER: I think that reference is in
5 there to make sure that the Commission understands that the
6 Commission -- that the Legislature has determined 8 percent
7 increase are just and reasonable, anything more than that is
8 not just and reasonable, and to the extent someone proposes
9 that, it's not consistent with just and reasonable rates.
10 I'm losing you, I think.

11 COMMISSIONER CLAYTON: No, you haven't lost
12 me. I just -- well, I don't understand in the sense that
13 why is that reference -- why does that reference to
14 Section 200 need to be there if it says in 245 that it's
15 just and reasonable?

16 MR. FISCHER: It probably -- it probably
17 doesn't because it seems real clear that they have said that
18 it's just and reasonable.

19 COMMISSIONER CLAYTON: That's my concern,
20 because the Legislature saw fit to put that phrase in there.

21 MR. FISCHER: It would be my contention that
22 it's just an additional reference that indicates that if
23 anything is above that or --

24 COMMISSIONER CLAYTON: Above what?

25 MR. FISCHER: Above the 8 percent or above

1 the --

2 COMMISSIONER CLAYTON: 200 doesn't say
3 anything about the 8 percent.

4 MR. FISCHER: No. It says this particular
5 statute, the price cap regulation statute says that if
6 you -- if you raise it by 8 percent or less, those are just
7 and reasonable rates.

8 Now, it's not consistent with just and
9 reasonable rates if you raise it by 10 percent or more or if
10 you don't follow the -- on the dollar and a half rebalancing
11 statute, if we would have tried to rebalance by \$2 a month
12 rather than a dollar and a half, that would not be just and
13 reasonable and would not be consistent with subsection 200.

14 COMMISSIONER CLAYTON: Thank you.

15 JUDGE THOMPSON: Thank you, Commissioner.
16 Thank you, Mr. Fischer.

17 MR. FISCHER: Thank you.

18 JUDGE THOMPSON: We will hear now from Sprint,
19 Ms. Creighton Hendricks.

20 MS. HENDRICKS: Commissioners, I'm appearing
21 on behalf of Sprint Missouri, Inc. today.

22 I had an opening written out and it was going
23 to cover much of the ground that SBC and CenturyTel had
24 covered, because we join them in their position in this
25 case, but instead I'd like to focus on the questions that

1 have just been raised from the Bench.

2 First of all, the question as to why does
3 392.200 appear both in subsection 4 and 11? The answer to
4 that question is because the Legislature intended for the
5 Commission to evaluate the nondiscriminatory provisions that
6 are contained in 392.200.

7 And if you look at the statute, you'll see
8 that of the -- I don't know if it's provisions in them --
9 they have in it, seven of them deal with nondiscrimination
10 in some form. Only one deals with just and reasonable
11 prices, and that's the first section.

12 Now, the way you get to that answer is that,
13 first of all, the canons of statutory construction tell us
14 that a specific statute, such as the price cap statute,
15 governs over general statute such as 392.200. And without a
16 doubt on the question of just and reasonable rates for price
17 cap companies, the price cap statute defines the
18 Commission's authority and defines what a just and
19 reasonable rate is. Therefore, it governs.

20 Furthermore, if you look at the price cap
21 statute, you will note that at least 41 times the
22 Legislature has used the word shall, and in the majority of
23 those cases the word shall defines what the Commission shall
24 do. In the statute they also use the word may, and I think
25 about six times, and in one of those cases it gave the

1 Commission discretionary action, and that's in subsection 10
2 where the Commission has the authority to defer a rate
3 decrease by long distance providers.

4 Clearly the legislators knew how to identify a
5 mandatory action by this Commission versus a discretionary
6 action by this Commission. And in connection with approving
7 maximum allowable prices, they used the word shall.

8 Now, the reference to 392.200, if those two
9 principles didn't already establish that the first section
10 of 392.200, which is the just and reasonable rates, did not
11 apply under the price cap statute, then the legislators
12 answered that question in subsection 5 of the price cap
13 statute.

14 And it was mentioned by CenturyTel's counsel,
15 but if you look at it, it instructs the Commission how to
16 handle a company that is coming back into price cap
17 regulation after having spent some time as a competitive
18 company.

19 And in that situation, it says specifically
20 that the Commission shall reimpose Section 392.200, I think
21 it's subsection 4(2)(c), and establish a maximum allowable
22 price under subsection 4 and 11 of the price cap statute.
23 It does not state and establish a maximum allowable price
24 under subsection 4, 11, and 392.200. The reference to
25 392.200 is to the nondiscriminatory provisions of the

1 statute.

2 So I think it's clear within the context of
3 the price cap statute what role 392.200 plays.

4 Furthermore, there's a greater question here,
5 too, is what is the purpose of the price cap statute? And I
6 think that Mr. Lane identified it. It's to establish a
7 balance between two categories of services, one which is the
8 basic and the access, in which we are being limited and in
9 most cases required to decrease our price, and then on the
10 other hand we are given flexibility, a defined area in which
11 we can manage our non-basic services.

12 And that's the quid pro quo of a price cap
13 statute. If you are to interpret it in the manner that OPC
14 suggests in this case, the price cap statute becomes
15 meaningless. It might as well not be there.

16 Therefore, we reiterate that we see as purely
17 a legal issue, and we think that the statute defines the
18 authority, it does it clearly, and it answers the question
19 about the role of 392.200.

20 Now, Sprint also does not have a witness in
21 the case, so I will make myself available if there are any
22 questions at this time.

23 JUDGE THOMPSON: Thank you.

24 Chair Simmons?

25 CHAIRMAN SIMMONS: Good morning.

1 MS. HENDRICKS: Good morning.

2 CHAIRMAN SIMMONS: How are you today?

3 MS. HENDRICKS: Fine.

4 CHAIRMAN SIMMONS: You know, I was just
5 thinking about this as we're talking about this legislative
6 intent and what the Legislature may have been thinking at
7 that time. I think you mentioned that they used the word
8 shall some 41 times and may some 6 times. You added all
9 that up, huh?

10 MS. HENDRICKS: I actually went through the
11 word count and found it, yes.

12 CHAIRMAN SIMMONS: And I was just thinking
13 about that as you were saying that. Wouldn't it be
14 interesting if you had legislators that you could ask that
15 question that might have, you know, participated or
16 something like that? They may have given us a clue to what
17 they may have been thinking. That would have been real
18 interesting in this case, wouldn't it?

19 MS. HENDRICKS: I think that for many of us
20 that would be particularly interesting, but I do think that
21 the canons of statutory construction govern that when we're
22 faced with a statute and we have to interpret it, we really
23 have to look at the rules that we have for interpreting, and
24 the Legislature should be held responsible for operating
25 within those rules, because it's applicable across the

1 board, not just to this Commission.

2 CHAIRMAN SIMMONS: I mean, you know, there are
3 times that I've just always wanted to ask legislators what
4 they were thinking as they were constructing these kinds of
5 statutes, and I never had that opportunity, but sometimes --
6 you know, I just may take that opportunity. It would be
7 interesting if you guys could even ask legislators that
8 might have participated what they might have been thinking.
9 But that's for neither here nor there.

10 Your position is quite clear that this
11 Commission does not have the authority as it relates to
12 Issue No. 1, we don't have the authority to interject or to
13 stop the increase of a non-basic service. That authority
14 has been taken away from us, correct?

15 MS. HENDRICKS: And I would probably rephrase
16 it in a different manner. That authority has been defined
17 for you. The Commission is a creation of the statute. The
18 statute has set your parameters and said this is your
19 authority with respect to price cap companies. Increases
20 within these parameters shall be approved.

21 So instead of taking the authority away, I
22 defined it or I would choose to say they defined your
23 authority. They've indicated what parameters you would act
24 within. But as long as we're within those parameters, then
25 they've only identified one option for the Commission.

1 CHAIRMAN SIMMONS: And I have to ask you that
2 question because I'm going to put everybody on notice, I'm
3 going to ask the same question to basically everybody. I'd
4 like to hear everybody's opinion, because I think it's
5 interesting in terms of either how they defined our
6 authority or how they've taken away our authority. I just
7 want to get everybody's opinion. I'm going to ask the same
8 question. So I appreciate your response.

9 MS. HENDRICKS: And Commissioner, one other
10 thing. On the other side of the coin, too, they have taken
11 away from the companies the ability to increase our basic
12 rates. I mean, they have -- and the access rates within
13 those parameters. Once again, we operate within those
14 parameters.

15 So there's two sides to the story. I just
16 want to make sure that the other side is highlighted,
17 because I do think it's a balance. It goes back to the
18 balance that SBC identified. Because I think in isolation
19 if you look at one side or the other, it could appear to be
20 unbalanced, but I think if you look at the total statute,
21 there is a balance being struck.

22 CHAIRMAN SIMMONS: Appreciate your thoughts.
23 That's all the questions I have. Thank you.

24 JUDGE THOMPSON: Thank you, Chair Simmons.
25 Commissioner Gaw?

1 COMMISSIONER GAW: Good morning.

2 MS. HENDRICKS: Good morning.

3 COMMISSIONER GAW: I want to touch on a little
4 bit of a different topic, but it plays into what you were
5 just talking about at the very end. And help me to
6 understand what the company's position is on this concept of
7 balance.

8 At the time that the '96 act was under
9 consideration, do you believe that this concept of
10 balance -- I hope that's not an indication that we're going
11 to have something come through the ceiling here, that noise
12 that we hear in the background. Pardon the editorial.

13 Do you think that concept of balance was
14 considered at the time that the '96 act were being -- were
15 being considered in the sense that basic and non-basic
16 services were in some sort of a -- together brought a
17 certain amount of revenue into the companies that was an
18 appropriate amount at that time for considering --
19 considering all the factors that went into calculating what
20 revenues should be up to that point?

