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12 In the Matter of Southwestern Bell)
Telephone Company, d/b/a SBC)
13 Missouri's Proposed Revised Tariff)
Sheet Intended to Increase by Eight) Case No. IT-2004-0015
14 Percent the Rates for Line Status)
Verification and Busy Line Interrupt)
15 as Authorized by Section 392.245,)
RSMo, the Price Cap Statute)
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23 REPORTED BY:
24 KELLENE K. FEDDERSEN, CSR, RPR, CCR
ASSOCIATED COURT REPORTERS
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13 FOR: Spectra Communications Group, LLC,
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1 P R O C E E D I N G S

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

9 My name is Kevin Thompson. I'm the Regulatory
10 Law Judge assigned to preside at this matter.

11 We will take oral entries of appearance at
12 this time beginning with SBC Missouri.

13 MR. BUB: Thank you, your Honor. Leo Bub for
14 SBC Missouri. Our address is One SBC Center, St. Louis,
15 Missouri 63101.

16 JUDGE THOMPSON: Thank you. Public Counsel.

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

21 JUDGE THOMPSON: Thank you, Mr. Dandino.
22 Staff.

23 MR. MEYER: Good morning. My name is David
24 Meyer, representing the Staff of the Commission. Our
25 address is P.O. Box 360, Jefferson City, Missouri 65102.

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1 JUDGE THOMPSON: Thank you, Mr. Meyer. There
2 are two proposed intervenors or intervenor applicants, one
3 of which is Sprint, Missouri, Inc. and one of which is
4 CenturyTel of Missouri, LLC. Is anyone present for Sprint,
5 missouri, Inc.?

6 MR. GARDNER: Yes, your Honor. Paul H.
7 Gardner, law firm of Goller, Gardner & Feather, 131 East
8 High Street, Jefferson City, Missouri, appearing on behalf
9 of Sprint, Missouri.

10 JUDGE THOMPSON: Thank you, sir. Is anyone
11 present for CenturyTel?

12 MR. FISCHER: Yes, your Honor. Appearing on
13 behalf of CenturyTel of Missouri, LLC and Spectra
14 Communications Group, LLC, doing business as CenturyTel, let
15 the record reflect the appearance of James M. Fischer,
16 Fischer & Dority, PC, 101 Madison Street, Suite 400,
17 Jefferson City, Missouri 65101.

18 JUDGE THOMPSON: Thank you, sir. Are there
19 any other attorneys present?

20 Okay. Why don't we take up the two
21 applications for intervention at this time. Are there any
22 objections to the intervention application of Sprint,
23 Missouri?

24 MR. MEYER: No, your Honor.

25 MR. BUB: No, your Honor.

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1 MR. DANDINO: No objection.

2 JUDGE THOMPSON: Intervention will be granted
3 to Sprint, Missouri, Inc.

4 Are there any objections to the intervention
5 application of CenturyTel of Missouri, LLC?

6 MR. MEYER: No.

7 MR. BUB: No, your Honor.

8 MR. DANDINO: No objection.

9 JUDGE THOMPSON: Intervention will be granted
10 to CenturyTel of Missouri.

11 The purpose of this prehearing conference is
12 to take up any issues that the parties might have at this
13 time and to give you an opportunity to develop a procedural
14 schedule. Perhaps you can also spend some time discussing
15 the issues and see whether settlement is going to be
16 possible or not.

17 Do the parties have any issues to bring before
18 me at this time?

19 MR. FISCHER: Your Honor, I assume that the
20 granting of CenturyTel of Missouri would also include the
21 affiliate Spectra?

22 JUDGE THOMPSON: Absolutely. I was just
23 reading from our printout here which only had CenturyTel on
24 it. I apologize.

