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January 4, 2002

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

JAN 04 2002

Missouri Public
Service Commission

Re: Case No. TO-2001-467

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case, please find the original and 8 copies of the **Office of the Public Counsel's Motion for Rehearing**. I have on this date mailed, faxed, and/or hand-delivered the appropriate number of copies to parties of record. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Very truly yours,

Michael F. Dandino
Senior Public Counsel

MFD:kh

cc: Counsel of Record

Enclosure

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

In the Matter of the Investigation of the)
State of Competition in the Exchanges of)
Southwestern Bell Telephone Company)

Case No. TO-2001-467

FILED²
JAN 04 2002
Missouri Public
Service Commission

OFFICE OF THE PUBLIC COUNSEL'S MOTION FOR REHEARING

COMES NOW the Office of the Public Counsel (Public Counsel) and pursuant to Section 386.500, RSMo. and 4 CSR 240-2.160 specifically sets forth the reasons warranting a rehearing and respectfully moves the Missouri Public Service Commission (Commission) for rehearing of its Report and Order regarding the investigation of the state of competition in the exchanges of Southwestern Bell Telephone Company (SWBT) dated December 27, 2001 and effective January 6, 2002 that classified certain telecommunications services offered by SWBT in certain exchanges as competitive services pursuant to Sections 392.245, 386.020 (13), 392.185, 386.050 (53) RSMo. 2000.

Public Counsel requests rehearing because those portions of the decision in the Report and Order that classify SWBT's services as competitive, except for Intralata toll service that is measured by minutes of use, is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is in violation of constitutional provisions of due process, is unauthorized by law, made upon an unlawful procedure and without a fair trial, and constitutes an abuse of discretion, all as more specifically and particularly described in this rehearing motion.

Public Counsel states that the Commission misapplied the law and overlooked the relevant and material facts that would prevent the Commission from approving competitive classifications.

1. The Commission misapplied the law and overlooked the relevant and material facts when it ruled that those services that had been declared to be transitionally competitive in Case No. TO-93-116 are now competitive services by operation of law in accordance with Section 392.370, RSMo 2000. Since November 18, 1997, SWBT has been regulated as a price cap company, subject to the limitations and restrictions of Section 392.245, RSMo. As such, the PSC should look to that statute for the process to reclassify SWBT's services to competitive rather than the classification process designed for rate of return companies under Sections 392.361 and 392.370. The provisions of Sections 392.361 and 392.370 were designed for a different era prior to local competition under the Federal Telecommunications Act of 1996 and the implementation provisions of Senate Bill 507. The provisions of Sections 392.361 and 392.370 not only apply to a different form of regulation, but also have separate and independent triggers for classifying services.

Section 392.361 establishes a system for the classification of services. The present case was not initiated or prosecuted under the provisions of Section 392.361, but rather the Staff moved to open an investigation pursuant to the provisions of the price cap statute, Section 392.245. Section 392.370 provides for the classification of transitionally competitive services based upon the passage of time and applies to all exchanges of SWBT. Section 392.245, the statute under

which this case and investigation was brought due to SWBT's price cap status, establishes effective competition for each service as the triggering event and further requires a finding of effective competition on an exchange by exchange basis. The PSC mistakenly concluded in its Report and Order that certain services classified as transitionally competitive services in Case No. TO-93-116 became competitive services by operation of law on January 10, 1999. These conclusions ignore the fact that SWBT was under a different method of reclassification of its services since its price cap status was approved in TO 97—397 on November 18, 1997.

SWBT is no longer regulated under rate of return regulation and the process in Sections 392.361 and 392.370 for the classification and transition of services from noncompetitive status to transitionally competitive status, and finally to competitive status. Transitionally competitive services are governed by price bands that are approved by the PSC in which the company can price its services. SWBT is now regulated under the price cap regulatory scheme. This system does not look to the cost of the services or the earnings of the company, but rather gives the company pricing flexibility to meet competition and protects consumers by imposing limits on the maximum prices the company can charge and restricts the amount these maximum prices can annually increase. The two systems of regulation as to the classification of services are not compatible. Each regulatory method has its own separate process to commence the reclassification of service and to determine when and how a service can be classified as competitive. Section 392.245.5 provides guidelines based on the existence of

effective competition on an exchange by exchange basis and requires a showing that effective competition exists prior to a reclassification of service in an exchange. Under the rate of return and its classification system in Sections 392.361 and 392.370, RSMo, a different standard is used that allows the passage of time to convert a transitionally competitive service to a competitive service unless the PSC extends the classification for another fixed period of time. The classification process in Sections 392.361 and 392.370 does not make an exchange by exchange investigation as does the price cap process and does not mandate a finding of effective competition as is required under the price cap statute..

The PSC also overlooked relevant and material facts and matters of law that prior to this case both the Staff and SWBT treated changes in the prices of those services as subject to the price cap regulation and strictly followed the price cap limits and restrictions under Section 392.245, RSMo. It is apparent that Staff and SWBT considered the provisions of Section 392.245 as the controlling law. The Commission acted upon SWBT's price adjustments under Section 392.245 price cap provisions. It was not until filing testimony in this case that the Staff and SWBT suddenly abandoned their prior legal positions without explanation and changed their positions to seek "confirmation" of the competitive status when at all times prior to this they acted upon SWBT's price structure as governed by the price cap statute for purposes of approving rate changes. There is no reasonable factual or legal justification to now reinterpret the scope of Section 392.245,

RSMo to now give consumers less protection and now exclude certain SWBT services from examination for effective competition on an exchange basis.