21 MS. HENDRICKS: Well, I think it's inescapable
22 that a balance was envisioned and it was contemplated,
23 because if you truly look at basic and access services,
24 there are limits, and they're well-defined limits, and we've
25 seen those limits operate to require us to decrease

1 services. And then on the other hand non-basic is treated
2 different than those services.

3 So the balance was a part of the statute. And
4 also if you look at the other price cap statutes that, as
5 SBC referenced, we'll be putting in place, having this
6 balance or quid pro quo is one of the main features of price
7 cap.

8 COMMISSIONER GAW: Well, here's what I'm
9 getting to, though. There's going to be testimony that's in
10 some of the prefiled testimony that I believe suggests that
11 there was -- there was an understanding or a belief that
12 basic services, particularly for residential, were priced
13 lower than perhaps they would be priced if you were looking
14 at those services purely from a cost base perspective. Is
15 that correct or close to being correct?

16 MS. HENDRICKS: I believe that's even
17 reflected in the statute, yes.

18 COMMISSIONER GAW: All tight. But on the
19 other hand, in order to make up for what was a policy that
20 had been sort of set over the years, non-basic services were
21 allowed to be priced at a higher level than what might be
22 considered to be their costs, so that together there would
23 be appropriate revenue for the company? I'm being very
24 general here, but I'm looking for feedback.

25 MS. HENDRICKS: I can't say that there was an

1 extensive amount of analysis probably done on the non-basic,
2 even though I think Mr. Lane had identified the background,
3 and I don't know to what extent the legislators were aware
4 of the background instruction of price. I do know that they
5 set a maximum allowable price just and reasonable based on
6 the work that had been done prior to going into the price
7 cap. So that work was captured at that time.

8 Furthermore, the non-basic service, they gave
9 us the flexibility for the services that were more likely to
10 be competitive and discretionary. So these are services
11 where you have limits other than the Commission that's going
12 to affect your price decision, and there is no guarantee
13 that we're going to be able to take advantage of that
14 8 percent, and I think time has proven that we haven't.

15 COMMISSIONER GAW: You're getting ahead of me,
16 though. I'm still right back here at trying to get to first
17 base on this. When we're talking about the revenues that
18 companies were making up to '96, do you believe that the
19 Legislature assumed that the total revenues of the companies
20 were adequate.

21 MS. HENDRICKS: At that time?

22 COMMISSIONER GAW: Yes, at that time.

23 MS. HENDRICKS: I believe that by setting the
24 maximum allowable price there was acknowledgement of the
25 Commission's work up to that time.

1 COMMISSIONER GAW: Which means what?

2 MS. HENDRICKS: Which means --

3 COMMISSIONER GAW: I don't know if you
4 answered my question.

5 MS. HENDRICKS: That the legislators accepted
6 the prices that the companies had at that time, and I -- I
7 don't see any indication that they saw it to be wholly
8 inadequate, but what they were setting was the parameters
9 for going forward.

10 COMMISSIONER GAW: Do you think that it was
11 based on an assumption that the revenues were adequate for
12 the companies?

13 MS. HENDRICKS: I believe it was.

14 COMMISSIONER GAW: Okay. Now, if I take that
15 as an assumption, then if I look at the total revenues that
16 are generated from basic and non-basic services of the
17 companies, what else am I missing on revenue streams?

18 MS. HENDRICKS: One thing I don't think you're
19 calculating in, and you've seen a trend in the industry,
20 that we're losing access lines. So we're just losing basic
21 access.

22 COMMISSIONER GAW: You're getting into the
23 future now. I'm back in 1996. I'm not looking ahead with
24 any information that's available to us now from hindsight.
25 I'm just looking at what we were -- what was being dealt

1 with in 1996. What other revenue streams were available to
2 the companies in consideration in a rate case, for instance,
3 other than basic and non-basic services?

4 MS. HENDRICKS: Well, access, I don't know
5 where you put that in.

6 COMMISSIONER GAW: I don't know either. Where
7 would you put it? Is that a separate category or is it --

8 MS. HENDRICKS: I think by statute it may be a
9 separate. I think it actually falls within non-basic, but
10 the price cap statute treats it similar to the basic. So it
11 almost creates a third category.

12 COMMISSIONER GAW: But it was acknowledged at
13 the time? It wasn't ignored?

14 MS. HENDRICKS: Correct.

15 COMMISSIONER GAW: So if I look at that
16 concept, then, and I break it down and split it into basic
17 and non-basic services, there was a concept that basic
18 services would -- that the Legislature would set a policy
19 that basic services would be subject to allowing them to
20 increase for the most part based upon consumer price index
21 and one other -- or one other test. I can't remember. But
22 it was to float with the increases of cost to consumers
23 measured by a couple of different methods; is that correct?

24 MS. HENDRICKS: Correct. There's a rate
25 rebalancing that occurs, but it's a revenue neutral.

1 COMMISSIONER GAW: Yeah, and that's a rate
2 rebalancing that deals with the access charges?

3 MS. HENDRICKS: Correct.

4 COMMISSIONER GAW: Let's ignore that for a
5 moment because it is just a rebalancing.

6 MS. HENDRICKS: Correct.

7 COMMISSIONER GAW: So if we then look at the
8 other available revenue stream, it would have been the
9 non-basic side?

10 MS. HENDRICKS: Correct.

11 COMMISSIONER GAW: All right. And the
12 Legislature made some statement about, well, we're going to
13 allow those to increase at an amount -- and we won't argue
14 about the meaning of the statute right now. Let's just
15 focus on the percentage -- an increase that could amount to
16 up to 8 percent per year, correct?

17 MS. HENDRICKS: Correct.

18 COMMISSIONER GAW: So the basic services were
19 being held to a standard that had to do with how prices
20 moved up and down overall to consumers; would that be right?

21 MS. HENDRICKS: Correct.

22 COMMISSIONER GAW: But non-basic services, the
23 company's position is, drives up to 8 percent a year without
24 any other analysis?

25 MS. HENDRICKS: Correct.

1 COMMISSIONER GAW: So if I look at it from
2 that standpoint, the company's position is that the overall
3 revenues, then, would, if the companies took advantage of
4 the 8 percent, increase at a greater rate than the rate of
5 inflation or the rate of rise in the consumer prices?

6 MS. HENDRICKS: It could be, yes.

7 COMMISSIONER GAW: Because I have no -- no
8 place here that I can see am I reducing anything except in
9 the event of basic services that the amount might be
10 depressed by decreasing consumer prices?

11 MS. HENDRICKS: Well, in fact, it has been, I
12 think, in most years it decreased.

13 COMMISSIONER GAW: You're jumping ahead of my
14 question. Isn't it true that that's the only place that it
15 might go down, and it just rides with the price on the
16 consumer of consumer pricing?

17 MS. HENDRICKS: Well, in fact, we can reduce
18 non-basic services if we would like. One thing I think this
19 conversation is forgetting, and I think it's evident by the
20 structure of the price cap statute, is this is intended to
21 bring us into a more competitive environment. It kicks in,
22 once again, based on a shell, when a CLEC is certified, and
23 then when that CLEC gets to a level of activity that is
24 sufficient to be effective competition, they're taken out.
25 So you're operating in this transition period.

1 During that period, with our non-basic
2 services, much of those services are going to be subject to
3 competition and/or be discretionary. And mind you, those
4 with whom we compete in a lot of those non-basic services
5 don't have an 8 percent per year, and I think as it was
6 identified do, in fact, have prices substantially higher.

7 And I think the purpose of the statute was to
8 get us more and work our way towards being competitive
9 companies. And as we approach that point, for our non-basic
10 services, the ones that already have the price pressure, to
11 treat us more like the competitors.

12 So there's many, many factors. The analysis
13 that I hear so far is really that rate of return analysis,
14 and I think that's what it was intended to get away from.

15 COMMISSIONER GAW: I'm just looking at what
16 existed in '96 before the act, which was a rate of return
17 system.

18 MS. HENDRICKS: Correct. And this was
19 intended to change it.

20 COMMISSIONER GAW: But in regard to the
21 assumptions that were being made, there was an assumption
22 that the rate of return that was being -- that the companies
23 were receiving was adequate?

24 MS. HENDRICKS: And there was an equally
25 strong assumption that the rate of return analysis would not

1 be applied to price cap companies because, pursuant to
2 subsection 7, in no uncertain terms does it state that we
3 should not be placed under that analysis.

4 COMMISSIONER GAW: I've heard those arguments
5 this morning about rate of return. I'm not sure whether
6 it's a red herring or a real argument, but I'm trying to
7 understand it.

8 This concept of this increase of up to
9 8 percent a year that the companies believe exists that
10 allows an increase in the overall pricing that the companies
11 had that increase faster than if the 8 percent is taken by
12 the companies in addition to the -- that the companies say
13 they're fully entitled to means that the Legislature
14 contemplated allowing the increases of revenues to these
15 companies that were already deemed adequate at a faster rate
16 than the Consumer Price Index, regardless of whether that
17 resulted in something that allowed a recovery at a greater
18 amount than what existed in 1996. I'm not sure that I see
19 any other conclusion other than that.

20 MS. HENDRICKS: I think that the statute did
21 not -- it didn't say you shall increase your prices by
22 8 percent every year. What it said, price cap company, you
23 may, and if you make the determination within this group of
24 services, we have defined the Commission's authority to let
25 you do it. They're discretionary services. If you want to

1 put your price up so high and force the customers not to use
2 it company, you can do that. They're competitive services.
3 If you want to price yourself out of the market, you can do
4 that.