25 MR. FISCHER: Thank you.

1 JUDGE THOMPSON: Let the record reflect,
2 Kellene, that intervention was also granted to Spectra.
3 Anything else?
4 MR. DANDINO: Yes, your Honor.
5 JUDGE THOMPSON: Yes, sir.
6 MR. DANDINO: I don't seem to have everything
7 in the, oh, the Order, but did the Commission set an
8 intervention deadline?
9 JUDGE THOMPSON: No. The Commission did not
10 give notice, did not set an intervention deadline, and has
11 not required the filing of a proposed procedural schedule.
12 Those are items we can address at this time, Mr. Dandino.
13 Do you feel that broader notice needs to be given of this
14 case?
15 MR. DANDINO: That's usually the case when the
16 Commission suspends a tariff and may even be required by
17 statute, if I remember right.
18 JUDGE THOMPSON: Well, you're more than
19 welcome to cite me to that statute. I'll be happy to
20 consider it. Do you have any proposal as to exactly who we
21 should give notice to?
22 MR. DANDINO: Well, there's a usual process
23 of, you know, publishing a notice to the industry.
24 JUDGE THOMPSON: Very well.
25 MR. BUB: Your Honor, for the record, we would

1 probably oppose that. We think that the fact that our
2 tariff has been suspended was well known, and I don't think
3 it's the usual case when a tariff is suspended that industry
4 notice be given.

5 We have an interest here in getting our tariff
6 approved quickly, and one of the things that we would
7 suggest for a procedural schedule would be that it would be
8 a -- since this is a matter of law that's at issue, that the
9 matter be briefed by the parties and submitted to the
10 Commission on briefing so that it may be resolved in an
11 expedited manner.

12 JUDGE THOMPSON: Okay.

13 MR. FISCHER: I think CenturyTel would
14 certainly support the idea we ought to brief this before we
15 go to an evidentiary hearing, too.

16 JUDGE THOMPSON: Okay. So you feel there's
17 legal questions to be resolved from the very beginning,
18 threshold matters such as can the Commission even suspend
19 this tariff, can the Commission disapprove this tariff,
20 things like that?

21 MR. MEYER: I think that's definitely a valid
22 suggestion, but depending upon the outcome it may lead to a
23 need for an evidentiary hearing on the specifics of the
24 rates that are at issue.

25 JUDGE THOMPSON: Okay. Well, as to the matter

1 of notice and an intervention date, since you've made the
2 proposal and SBC has opposed it, I'm going to have to
3 require you to file a written motion. Anyone who wants to
4 then can respond within ten days.

5 You know the standard way things work,
6 because, of course, since it's opposed it's going to jump up
7 to the Commissioner level and they're going to want to see
8 something written. So if you would go ahead and put your
9 proposal in written form, then we can get that part moving.

10 As far as the suggestion that certain legal
11 questions be addressed as a threshold matter before a
12 further procedural schedule is developed, that's certainly
13 fine with me. If there are any objections to that proposal,
14 first of all?

15 MR. DANDINO: Well, your Honor, if the legal
16 issue that we're presenting is the authority of the
17 Commission to even suspend the tariff and to -- and to have
18 any kind of investigation at all, just that narrow point,
19 then I would agree that we would probably need to -- that
20 should be the threshold legal question to decide.

21 If it's the question of what the Commission's
22 authority is over -- over whether they can approve or not
23 approve or what they can judge, what standards they can use
24 to review the tariff, I think that's -- that really can't --
25 I don't think can't be decided out of context of a hearing.

1 I think you're going to need some evidence where a court
2 will have something to look at.

3 But I agree if it's the narrow threshold
4 issue, you know, let's not waste time if they want to go
5 right to that jurisdictional. But if there's another level,
6 I think you have a -- you may have more the manner in which
7 the Commission performs rather than their jurisdiction.

8 MR. BUB: Your Honor, in our view, to follow
9 up on Mr. Dandino, I think this would qualify as a narrow
10 threshold matter, because in the Commission's Order itself
11 on page 2, the Commission states that, and I'm quoting, it
12 is not at all clear that the Legislature intended to permit
13 annual rate increases of 8 percent regardless of general
14 economic conditions.

15 I think this is a straightforward legal issue
16 involving the price cap statute, and it is a threshold
17 matter.

18 JUDGE THOMPSON: Well, you know, you raise an
19 interesting point, relying on that quote. That's a mixed
20 question of law and fact because, of course, the status of
21 general economic conditions is a factual question, not a
22 legal question. How one construes 245 may be more strictly
23 legal.

24 But if the question is posed as to whether the
25 Commission with respect to the subsection 11 services in

1 that price cap should take into account the economy, then
2 you're going to have to have a factual record.