5 COMMISSIONER GAW: And what was supposed to
6 control, what was supposed to ensure just and reasonable
7 rates on particular services according to the company?

8 MS. HENDRICKS: The just and reasonable rates
9 are in place as long as you operate within the parameters
10 that the Legislature set out in the statute.

11 COMMISSIONER GAW: So even if the rates were
12 just and reasonable or assumed to be just and reasonable in
13 '96, and even if the Consumer Price Index would increase at
14 a rate far less than 8 percent a year, then an increase of
15 8 percent per year was going to be conclusively presumed to
16 be just and reasonable, that's the company's position?

17 MS. HENDRICKS: Correct. Supported by the
18 statute, yes. I won't --

19 COMMISSIONER GAW: That's your argument, isn't
20 it, Counsel?

21 MS. HENDRICKS: I know. I'll refrain. I'll
22 refrain.

23 COMMISSIONER GAW: But that's your position?

24 MS. HENDRICKS: Correct, that is our position.

25 COMMISSIONER GAW: And so it's the company's

1 position that, regardless of where the reality is in the
2 view of independent assessment, that an 8 percent increase
3 per year which could over the scope of two years, I guess,
4 if you take 8 percent plus 8 percent and another 8 percent,
5 you're talking about in three years that's 24 percent, or is
6 that -- my math days are getting away. That's even more
7 than that, Commissioner Clayton suggests.

8 So we're increasing even though that is far in
9 excess of what we've experienced the last few years on the
10 increase in consumer prices, this Commission is supposed to
11 say, the Legislature conclusively presumed that that is just
12 and reasonable and not -- and not look at any other piece of
13 evidence?

14 MS. HENDRICKS: That is correct. And if I may
15 emphasize the fact that this was intended to be something
16 that was in place as we transition to a competitive company,
17 and mind you those with whom we compete have no 8 percent
18 which they operate under. They could increase their prices
19 substantially higher than that if they choose.

20 I think to answer the question, I think once
21 again it's that balance and focus on what the price cap
22 statutes intended to accomplish. The whole time that it's
23 allowing us to look more like our competitors, it is
24 protecting that group of services that I think the
25 legislators were most worried about, and those are basic

1 services and access services.

2 And so if you just focus on what's happening
3 in non-basic, I do think we can get to arguments such as the
4 one you have presented to me here, but I think we have to
5 look at the entire statute and look at the purpose of the
6 statute, because once we incorporate that, it becomes
7 understandable what they're doing and I believe the goals
8 become clear of the price cap statute.

9 COMMISSIONER GAW: I'm trying to understand
10 when we're talking about balance, if there was balancing in
11 1996 which was partially set by social policy in between
12 basic and non-basic rates and if those -- if those together
13 were presumed to produce adequate revenues for the
14 companies, then why would there be a conclusive presumption
15 that an 8 percent increase on non-basic services would
16 preserve that balance and that it would have anything to do
17 with just and reasonable rates as a matter of a total
18 conclusion?

19 Why would the Legislature have come to that
20 conclusion without any other safety net or protection in the
21 event that the 8 percent was totally irrelevant to what was
22 going on in the world?

23 MS. HENDRICKS: I think there are two
24 responses to that. One, because what they were trying to
25 achieve was to allow me to look more like the companies with

1 whom I compete who have substantial more pricing
2 flexibility.

3 And two, with respect to the basic, I took all
4 the risk. I mentioned one thing that is happening in the
5 industry, I'm losing access lines. I can't go back to my
6 basic service to recover that revenue. So I -- that's just
7 one example. All the risk associated with the basic
8 services I assume, and that's not something I assumed prior
9 to the price cap statute, but it's something I assumed after
10 the price cap statute.

11 COMMISSIONER GAW: I know you're advocating
12 the company's position in regard to the reference to 200 and
13 in regard to more specific language governing over more
14 general.

15 Are you aware of any particular analysis of
16 that -- of that legislative -- of that tool to determine
17 legislative intent where there is a specific reference that
18 the statute that is being relied on is being more specific
19 is to be looked at under the guidelines of the more general
20 statute?

21 MS. HENDRICKS: I think what our Brief
22 contains are the legal citations that support the principle
23 or the statutory --

24 COMMISSIONER GAW: Construction?

25 MS. HENDRICKS: Correct, that the general

1 governs the more specific. And I would submit that that is
2 a very well-known concept.

3 COMMISSIONER GAW: It is very well known,
4 isn't it, counsel? But do you have any cases that say, that
5 particularly have this element in it where there's a
6 specific reference that the -- that the general provision
7 will be looked at or will be taken into account when
8 examining the specific statute? Are there any cases that
9 you've seen that have that element to it?

10 I'm aware of the long list of cases and the
11 Hornbook law that exists about the more specific overruling
12 the more general, if those are the only thing -- if that's
13 the only element of statutory construction being looked at.
14 But this has an added element to it.

15 Are any of those cases that you're aware of --
16 and I don't have to know right now. I'm interested in
17 knowing whether or not any of them have that element that
18 you have cited or that you know of, because it presents a
19 different question of statutory construction to me as of
20 now, and I'd like to know whether or not there's something
21 that says that's an irrelevant matter, it does not come into
22 looking at what the statutes mean read together.

23 MS. HENDRICKS: As I stand here, I can't say
24 that one of the cases we cited specifically is responsive to
25 your question.

1 COMMISSIONER GAW: Okay. And I'm not going to
2 hold you to that, because I know that's -- I mean, I'm just
3 throwing it out here off the cuff, but it's something that
4 I'd like to see something about in more detail.

5 MS. HENDRICKS: Yes. May I add that the
6 statute itself in subsection 5 addresses this very question,
7 and I think in subsection 5 it states in a manner that leads
8 to the conclusion that it was the nondiscriminatory
9 provisions of 392.200 that were to be applied, and when it
10 came to maximum allowable price, it is subsections 4 and 11
11 that apply.

12 COMMISSIONER GAW: I'll look at that some
13 more.

14 That's all I have. Thank you, Judge.

15 JUDGE THOMPSON: Thank you, Commissioner.

16 COMMISSIONER GAW: Thank you, counsel.

17 JUDGE THOMPSON: Commissioner Clayton.

18 COMMISSIONER CLAYTON: Thank you, Judge.

19 I'm going to ask you just a couple of
20 questions that I asked Mr. Fischer earlier. Does Sprint
21 consider these two services any different than any of the
22 other non-basic services that are offered in terms of an
23 emergency situation?

24 MS. HENDRICKS: I'm not -- Commissioner, I'm
25 not so sure I can answer it. I do know that we're aware of

1 situations that it's used similar to the ones CenturyTel
2 identified, not always in an emergency situation.

3 COMMISSIONER CLAYTON: So not -- so does
4 Sprint consider it an emergency service or not an emergency
5 service?

6 MS. HENDRICKS: I do believe that the service
7 could be used in a situation that one perceived as
8 emergency. I do believe that today, with a lot of the
9 technology that we have, there's other mechanisms that serve
10 as a substitute, such as a cellphone, for this service if
11 you're trying to reach a person that happens to be on the
12 phone.

13 COMMISSIONER CLAYTON: Okay. Well, in that
14 line, I may need some clarification on something. If I were
15 to -- could I dial using a cellular telephone or a digital
16 phone, could I -- whose service would I actually be using if
17 I dialed the cellular service to break into an ILEC Sprint
18 phone number?

19 MS. HENDRICKS: Maybe I should add a little
20 more details. I think frequently you're going to find that
21 people have cellphones in addition to their home lines. So
22 when you call their home line and it's busy, a lot of people
23 just hang up and call the cellphone.

24 COMMISSIONER CLAYTON: Oh, that's what you
25 meant?

1 MS. HENDRICKS: Correct.

2 COMMISSIONER CLAYTON: Rather than using a
3 cellphone as competition for this particular service?

4 MS. HENDRICKS: Correct.

5 COMMISSIONER CLAYTON: Well, still, are you
6 able to answer that question that if I were to pick up --
7 say I have a Sprint cellular telephone and I dial -- I want
8 to break a Sprint ILEC telephone number. Would it to be
9 billed on the cell as part of the cell number's tariff or
10 would it -- is that a Sprint ILEC tariff charge? Wake up,
11 John.

12 MS. HENDRICKS: I think I'm being told the
13 cellphone. It would be a cellphone charge.

14 COMMISSIONER CLAYTON: You started that line
15 of thinking and I wanted to finish that.

16 So Sprint because of that competitive nature
17 and because of other alternatives wouldn't see these two
18 services as being emergency in nature and requiring a
19 different analysis than other non-basic services?

20 COMMISSIONER CLAYTON: As far as the statutory
21 definition, I clearly see that it fits in. I don't want to
22 diminish anyone's need that may arise for this service. But
23 we do -- we are aware of uses that are non-emergency uses,
24 and they are -- there are services that compete with us,
25 too.

1 COMMISSIONER CLAYTON: But you don't think it
2 should be -- the price should be affected any differently
3 under the statute?

4 MS. HENDRICKS: Correct.

5 COMMISSIONER CLAYTON: If in subsection 5 --
6 and I don't have subsection 5, and I believe that's
7 subsection 5 of Section 245?

8 MS. HENDRICKS: Yes.

9 COMMISSIONER CLAYTON: Where you make
10 reference to the discriminatory -- it can't be a
11 discriminatory charge. Is that a fair assessment of what
12 you're saying?

13 MS. HENDRICKS: Correct.

14 COMMISSIONER CLAYTON: Why in your opinion is
15 the reference to Section 200 in Section 245, sub 11, why is
16 that reference in there?

17 MS. HENDRICKS: Once again, I think it's there
18 because there are several provisions in 392.200, the
19 majority of which, overwhelming majority of which address
20 nondiscrimination, that can exist in a tariff filing. And
21 it's there in connection with a tariff that we determined to
22 file and it's followed by a sentence that says, it shall be
23 approved as long as it's not in excess of the maximum
24 allowable price.

25 COMMISSIONER CLAYTON: According to the

1 statute, does the tariff filing or the price cap filing,
2 whatever you'd want to call it, does it have to be
3 consistent with Section 200? Is that a shall be consistent
4 or a may be consistent? Because it actually follows a may.
5 In the preceding clause it's actually may. So is that a
6 shall be consistent or may be consistent?

7 MS. HENDRICKS: I think as I -- I don't have
8 the statute in front of me, but I think it says that we may
9 file and consistent with. I don't know if there's a shall
10 or a may.

11 COMMISSIONER CLAYTON: Well, there's not.
12 That's why I'm saying what should it be or how should we
13 assess that clause? I mean, is there discretion or not
14 discretion there?

15 MS. HENDRICKS: I think the discretion is
16 really if you go from 392.200. There are some provisions
17 you are free to not apply to us when it comes to
18 discrimination as long as we make a certain showing, and
19 some of that deals with charging customers within an
20 exchange a different price for a different service.

21 So I think much of the discretion is -- or the
22 action as far as the nondiscrimination determinations, you
23 have to look at 392.200.

24 COMMISSIONER CLAYTON: With the other language
25 that is in the price cap statute relating to discriminatory

1 pricing, is this reference here just redundant in your
2 position, is that what you're saying? It's superfluous,
3 would that be the right word?

4 MS. HENDRICKS: I think it actually serves a
5 rule. I think there are provisions in the statute says that
6 we shouldn't charge people within an exchange a different
7 rate unless we make a certain showing, and they intended to
8 carry that concept into the price cap filing.

9 However, because it is so clear on the price,
10 and that's the purpose of the whole statute, with respect to
11 that, that was to be followed by --

12 COMMISSIONER CLAYTON: In Sprint's position?

13 MS. HENDRICKS: Correct.

14 COMMISSIONER CLAYTON: It is so clear?

15 MS. HENDRICKS: Correct. And that was to be
16 determined by what's established in the price cap statute.
17 That's the purpose of the price cap statute is to establish
18 maximum allowable prices.

19 COMMISSIONER CLAYTON: But be consistent with
20 Section 200, which you believe is -- just relates to
21 discrimination and not anything else?

22 MS. HENDRICKS: The majority of the provisions
23 do. I think the reference we find in the price cap statute
24 is intended to capture solely the nondiscrimination
25 provisions of 392.200, yes.

1 COMMISSIONER CLAYTON: Thank you.

2 JUDGE THOMPSON: Ms. Creighton Hendricks, I'm
3 intrigued by your description of how to interpret the price
4 cap statute. You indicated that the reference to 392.200 is
5 primarily to capture the nondiscriminatory, nonpreferential
6 prohibition on geographical deaveraging, those elements of
7 that statute, correct?

8 MS. HENDRICKS: Yes, your Honor.

9 JUDGE THOMPSON: But when I look at Section 7,
10 subsection 7 of the price cap statute that states, a company
11 regulated under this section shall not be subject to
12 regulation under subsection 1 of Section 392.240, are you
13 familiar with that?

14 MS. HENDRICKS: Yes, your Honor.

15 JUDGE THOMPSON: So the General Assembly knew
16 how to exclude a provision if, in fact, they wanted to do
17 that. Why do they not include subsection 1 of 392.200?

18 MS. HENDRICKS: If you look at the first
19 paragraph of the price cap statute, it states that by
20 applying this statute, you have just, reasonable and lawful
21 rates. If you look at 392.200 subsection 1, it says the
22 Commission shall ensure just, reasonable and lawful rates.
23 You have it. You've complied with it, and that's a
24 mechanism because it's specific through which you've
25 complied with that provision.

1 JUDGE THOMPSON: Thank you.

2 COMMISSIONER CLAYTON: Another similar
3 question that I asked CenturyTel I forgot to ask you. Are
4 you aware of what amount of revenue or what percentage of
5 revenue that these two services bring in to Sprint?

6 MS. HENDRICKS: No, your Honor, I'm not,
7 Commissioner. I don't have that information available to
8 me.

9 COMMISSIONER CLAYTON: In your Brief, is there
10 a reference to or is there a relisting of subsection 5 of
11 Section 245? Is that in your Brief?

12 MS. HENDRICKS: Yes, your Honor.

13 COMMISSIONER CLAYTON: Thank you.

14 JUDGE THOMPSON: Further questions from the
15 Bench?

16 (No response.)

17 JUDGE THOMPSON: Hearing none, you may step
18 down. Thank you.

19 We're due now to hear from Staff. However,
20 before we do, we've been going about 90 minutes, so we'll
21 take five minutes at this time. We are in recess.

22 (A BREAK WAS TAKEN.)

23 JUDGE THOMPSON: Mr. Meyer?

24 MR. MEYER: May it please the Commission.

25 Staff is appearing today to present evidence for the

1 Commission's consideration to enable the Commission to
2 address its concerns with the justness and reasonableness of
3 the SBC proposed rate increases.

4 As the Commission has not yet made a
5 determination on the legal issue at this time, the General
6 Counsel's Office continues to believe, as stated in the
7 past, that its reasonable interpretation of the price cap
8 statute gives meaning to the first sentence of
9 Section 392.245.1 that states that the Commission shall have
10 the authority to ensure that the rates, charges, tolls and
11 rentals for telecommunications services are just, reasonable
12 and lawful by employing price cap regulation, and thus that
13 the Legislature intended that rates set under the price cap
14 statute are by definition just and reasonable.

15 Additionally, statutory interpretation
16 supports the conclusion that the Legislature did not intend
17 to permit the Commission to conduct a full examination of
18 rates posed under the price cap statute by its elimination
19 of the Commission's authority to determine whether rates are
20 unjust, unreasonable, unjustly discriminatory or unduly
21 preferential and to determine appropriate just and
22 reasonable rates under Section 392.240.1.

23 These and other legal arguments support the
24 conclusion that the Commission's jurisdiction is limited in
25 this matter to a review to ensure the mathematical accuracy

1 of maximum allowable prices under Section 392.245 .11.

2 I was intending to do a more elaborate
3 discussion of the legal issues at the conclusion of this
4 proceeding. Given what has just transpired with the two
5 preceding attorneys, I can do a full discussion of those
6 legal issues now or save it until the conclusion depending
7 upon what the Commission would prefer.

8 JUDGE THOMPSON: The parties will provide oral
9 argument at the close of the evidence, so --

10 MR. MEYER: That was my understanding. I was
11 intending to, therefore, do that discussion then.

12 JUDGE THOMPSON: Why don't you do your brief
13 discussion, and if there are any questions from the Bench --

14 MR. MEYER: That was my brief discussion to
15 the legal issue, so I will proceed.

16 Staff's evidence is comprised of a compilation
17 of information obtained from available sources that can be
18 used to support a finding that the proposed increases and
19 the maximum allowable price for line status verification and
20 busy line interrupt services are or are not reasonable.

21 Mr. Thomas focuses his inquiry on general
22 economic conditions over the past two years and beyond,
23 examining general economic conditions measured by such means
24 as the Consumer Price Index and gross domestic product, as
25 well as more specific changes measured by UCs such as the

1 producer price index and the employment cost index.

2 He also addresses Staff's concern with the
3 lack of a relationship between the cost of providing these
4 services and the charge to customers for these services, a
5 residual effect of the pre-deregulation pricing methodology
6 created by the Commission in Case 18-309, and notes the
7 additional factor that SBC's rates were frozen for non-basic
8 as well as basic services for a period after SBC entered the
9 price cap regime.

10 Complimentary to Mr. Thomas' scope of inquiry,
11 Mr. Peters has focused his examination on the nature of the
12 services themselves and how SBC's rates compare with other
13 companies' rates for similar services. He provides
14 comparisons between the charges of competitive local
15 exchange carriers, interexchange carriers, incumbent local
16 exchange carriers in other states, and other Missouri
17 incumbent local exchange carriers.

18 Mr. Peters also examined SBC's costs in
19 providing the services we are examining and has provided his
20 estimations of the impact of the increased cost since the
21 last cost study. Like Mr. Thomas, Mr. Peters discusses the
22 impact of Case 18-309 and notes the historic disconnection
23 between cost and the rates charged to customers for these
24 services.

25 He also looks at the demand and revenue impact

1 these services have on SBC as a company, as well as any
2 available substitutes for these services as he endeavors to
3 round out an overall picture of these services and the
4 relationship between the services themselves, SBC and its
5 customers.

6 Taking the results of Staff's two witnesses'
7 testimony in conjunction, you can see that the conclusion
8 rests upon decisions on how to reach that conclusion. If
9 the Commission wishes to examine the rates individually or
10 if the Commission must examine the overall profitability of
11 the company, Staff perceives two different paths to a
12 decision.

13 Mr. Thomas and Mr. Peters can each speak to
14 the outcomes if an individual service-specific analysis
15 should take place, but if not and the overall company is at
16 issue, Staff believes additional evidence is necessary to
17 draw a conclusion as outlined on page 16 of Mr. Thomas'
18 rebuttal testimony.

19 And that leads to the dilemma that Staff would
20 face in that Staff has no established procedure in place to
21 deal with that issue. Such an analysis, which would be
22 tantamount but not equal to traditional ratemaking, would
23 require further time, more than has been allotted here, and
24 is likely to receive potentially further challenges from the
25 companies involved here today.