3 What I'm going to suggest is this. I'm going
4 to leave you to discuss a procedural schedule, and it could
5 be that there will be some very different points of view as
6 to what the schedule should look like, how long it should
7 take, whether or not there be an evidentiary hearing.

8 So perhaps you can iron that out and propose a
9 joint schedule. If you cannot, then I would suggest that
10 the parties file their proposed schedules, let's say, a week
11 from today. Okay. And if it's a question where the
12 Commission will just have to take a look at different
13 competing views and select the one it wants to proceed on,
14 then let's get it on paper and proceed from there.

15 As far as threshold legal matters go, there --
16 I will just point out there are no motions presently before
17 the Commission. So if you want to put any such threshold
18 matters before the Commission, you'll have to file an
19 appropriate motion, okay, assuming you can't build it into
20 your procedural schedule.

21 Sir?

22 MR. DANDINO: Another matter. Looking at all
23 three, not only the Order, the concurrence and the dissents,
24 I'm -- and since it was done on the Commission's own motion,
25 I'm also, I guess, really kind of requesting your Honor to

1 maybe act as a go-between between us and the Commission to
2 find out exactly what issues, you know, other than what
3 they've kind of stated in here -- I get the idea that
4 there's a broader intent. Is this an examination of the
5 price cap and its ramifications?

6 I'm not really sure, I mean, or just this --
7 you know, if we stay -- as in most cases we have to stay
8 very relevant and very specific to this -- to the tariff.
9 It may be so narrow that it's not going to address the
10 issues the Commission's really interested in, because it
11 sounds like they want to make an investigation of how this
12 price cap has been used using this tariff.

13 I don't know if that makes sense or not, but
14 I'm just -- I just don't want to, you know, overly, you
15 know, proceed on a very narrow basis when the Commission's
16 looking for something broader, or if they just want to take
17 a narrow issue on this thing, you know, and not address the
18 broader issues, that's fine.

19 But I think, you know, for the parties just
20 to -- after we get through the threshold is how do you
21 grapple with framing, you know, the issues for trial. I'm
22 having a hard time in a vacuum deciding that.

23 JUDGE THOMPSON: I appreciate that point of
24 view, Mr. Dandino. Yes, sir?

25 MR. BUB: Your Honor, I guess it would be our

1 view that before launching into any investigation like that
2 we really need to address the threshold matter of the
3 Commission's authority, and here it would be whether it has
4 the authority under the price cap statute to even consider
5 general economic conditions.

6 We would view that as a straight matter of law
7 that would be appropriate for briefing, and if it's decided
8 at the end of the day that they do have that authority,
9 then, like you were saying, there are two questions there, a
10 legal and a factual one. We think it may be appropriate
11 that it be handled first the threshold legal question of the
12 authority, and if it's decided at the end of the day that
13 there is, then you address the factual issue.

14 It would be our view that there is no
15 authority, so there would be no need nor would it be
16 appropriate to go forward with review of the general
17 economic conditions or other factors that Mr. Dandino might
18 suggest. That's why we believe it's appropriate to brief
19 the narrow legal issues of the Commission's authority before
20 we go too far down the road.

21 JUDGE THOMPSON: Well, I appreciate that point
22 of view as well. What I can say in response to -- do you
23 have something to say in response?

24 MR. DANDINO: Just one thing. I think what
25 Mr. Bub really addressed or is stating is kind of the nature

1 of my dilemma. Say if we're saying if we're going to brief
2 it under the narrow point on the point of the jurisdiction
3 to consider economic conditions, well, what about other
4 conditions? I mean, that's what they said in their
5 suspension order. Now, is that the only grounds we're going
6 to review whether they have the authority to do it on, or
7 are we going to look at this as the broader thing, does the
8 Commission have authority to review it and suspend it and on
9 what grounds? It's a little bit different. It's a little
10 bit broader question.

11 If we limit it just to the economic one, if
12 that's all the Commission's interested in is that aspect of
13 it, that's where we need some of the guidance. If they want
14 to know, you know, do we have any authority to suspend this
15 for whatever reasons, what's the limits to that authority?

16 MR. BUB: I guess it was our understanding
17 from the Order that it was suspended because of the concern
18 about the general economic conditions.

19 MR. DANDINO: Sure. But like I said, it just
20 looks like from all the other comments there's a broader --
21 there's a broader interest from both sides of the boat.