1 Staff's presentation, admittedly colored by
2 the underlying legal analysis that the Commission's
3 exploration of this topic may be beyond the scope
4 established by the Legislature, is as comprehensive as
5 possible at this time and we believe provides the Commission
6 with all the tools it needs to prepare your Order in this
7 matter.

8 JUDGE THOMPSON: Thank you, Mr. Meyer.
9 Question from the Bench. Chair Simmons?

10 CHAIRMAN SIMMONS: Yes. I have maybe a few.
11 Good morning, sir.

12 MR. MEYER: Good morning.

13 CHAIRMAN SIMMONS: Again, we are basically
14 dealing with two main issues here as far as the briefings
15 are concerned. The first one is, you know, whether or not
16 we have authority to reject price changes for non-basic
17 telecommunications services, the same question that I've
18 asked the other two or three that have appeared before us.

19 I read your -- Staff's statement in your
20 position it says it does not appear to grant the Commission
21 authority to reject. So is that a no or a -- I mean, how do
22 you interpret that? You don't interpret it differently than
23 the others?

24 MR. MEYER: We believe that we -- let me start
25 over. Staff's interpretation on a legal level as at this

1 time directed by the General Counsel's Office is in
2 conjunction essentially with or in agreement with the
3 position espoused by SBC, Sprint and CenturyTel. So yes,
4 that is correct, I believe.

5 CHAIRMAN SIMMONS: So I think I understand
6 where you're coming from. You raised something in your
7 opening statement about Staff not having a process or a
8 procedure. Could you clarify that for me again?

9 MR. MEYER: This is a situation where Staff
10 has been under the understanding that it is to investigate
11 the reasonableness of the 8 percent increase, or less than
12 8 percent as the case may be in this case, which is
13 something that as I understand it has not previously done.

14 Therefore, Staff did an analysis and took in
15 what evidence it was able to take in in consideration of
16 these specific services, the relationship between these
17 services, the cost, the customer cost, the cost of the
18 company to provide these services on a -- on a
19 service-specific basis.

20 If instead, and as certainly some of the
21 previous discussions have addressed, a broader perspective
22 is necessary here, Staff did not do a full examination of
23 SBC's books to determine whether that 8 percent increase in
24 these services ties in to some broader perspective on SBC's
25 books.

1 And I think that's where Staff would,
2 therefore, require maybe additional guidance from the
3 Commission on where such an examination should trend, in
4 light of the fact that the Commission does appear to be
5 preempted from a full-fledged traditional ratemaking
6 mechanism, which Staff certainly would be more familiar
7 with.

8 CHAIRMAN SIMMONS: So from a broader
9 perspective, you believe that the Commission has the ability
10 to determine reasonableness, just and reasonableness?

11 MR. MEYER: From a legal standpoint, it
12 appears that the Commission has had that determination of
13 justness and -- justness and reasonableness determined to be
14 something 8 percent or less by the -- by the Legislature.

15 The justness and reasonableness determination
16 the Commission does have the control over is to ensure that
17 any increases is in keeping with the price cap statute, in
18 other words that it's 8 percent or below. If the company,
19 for example, were to file tariffs and provide notice that
20 said that the increase was going to be 9 percent, the
21 Commission would certainly have the authority to determine
22 that that is not just and reasonable.

23 CHAIRMAN SIMMONS: So the ability for a
24 Commissioner to determine just and reasonableness is on the
25 8 percent that would be before us on a particular non-basic

1 service and not just and reasonableness in terms of the
2 totality of whether or not we think that 8 percent is high
3 based on four or five years of data, number of years of
4 service? How do you --

5 MR. MEYER: That is correct. That is our
6 interpretation of the statutes at this time.

7 CHAIRMAN SIMMONS: Okay. That's all the
8 questions that I have. Thank you.

9 JUDGE THOMPSON: Thank you, Chair Simmons.
10 Commissioner Gaw?

11 COMMISSIONER GAW: Good morning, Counsel.

12 MR. MEYER: Good morning.

13 COMMISSIONER GAW: Have there been any
14 interpretations of this issue by a court in Missouri?

15 MR. MEYER: Not at this time.

16 COMMISSIONER GAW: So we don't have any
17 guidance from the judiciary about what this language means
18 is that right?

19 MR. MEYER: As I understand it, not at this
20 time. Peripheral issues have been argued at levels, at
21 least as to my personal knowledge, at the circuit court, but
22 those decisions have not issued.

23 COMMISSIONER GAW: Is there an Attorney
24 General's Opinion on this issue?

25 MR. MEYER: Not that I'm aware of.

1 COMMISSIONER GAW: Thank you. That's all.

2 JUDGE THOMPSON: Thank you, Commissioner Gaw.
3 Commissioner Clayton.

4 COMMISSIONER CLAYTON: You may have answered
5 this. I've been looking through this statute. So I
6 apologize if I ask a question that you've already answered.
7 I feel like I'm in class, asking a question that's already
8 been answered.

9 Did you give a reason why Staff believes there
10 is a reference to Section 200 in the price cap statute?

11 MR. MEYER: I did not elaborate on that, but I
12 would -- I'm sorry. I did not address that.

13 COMMISSIONER CLAYTON: Let me ask the
14 question. Why is the section consistent with Section 200,
15 that language, in subsection 11 of 392.245?

16 MR. MEYER: My reading of that was, in fact,
17 pretty much along the same lines as what Ms. Creighton
18 Hendricks previously discussed.

19 COMMISSIONER CLAYTON: Which is what?

20 MR. MEYER: The subsection 1 in
21 Section 392.200 -- I guess it's subsection 1 of 392.200
22 would be addressed by the first sentence of the price cap
23 statute which uses the similar language that the price cap
24 set rates are just and reasonable.

25 The remaining sections of Section 392.200

1 addressing discrimination would still be something that
2 would require the Commission's and Staff's also review.

3 COMMISSIONER CLAYTON: Why do you think the
4 statute or the reference is not more specific to that
5 subsection on discrimination? Do you understand my
6 question?

7 MR. MEYER: I think so. Why the Legislature
8 didn't explicitly exempt it didn't say that it needed to be
9 in keeping with sub --

10 COMMISSIONER CLAYTON: Why did it make a
11 specific reference rather than refer to the entire section
12 or the entire Section 200?

13 MR. MEYER: The only thing I could guess there
14 would be perhaps linguistic economy. I don't have an
15 actual --

16 COMMISSIONER CLAYTON: From the General
17 Assembly? I've got some authority on this issue.

18 MR. MEYER: I'm merely applying the canons of
19 statutory construction to that terminology, but I don't have
20 a clear answer on why.

21 COMMISSIONER CLAYTON: But in terms of
22 statutory construction, there's a reference that the price
23 shall be consistent to Section 200. It doesn't say
24 Section -- it should be consistent with Section 200.5 or
25 200.1 or 200.2 or with only certain provisions under

1 Section 200. It makes reference to the entire section.

2 So under the canons of statutory construction,
3 wouldn't it be a fair -- a fair interpretation that the
4 price must be consistent with all the provisions of Section
5 200 under what you're saying, under strict constructionary
6 analysis?

7 MR. MEYER: Absolutely. I think that is
8 absolutely correct. However, I think that the two sections
9 could be harmonized. The first sentence of 392.245.1 and
10 392.200.1 could be harmonized by reading the two together
11 and assuming that the General Assembly in speaking within
12 the price cap statute to justness and reasonableness has
13 paralleled that language in 392.200.1 and addressed that
14 particular aspect but has not anywhere else in the price cap
15 statute addressed anything regarding discriminatory conduct
16 and, therefore, that those principles still need to be
17 rolled into price cap filings.

18 COMMISSIONER CLAYTON: I don't know if you're
19 going to be prepared to answer this question, but there was
20 discussion with Ms. Creighton Hendricks earlier regarding a
21 subsection 5 and some anti-discriminatory language. Were
22 you in the room for that discussion?

23 MR. MEYER: Yes.

24 COMMISSIONER CLAYTON: Are you familiar with
25 that section? I've been trying to find it and I'm having

1 difficulty. Is it a sub sub 5?

2 MR. MEYER: Bear with me. I am familiar with
3 it, but I can't remember that right off the top of my head.

4 MS. HENDRICKS: If I may, I could respond to
5 that. The reference in subsection 5 specifically referenced
6 392.200, subsection C(4)(2), I believe. It doesn't use the
7 word nondiscrimination, but if you go read that provision is
8 where I acquired the description of that reference.

9 MR. MEYER: I think it's subsection 4(C)(2).

10 MS. HENDRICKS: Correct. I don't have it. Is
11 it subsection first or paragraph?

12 MR. MEYER: I think what it is is
13 Section 392.245, sub 5 has a cross reference to Section 392,
14 subsection 4, paragraph C of subdivision 2.

15 COMMISSIONER CLAYTON: I don't see why --
16 well --

17 MR. MEYER: The subsection 5 is within the
18 price cap statute. The subsection 4 is within --

19 COMMISSIONER CLAYTON: And that's a specific
20 reference within Section 200, correct?

21 MR. MEYER: Absolutely, yes.

22 COMMISSIONER CLAYTON: Well, if the
23 Legislature intended for that section to also be referenced
24 in the other, why didn't it use that specific reference
25 rather than just the overall 392.200?

1 MR. MEYER: Again, I can only -- I can only
2 guess at this, but the Legislature had -- was aware of the
3 fact that the specific language was in the price cap
4 statute, specific language was in 200, that the language --
5 the words of those two mesh together and could be easily
6 harmonized together to presume that the price cap statute --

7 COMMISSIONER CLAYTON: Could it be that the
8 Legislature intended for all the provisions of Section 200
9 to be incorporated in price cap regulation?

10 MR. MEYER: I think that's true, but again
11 that the two sections work together.

12 COMMISSIONER CLAYTON: And so as opposed -- so
13 there would be no just and reasonable analysis under
14 Section 200, then? That section should be -- that section
15 should just be ignored?

16 MR. MEYER: I don't think it would be ignored.
17 It would be that there would still be an analysis to ensure
18 that the proposed price cap increases are just and that they
19 are, in fact, legally valid. In other words, again, if a
20 9 percent increase was proposed and the statute says
21 8 percent or less, or up to 8 percent I believe.

22 COMMISSIONER CLAYTON: So there really
23 wouldn't be a just and reasonable analysis; it would just be
24 a straight 8 percent?

25 MR. MEYER: It would be -- it would be not to

1 the -- not to the degree, for example, proposed by Public
2 Counsel.

3 COMMISSIONER CLAYTON: Do you believe there's
4 a presumption that 8 percent is just and reasonable and that
5 that -- could that presumption be rebutted with just and
6 reasonable analysis in Section 200?

7 MR. MEYER: I don't think that the -- and
8 again, this is -- based on the statute, it appears as though
9 the 8 percent has been determined to be the just and
10 reasonable cap.

11 COMMISSIONER CLAYTON: Thank you.

12 JUDGE THOMPSON: Further questions from the
13 Bench? Commissioner Gaw.

14 COMMISSIONER GAW: Counsel, you're going to
15 have to help me through this now, because I'm having a
16 terrible time following how you get to that conclusion as a
17 matter of total -- as a matter that was without argument.

18 MR. MEYER: Perhaps I should have done my full
19 legal discussion now, rather than saving it for closing.

20 COMMISSIONER GAW: Maybe so, but I'm --
21 looking at 392.245, subsection 1, the first sentence.

22 MR. MEYER: I'm sorry. 392.245, subsection 1,
23 the first sentence. Okay.

24 COMMISSIONER GAW: That says the Commission
25 shall have the authority to ensure that rates, charges,

1 tolls and rentals for telecommunications services are just,
2 reasonable and lawful by employing price cap regulation,
3 doesn't it?

4 MR. MEYER: Correct.

5 COMMISSIONER GAW: In the first sentence?

6 MR. MEYER: Yes.

7 COMMISSIONER GAW: And then it defines in the
8 next sentence what price cap regulation is?

9 MR. MEYER: Yes.

10 COMMISSIONER GAW: Is that right? Now, if the
11 Legislature had -- if the Legislature says the Commission
12 shall have the authority, now, I think that there's two
13 possible ways to read that. Now, in trying to figure out
14 what this means by itself, and before I look at other
15 things, it could mean that the Legislature said that that is
16 the only method which to determine whether those services
17 are just and reasonable.

18 That's the interpretation that I'm hearing
19 from you, isn't that right? You're saying that that's the
20 only means this Commission has to determine whether those
21 charges are just and reasonable is employing price cap
22 regulation?

23 MR. MEYER: I might be viewing it slightly
24 different. I think I end up at the same place, but my
25 interpretation of that is that the Commission shall have the

1 authority, grants the Commission the authority to then grant
2 price cap status to a telecommunications company. If that
3 price cap status is granted, then I reach that conclusion.
4 So the Commission does --

5 COMMISSIONER GAW: Doesn't say anything about
6 granting price cap status in that sentence, though, does it?

7 MR. MEYER: Not in that sentence, no, but I
8 think that's the --

9 COMMISSIONER GAW: This says they have the
10 authority to ensure that rates, charges, tolls and rentals
11 for telecommunications services are just -- excuse me --
12 just, reasonable and lawful by employing price cap
13 regulation.

14 Does that -- but there is another
15 interpretation of that, isn't there, and that is that the
16 General Assembly intended the Commission to have the ability
17 to utilize that mechanism or that method in order to
18 determine whether charges were just and reasonable?

19 MR. MEYER: I think that's a possible
20 interpretation.

21 COMMISSIONER GAW: It doesn't say necessarily
22 that that's the exclusive method of using -- of determining
23 whether prices are just and reasonable in that sentence,
24 does it?

25 MR. MEYER: In that specific sentence, there's

1 no reference to exclusive, that's true.

2 COMMISSIONER GAW: So you have to -- in
3 getting through your interpretation, you have to back that
4 up with some other provisions within the chapter; is that
5 correct?

6 MR. MEYER: That is correct.

7 COMMISSIONER GAW: When you're trying to
8 determine again why that is the exclusive method, and tell
9 me where you go next in your analysis.

10 MR. MEYER: Well, the next thing I have on my
11 list is that the cross reference to Section 392.200 works
12 even with Section 200 -- subsection 200.1 already being met,
13 because the other subsections still apply. So there's
14 meaning in that reference.

15 COMMISSIONER GAW: If I were to suggest that
16 the Commission could use as one way of determining whether
17 prices were just and reasonable price cap regulation, that
18 would still be consistent with your interpretation so long
19 as I -- as long as I didn't look at any other means, would
20 it not?

21 I mean, if the goal here is -- if the goal
22 here from the Legislature was to make sure the prices were
23 just and reasonable and it authorized the Commission to
24 utilize price cap regulation as a means of determining that,
25 so long as the Commission utilized it, the statute really

1 doesn't suggest that the Commission would be in error if it
2 utilized that mechanism, would it?

3 MR. MEYER: If I understood what you said
4 correctly, I believe yes, that is, in fact, true.

5 COMMISSIONER GAW: Well, is it inconsistent
6 with that position if the -- to suggest that the Commission
7 did not lose its authority, the authority that it already
8 possessed prior to the '96 act passing in regard to the
9 general directive of the Legislature to determine that
10 prices were just and reasonable?

11 Is there a -- where in here does it suggest
12 that what was -- that the Legislature -- that the Commission
13 lost authority?

14 MR. MEYER: I think that would be where we
15 would then go to Section 392.245.11 and look at the specific
16 provisions there with explicit references to 8 percent,
17 terminology such as the company -- or implicitly that the
18 company may increase the rates up to 8 percent by filing
19 with the Commission, providing notice, references to that
20 the Commission shall approve them. Implicitly, of course,
21 if they're mathematically correct, in which case if they
22 were not, they would not be just and reasonable.

23 COMMISSIONER GAW: Sure. And that would be --
24 that interpretation would be consistent with utilizing price
25 cap regulation?

1 MR. MEYER: Right. I believe that is true.

2 COMMISSIONER GAW: But where does it say in
3 subsection 11 that price cap regulation is the exclusive
4 means of determining whether rates are just and reasonable?

5 MR. MEYER: Having not the access to a word
6 processor, I can't say this definitively, but I do not
7 believe there's any reference to exclusivity in the price
8 cap statute. That's purely implicit.

9 COMMISSIONER GAW: It is clear that the
10 Commission was still given the direction and the mission to
11 ensure just and reasonable rates in some provisions and that
12 as a substitute -- I know this is a little reverse in
13 wording, but as a substitute that competition -- if
14 competition existed, that competition would substitute for
15 the Commission's role in determining if prices were just and
16 reasonable?

17 MR. MEYER: There appears to be a component to
18 that, yes.

19 COMMISSIONER GAW: But the Commission was not
20 relieved of its responsibility to determine if prices were
21 just and reasonable absent competition being found to exist?

22 MR. MEYER: I think I need to think that out.
23 Could you say that one more time?

24 COMMISSIONER GAW: I don't know.

25 JUDGE THOMPSON: Could you read that back,

1 Kellene.

2 COMMISSIONER GAW: Thank you.

3 THE REPORTER: "But the Commission was not
4 relieved of its responsibility to determine if prices were
5 just and reasonable absent competition being found to
6 exist?"

7 MR. MEYER: I'm trying to work my way through
8 the negatives.

9 COMMISSIONER GAW: I know. I'm really bad
10 about that. I hate it when people ask me questions that
11 way.

12 MR. MEYER: I think I'm interpreting the
13 question to be, was the Commission relieved of
14 responsibility to review the justness and reasonableness of
15 rates in the presence of competition?

16 COMMISSIONER GAW: No.

17 MR. MEYER: I don't want to answer the wrong
18 question.

19 COMMISSIONER GAW: So long as -- if you
20 exclude that as a category, in other words, what you just
21 stated by itself, take that separately. Competition exists,
22 the Commission finds it. The Commission no longer has -- is
23 to be utilized in determining whether rates are just and
24 reasonable?

25 MR. MEYER: That appears to be the practice,

1 yes.

2 COMMISSIONER GAW: So unless the Commission at
3 some point finds that competition no longer exists?

4 MR. MEYER: Exactly.

5 COMMISSIONER GAW: But if competition does not
6 exist, then is not the Commission still charged with
7 ensuring just and reasonable rates under 200?

8 MR. MEYER: I think that's where the
9 relationship between 200 and 245 comes in, and we end up
10 with this discussion that we're having. Yes, that is a
11 correct path, I believe.

12 COMMISSIONER GAW: And isn't one possible
13 interpretation of that albeit the General Counsel's Office
14 believes that this is not the interpretation that they --
15 that they would conclude?

16 MR. MEYER: The most reasonable, I believe, at
17 this time, yes.

18 COMMISSIONER GAW: That's what your position
19 is?

20 MR. MEYER: Correct.

21 COMMISSIONER GAW: But is it not also possible
22 to interpret these statutes together and to conclude that
23 Section 392.200 and the Commission's mission to ensure just
24 and reasonable rates also allows it the ability to look
25 outside of the price cap mechanism?