22 MR. BUB: And I don't know. I guess it would
23 be our concern that this tariff proceeding wouldn't be the
24 appropriate place. I think we need to focus on what we
25 presented and the concerns that's been raised by the

1 Commission.

2 MR. DANDINO: Sure. And that's a valid
3 concern, too. It may be that another process is -- should
4 be involved. I'm just -- I'm kind of throwing out some
5 ideas for the kind of stuff that I would respectfully
6 request the judge maybe bring up to the Commission, see what
7 their -- what direction they want to go on this.

8 JUDGE THOMPSON: Well, as I was going to say,
9 I think I can tell you, Mr. Dandino, that the Commission's
10 concern is whether or not -- and should I say the majority's
11 concern is whether or not the Commission retains authority
12 to reject a tariff submitted under subsection 11 of the
13 price cap because it results in a rate that's not just and
14 reasonable, or that may not be just and reasonable, because,
15 of course, without an evidentiary hearing I don't know how
16 you can reach the conclusion that it's not just and
17 reasonable.

18 So that's the heart and soul of the
19 Commission's question. The price cap statute is designed,
20 clearly the Commission retains a role. The tariffs must be
21 submitted to the Commission for approval. Is that -- is the
22 Commission's authority limited to a purely arithmetical
23 exercise, in other words, a determination that the proposed
24 new cap is no more than eight percent higher than the last
25 one, or does the Commission retain additional authority to

1 review the tariff in the light of 392.200 and its
2 provisions.

3 I mean, that statute is expressly cited in the
4 price cap statute with respect to the Commission's tariff
5 approval function. So the first subsection of 392.200
6 includes the requirement that charges be just and
7 reasonable.

8 On the other hand, there are some who take the
9 position that subsection 1 of the price cap statute
10 essentially declares that rates calculated under the price
11 cap statute and in accordance with it are just and
12 reasonable. Is that really what that subsection means?

13 So these are the questions that the Commission
14 is seeking an answer to, and I realize that the place where
15 it's really going to get that answer is 1300 Oak Street in
16 Kansas City. So that's where this is going as quickly as we
17 can get it there. Okay?

18 MR. MEYER: Your Honor, then if I could ask
19 for clarification. Depending upon how those questions play
20 out, is Staff's impression at least that possibly that what
21 would be expected would also be a hearing on whether or not
22 the rates themselves, these specific rates that are
23 suspended in this tariff are just and reasonable?

24 JUDGE THOMPSON: I think that's what the
25 Commission contemplated.

1 MR. MEYER: That aspect of an evidentiary
2 hearing to allow for that, then, I think we might have some
3 concerns with the time frame that is allowed with the time
4 that the tariff is suspended.

5 JUDGE THOMPSON: Well, the tariff's been
6 suspended for 120 days. If a party suspects it's going to
7 be necessary to go longer, I think we have another six
8 months that the tariff could be suspended for.

9 MR. FISCHER: Your Honor, there's also a new
10 provision in the Commission's rules regarding motions for
11 summary determination, and at least part of this case
12 appears to me to certainly fall within that, and that's the
13 question that you were asking earlier on.

14 When you get to questions of whether it's just
15 and reasonable, that may have a need for an evidentiary
16 hearing. But I'm not sure that you ever get there if you
17 get to the question of law first.

18 JUDGE THOMPSON: If we can't consider it, then
19 you're right, we wouldn't need an evidentiary hearing to
20 take evidence as to whether or not it's just and reasonable
21 if, in fact, the Commission has no authority over that
22 point. And so that's something to consider.

23 And I don't know if I'm out of place to throw
24 out that when I was on the other side of the bar and I
25 thought an administrative tribunal was doing something it

1 shouldn't, I always ran down and got a writ of prohibition.
2 So that's another possibility here if you want to move it
3 into another playing field more quickly.
4 Anyway, if there's nothing further, I'll leave
5 you to discuss procedural schedules and different theories
6 of how the case should proceed. Again, I will expect
7 something to be filed a week -- no later than a week from
8 today. I will issue a notice reminding the parties of that.
9 Thank you very much. Nice to see you all this morning.

10 That will conclude the recorded portion of the
11 prehearing conference.

12 WHEREUPON, the recorded portion of the
13 prehearing conference was concluded.

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