1 MR. MEYER: If I understand you correctly,
2 you're asking is that a completely impossible
3 interpretation?

4 COMMISSIONER GAW: Yes.

5 MR. MEYER: I believe I cannot say that that
6 is a completely impossible interpretation.

7 COMMISSIONER GAW: In fact, if they had wanted
8 to do that, could not the Legislature have simply said
9 something to the effect that just and reasonable and lawful
10 rates, charges, tolls and rentals for telecommunications
11 services shall be determined exclusively by employing price
12 cap regulation?

13 MR. MEYER: Could the Legislature have said
14 that? Absolutely.

15 COMMISSIONER GAW: And would that not have
16 taken away the question that we have in front of us if that
17 language had been utilized?

18 MR. MEYER: Again, if the Legislature would
19 have used that language, it's quite likely, although there's
20 never a hundred percent guarantee.

21 COMMISSIONER GAW: Well, I agree with you
22 there, but there could be some other provisions to take into
23 effect. But would that not have cleared up this -- at least
24 this first sentence in subsection 1 of 392.245?

25 MR. MEYER: Hypothetically, yes.

1 COMMISSIONER GAW: I think that's all I have.
2 Thanks, Judge.

3 JUDGE THOMPSON: Thank you, Commissioner Gaw.
4 Other questions from the Bench?

5 (No response.)

6 JUDGE THOMPSON: Hearing none, you may step
7 down. Thank you, Mr. Meyer.

8 MR. MEYER: Thank you.

9 JUDGE THOMPSON: Mr. Dandino?

10 MR. DANDINO: Thank you, your Honor. May it
11 please the Commission. I feel that I'm the lone voice
12 crying in the wilderness on this matter of interpretation of
13 the Commission's authority.

14 I think this Commission has already spoken
15 about its authority in this matter. I'd like to direct you
16 to the Order that approves Southwestern Bell's price cap
17 regulation in the matter of the petition of Southwestern
18 Bell Telephone Company for determination that it is subject
19 to price cap regulation under Section 392.245, TO-97-397,
20 September 16th of 1997.

21 With respect first of all with
22 Section 392.245.1, the Commission said that some of the
23 intervening parties -- well, what the Commission was saying
24 is that this section about ensuring that there's -- ensuring
25 just and reasonable rates, what it does is create a

1 legislative imprimatur for the use of price cap regulation
2 which was not previously authorized by the Legislature.

3 I think what they're saying is not -- the
4 Commission is saying is it doesn't mean that everything from
5 here on out is considered just and reasonable. It's just
6 authorizing a new form, an alternate form of regulation.

7 Then I think -- let's go back to what the
8 Commission has previously ruled about its own scope of
9 authority in the same Order, and this is at page 25, and
10 it's cited in Public Counsel's Initial brief, but I think
11 it's worthy to bring it up and discuss it here.

12 Finally, the Commission stresses that the
13 application of price cap regulation under Section 392.245.2
14 will not exempt a company so regulated from the jurisdiction
15 and oversight of this Commission. Price cap regulation is a
16 method of regulating the maximum prices charged by a
17 company, period. And then it goes on.

18 Public Counsel is concerned, in fact disturbed
19 that the interpretation the price company companies here
20 today and even the Staff is trying to persuade the
21 Commission to adopt would turn this Commission into no more
22 than a calculator from the everything's a buck store.

23 I think that's a wrong way of going about
24 statutory interpretation. I think that is completely
25 contrary to what the General Assembly intended with price

1 cap regulation and the authority of the Commission.

2 If you want to find out what the intent of the
3 Legislature was, simply turn to 392.185, the purpose of the
4 chapter. The provisions of this chapter shall be construed
5 to, and it lists nine different elements that the Commission
6 or that this chapter is designed -- it's a
7 telecommunications chapter -- that telecommunications
8 regulation is designed to accomplish. This too was part of
9 Senate Bill 507 in 1996.

10 And I think by looking at this we can -- we
11 can find -- and I would direct your attention to No. 6,
12 which I think is most appropriate here, where it allows full
13 and fair competition to function as a substitute for
14 regulation when consistent with the protection of ratepayers
15 and otherwise consistent with the public interest. And then
16 in subsection 4, ensure that customers pay only reasonable
17 charges for telecommunications service.

18 I don't believe the General Assembly could be
19 any more clear of what it intended with Senate Bill 507 and
20 price cap regulation.

21 Any decision by this Commission should be
22 judged in terms of what is reasonable and what is authorized
23 by law, and I'll discuss the authorized by law first because
24 that's what gets us to the reasonableness.

25 I think that Section 392.245 sub 11 does not

1 grant price cap companies immunity from Public Service
2 Commission review. The 8 percent is a cap that the General
3 Assembly has imposed not only on the companies, but also on
4 this Commission in their ability to grant rate increases.

5 There's nothing in that statute that repeals
6 all other powers of the Commission to review rates, with one
7 particular exception, 392.240.1. That specifically removes
8 that from the Commission's jurisdiction in price cap
9 regulation. That section is the -- involves the rate of
10 return regulation that's based on rate of return on the
11 equity and on the profits of the company. It removes that
12 as a factor from consideration.

13 The Commission again specifically discussed
14 that aspect of it in -- when they granted price cap
15 regulation in TO-97-397.

16 The 8 percent is not an entitlement. It's
17 like a -- I guess it's like a fence. It's the outer limits
18 that you're looking at. And there are some circumstances
19 where this Commission based on the facts should go in there,
20 should look inside what is being proposed, even if it's
21 within that fence, and say, well, maybe we should modify
22 that for the overall protection of the public or for
23 protection of competition or too ensure that there's fair
24 and just rates.

25 I think by taking the -- interpreting the

1 statute to take away -- first of all, let me go back. We
2 can talk about the very methods of statutory construction,
3 the countless rules of statutory construction, which are
4 very handy and helpful.

5 But once again, the overall purpose, the
6 overall -- the key to legislative interpretation is to look
7 at what the intent of the Legislature was. Once again, I
8 direct your attention to 392.185 which specifically provides
9 what the intent of the Legislature was.

10 I don't think you can determine the intent of
11 the Legislature by saying, well, there's seven things about
12 discrimination, only one about just and reasonable rates;
13 so, therefore, that the discrimination controls over that.
14 It's not a numbers game. It's a legislative intent game, or
15 not game, but it's a legislature intent analysis.

16 I think that the Commission has to look in
17 terms of their authority, but also in terms of
18 responsibility, credibility and accountability. I think
19 responsibility is that you're charged with a duty under all
20 the statutes, taken as a whole and viewed as a whole, as the
21 protector of the ratepayers and the public interest.

22 That bottom line, that's what I think the
23 Commission's duty is. That's what the Legislature intended.
24 They intended an orderly system of regulation where you do
25 protect the utilities, you assure that they operate and

1 there's safe and adequate service for the customers and
2 there's a protection for the ratepayers and the public
3 interest. That's the responsibility.

4 The credibility, I think you have to have an
5 exercise of that power where it can be seen not only by the
6 companies, but also as a -- as a true regulatory force and
7 something to be recognized, but also with the public.

8 Chairman Simmons pointed it out, that many
9 times the public says, well, what can you do about this?
10 Where's your authority? It specifically came up in the
11 natural gas cases where people were looking for, the
12 citizens are looking for some credibility. And if the
13 legis-- if the Commission backs off their ability to -- to
14 their ability to regulate and desire to regulate, they're
15 going to suffer credibility not only with the public, with
16 the utilities, but with the General Assembly.

17 And finally I think you have to have
18 accountability. The companies, you know, and rightfully so,
19 are accountable to their shareholders. That's what it's all
20 about. That's their bosses. The Commission is accountable
21 to the public, the same as our office is accountable to the
22 ratepayers.

23 Without the -- without oversight, without the
24 oversight the Commission provides, I don't think you're
25 going to have accountability to the public.

1 If you would adopt the limited process, the
2 limited jurisdiction, the limited authority, the limited
3 duty that the parties here, the other parties here are
4 pressing upon you, I think your role will be no more than to
5 sign off, sit back and shut up when it comes to these rate
6 increases. I do not think that is what the General Assembly
7 intended.

8 Let's go back to the other aspect of the just
9 and reasonableness and what should the Commission consider.
10 Well, as I discussed before, under Section 392.240.1, you
11 shall not consider the rate of return and the profitability
12 of the company, but I think you can look at the other
13 relevant factors.

14 Now, let's talk as a very practical matter.
15 Do we expect the Commission to go in at every case and make
16 a -- and make a full-blown case to decide it? Not
17 necessarily. I can only say probably not at all.

18 But I think it's important that the very
19 company that comes before you to ask for you to approve this
20 and put your blessing on it should at least justify it in
21 some manner. It doesn't necessarily mean a full-blown cost
22 study. It may be comparison of other rates. It may be a
23 cost. There's a lot of other -- there's a lot of factors
24 that go into it, maybe even the history of the rate
25 increases for the service. But I think -- I think they owe

1 you an explanation. I think they owe you a justification,
2 because they're asking you to approve it, and I think at a
3 minimum they have to show, have some showing that it's just
4 and reasonable.

5 You can exercise -- and with that information
6 you can exercise, and rightfully so, the discretion that's
7 legally vested in you to determine whether it is just and
8 reasonable and whether there's sufficient information to
9 make that ruling.

10 But in this case, Southwestern Bell or SBC has
11 said, we're not going to provide this information. We're
12 entitled to the 8 percent.

13 The Staff when they asked you to approve this
14 in their recommendation didn't give you any justification or
15 background or any information to make a determination of
16 whether it's just and reasonable except to say it's within
17 the 8 percent. That's not good enough from Public Counsel's
18 point of view. I don't think it's necessarily good enough
19 under the statute.

20 Now, Ms. Meisenheimer in her testimony
21 analyzed -- looked at some economic data from the Bureau of
22 Labor Statistics and looked at the history of the price
23 increases for the pricing of this product since price cap
24 regulation, and she makes the comment that competition does
25 not yet discipline these rates.

1 So what you have here is where competition has
2 not -- has not become that counterbalance for the incumbency
3 that the whole system of regulation intended. It doesn't --
4 hasn't quite reached that point yet.

5 When price cap companies originally went under
6 regulation, all they had to do was show the presence of one
7 competitor. Well, and so virtually they were still a
8 monopoly, and now that's changing, and it's changing toward
9 the ultimate goal of effective competition which, as this
10 Commission recognizes, should have discipline on the prices.
11 However, we haven't reached that point yet.

12 And it's for these reasons that
13 Ms. Meisenheimer raised the question and said that
14 Southwestern Bell should provide some justification to the
15 Commission under these circumstances of why it should be
16 approved. I don't think that's in the record at this point,
17 and for that reason believe that you should reject it.
18 Thank you.

19 JUDGE THOMPSON: Thank you, Mr. Dandino.
20 Questions from the Bench. Chair Simmons?

21 CHAIRMAN SIMMONS: Yes. Thank you. Good
22 morning, Mr. Dandino. It is still morning. As I said
23 earlier, I'm going to ask the same question pretty much
24 universally through everyone's presentation.

25 I can pretty much assume, and I know I

1 shouldn't, but with most of the questions that I have asked
2 as it relates to Item No. 1 dealing with our authority,
3 everyone pretty much has said that, you know, paraphrasing,
4 it's been trumped by the Missouri General Assembly.

5 What I read from your briefing is that you
6 believe that it has not based on some of the things that you
7 have said in your opening statement, and you're primarily --
8 your reason and rationale primarily in terms of this
9 Commission's authority has not been trumped is what?

10 MR. DANDINO: Basically our position is you
11 have to look at the entire context of the statutes of 386
12 and 392. When price cap regulation was adopted, it didn't
13 take away the Commission's authority to look at just and
14 reasonable and the discrimination. That specific section is
15 referred to consistent with 392.200.

16 To me, you know, it is difficult to see how
17 that does not, I guess, referencing that statute to be part
18 of the price cap statute. And I think that's where I'm
19 saying the General Assembly didn't intend that the
20 Commission's power is to be trumped other than in
21 considering rate of return.

22 CHAIRMAN SIMMONS: I think that's going to be
23 the only question I have for right now. I may come back.
24 So, Judge, thank you.

25 Thank you, Mr. Dandino.

1 JUDGE THOMPSON: Thank you, Chair Simmons.
2 Commissioner Gaw?

3 COMMISSIONER GAW: Not right now, Judge.
4 Thank you.

5 JUDGE THOMPSON: Thank you. Commissioner
6 Clayton?

7 COMMISSIONER CLAYTON: Thank you, Judge. I
8 have a couple of questions

9 Just for clarification as we move forward, is
10 it the position of the Office of the Public Counsel to
11 oppose any increases under the price cap section or do you
12 have a specific gripe about this increase?

13 MR. DANDINO: We will -- we do not intend to
14 oppose all increases under the price cap statute. These
15 increases, we did not even move to suspend them in the first
16 place even though it is -- our opinion is that if this is
17 supposed to be competition, why are we increasing these
18 8 percent and 8 percent and 8 percent year after year?

19 COMMISSIONER CLAYTON: Will your witnesses
20 provide factual -- and I have read the testimony, but I
21 can't remember specific references to busy line interrupt
22 and line verification charges. You believe that these
23 increases are inappropriate?

24 MR. DANDINO: Just to the extent of what the
25 history was and as compared to the Bureau of Labor

1 Statistics increase. I think really our testimony is very
2 limited on that basis. You know, frankly, we believe that
3 the larger issue of the Commission's authority is more
4 important in this case than this.

5 COMMISSIONER CLAYTON: If we were to look in
6 subsection 11 of 245, the price cap section, and we were to
7 remove in the last sentence the words, quote, consistent
8 with the provisions of Section 392.200, closed quote, if we
9 were to remove those quotes, would the office of the Public
10 Counsel agree with the industry that the increases would be
11 automatic?

12 MR. DANDINO: No, Commissioner.

13 COMMISSIONER CLAYTON: You would not?

14 MR. DANDINO: We would not. That merely
15 cements, I think, our position even stronger, referencing
16 that. Once again, I think you -- it has to -- you still
17 have to look at this statute in the complete context of all
18 the statutes in 392 which could apply.

19 There's a provision, kind of a catchall
20 provision. I can't remember. It may be 190, 392.190 that
21 says all these statutes, and sets the range of it, shall
22 apply to all telecommunications companies unless
23 specifically prohibited. You know, I'll -- I'd have to
24 provide you the exact citation and language of it.

25 But generally there are statutory provisions

1 in the statute that try to make this a comprehensive system,
2 scheme of regulation, even though it's divided into three
3 parts of rate of return, price cap regulation and
4 competitive regulation.

5 COMMISSIONER CLAYTON: If I may, can I read
6 another sentence from that same subsection?

7 MR. DANDINO: Certainly.

8 COMMISSIONER CLAYTON: This is several
9 sentences prior. I'm operating in -- reading subsection 11
10 of that same section. It says, thereafter, the maximum
11 allowable prices for non-basic telecommunications services
12 of an incumbent local exchange company may be annually
13 increased by up to 8 percent for each of the following
14 12-month periods upon providing notice -- upon providing
15 notice to the Commission and filing tariffs establishing the
16 rates for such services.

17 Now, as much as -- I want relevance in this
18 whole process as much as anyone else, doesn't that seem to
19 indicate that all they have to do is provide notice and they
20 don't have to ask for permission?

21 MR. DANDINO: Well, the way I read it is more
22 of a -- well, first of all, I think you can't read one
23 sentence in isolation from another. I still think you have
24 to read it in the entire context, which goes back to the
25 sentence that says shall be approved by the Commission.

1 Approved by the Commission. There's that element.

2 But going back to that point and specifically
3 looking at it, I see that more as a procedure. What they're
4 doing is laying out the procedure. What do you have to do
5 to get it? Well, you have to file your tariffs. If you
6 want this increase, you have to file your tariff and give
7 your notice. That's how I would read that.

8 COMMISSIONER CLAYTON: Can you tell me or
9 point me to what other section or statute that would require
10 more than just notice being provided to the Commission,
11 where there has to be permission granted or --

12 MR. DANDINO: 392.200, duty of the Commission,
13 set reasonable -- just and reasonable rates.

14 COMMISSIONER CLAYTON: And is that based on,
15 how I started this inquiry, the language, quote, consistent
16 with the provisions of Section 392.200, close quote?

17 MR. DANDINO: It's not dependent upon it, but
18 I think independently, even without that language, I think I
19 can get to that language, because that's the general duty of
20 the Commission, as well as looking at the purpose. And you
21 were told to go to that Section 392.200 indirectly by the
22 purpose of Chapter 392.185 No. 4, ensure the customers pay
23 only reasonable charges for telecommunications service.

24 COMMISSIONER CLAYTON: Do you believe this
25 12 cent increase is unreasonable?

1 MR. DANDINO: I don't know.

2 COMMISSIONER CLAYTON: You ended your comments
3 demanding that the company justify any proposed increase
4 under this section, and then you kind of also asked the
5 question, how should that be done? And how does the Office
6 of Public Counsel believe that should be done if we require
7 the company to actually justify this 12 cent increase? How
8 would -- what justification must they show, according to the
9 law?

10 MR. DANDINO: I think that when they -- when
11 they file a tariff, when they file a tariff for any type of
12 a raise, they have to specify what, you know, what the
13 purpose of it is and why they're increasing the rate.
14 Saying to keep up with the other companies; at least that's
15 a justification. Whether that's going to be a good
16 justification or not, it depends on the circumstances.

17 COMMISSIONER CLAYTON: So if they were to say,
18 well, the rate that we're charging is far less than any IXC
19 or any CLEC is charging, that would be sufficient to meet
20 the -- to meet this muster that you're referring to?

21 MR. DANDINO: Well, at least they would be
22 providing a factual basis of justification for it, an
23 explanation.

24 COMMISSIONER CLAYTON: If they would have said
25 that, would OPC be opposing this increase?

1 MR. DANDINO: Well, they said less than that
2 and we didn't file for suspension. The reason,
3 Ms. Meisenheimer said that you ought to require them to
4 provide more information or, in the alternative, reject it.

5 You know, how much information is going to be
6 satisfy this Commission is within your discretion, and right
7 now in this matter I think that probably if they would have
8 provided the information that's in the record provided from
9 other parties or from the Staff and Ms. Meisenheimer, that,
10 you know, maybe that would have sufficed.

11 COMMISSIONER CLAYTON: Thank you very much. I
12 have no further questions.

13 JUDGE THOMPSON: Thank you, Mr. Dandino. Any
14 further questions from the Bench?

15 (No response.)

16 JUDGE THOMPSON: Hearing none, you may step
17 down.

18 At this point we're ready to begin taking
19 testimony, but I notice that we are at about 13 minutes from
20 the noon hour. Consequently, what I'm going to do is recess
21 for lunch at this time. We will return promptly at
22 one o'clock and begin taking testimony at that time.

23 We are in recess. Thank you.

24 (A BREAK WAS TAKEN.)

25 JUDGE THOMPSON: Mr. Unruh, would you go ahead