For these foregoing reasons, Public Counsel states that the PSC's ruling that the following services are competitive services by the operation of law as of January 10, 1999 rather than under any analysis for effective competition under the terms of Section 392.245 is erroneous, unlawful, unreasonable, and unjust:

Issue 5	intraLATA private line/dedicated services
Issue 8	intraLATA toll service
Issue 11	WATS and 800 services
Issue 12	special access service
Issue 17	operator services: Station-to-Station, Person-to-Person, calling card

2. By relying upon reclassification of these specific services as competitive by operation of law under the provisions of Section 392.370, the Commission's decision is unlawful, unreasonable, unjust, arbitrary and capricious, and constitutes an abuse of discretion in that the PSC failed to comply with Section 392.245 and reclassified those services without making the required analysis and the appropriate determination and findings on the existence or absence of effective competition as required by Section 392.245.
3. The Commission's decision is unlawful, unreasonable, unjust, arbitrary and capricious, is not supported by competent and substantial evidence on the whole record, and constitutes an abuse of discretion in that the PSC found that effective competition exists in the St. Louis and Kansas City SWBT

exchanges for business core services (Issue 1) and its inseparable related services: business line related services (Issue 2), high capacity services (Issue 3). The PSC made this finding of competitive status even though the services did not meet the very standards for effective competition the PSC enunciated as relevant and material in its Report and Order. While the PSC stated that the significance of marketshare is not the determinative factor for effective competition (page 14), the PSC relied heavily on the marketshare of SWBT and its competitors (cast in terms of SWBT's loss of marketshare) in those exchanges (p.22). The PSC further said at page 14 that evidence of substantial CLEC marketshare in an exchange is not determinative of effective competition. The PSC's findings did not consider the nature of the competition and how the CLEC marketshare was divided among a number of CLECs such that each CLEC's marketshare was dwarfed by SWBT's customer base.

4. The PSC further stated that a key aspect of effective competition was its ability to discipline SWBT's prices. The PSC clearly stated in its Report and Order that this record totally lacks evidence of any restraint on SWBT's pricing due to competition. At page 19, the PSC said that SWBT had made only limited price changes for most of its services since 1984 and has no plans to change rates. The price changes reflected in Ex. 29 are those permitted under the price cap statute. The PSC found that there was no testimony in this case that any SWBT price changes were done as a result of competition or that there was any such competitive analysis performed that resulted in price

adjustments. (Report and Order, p. 20). The PSC also found that there was very little evidence competition had any specific impact on SWBT's prices or its pricing and product policies, strategies and plans. (Report and Order, p. 15) Yet, even with these findings of lack of any price discipline imposed by effective competition, the PSC ignored its own findings and found that business services in the St. Louis and Kansas City exchanges and residential services in St. Charles and Harvester exchanges were competitive. If competition is to act as a substitute for regulation to protect the consumer from unjust and unreasonable rates and to provide a counterbalance to the incumbent's dominant market power, it must have an influence on SWBT's prices. That was SWBT's own testimony and that was the PSC's findings on this vital element of effective competition. The PSC did not use its own standards of effective competition to make its findings on these services in these exchanges.

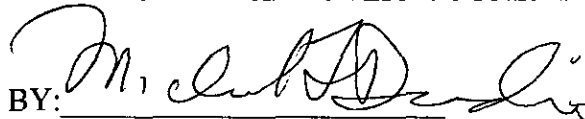
5. The Commission's decision is unlawful, unreasonable, unjust, arbitrary and capricious, is not supported by competent and substantial evidence on the whole record, and constitutes an abuse of discretion in that the PSC found that effective competition for residential line services and the related residential services exists in the St. Charles and Harvester exchanges. Essentially, SWBT competitor comes from AT&T's cable TV operation. This competitor's assets and customer base has recently been transferred to a new owner Charter Fiberlink-Missouri, LLC. in TM 2002-71 and TA 2001-346. The evidence in the record was that AT&T's residential service offerings were

a test market for AT&T (Tr. 665-666). The market is still dominated by SWBT with a market of almost 80% with AT&T's successor owner holding a very distant second and a smattering of other providers, mostly resale and many prepaid providers, far down the ladder. There is no finding that the residential competition in those two exchanges is viable for the long run. . Again, there is no finding that the presence of AT&T providing local residential service provided any price discipline on SWBT. The record and the PSC's own findings in its Report and Order reveal no such price discipline.

For the foregoing reasons, Public Counsel asks the Commission to rehear the case to the extent that it grants competitive status to certain services by operation of law under Section 392.370 and grants competitive status to business core line services and the interrelated services in St. Louis and Kansas City exchanges and grants competitive status to residential line services and the interrelated services in the St. Charles and Harvester exchanges, and for such further and additional relief as may be necessary.

Respectfully submitted,

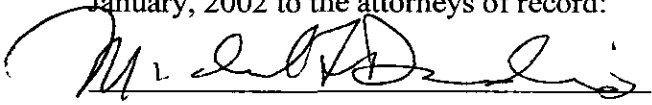
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed or hand delivered this 4th day of January, 2002 to the attorneys of record:

A handwritten signature in black ink, appearing to be "M. L. [unclear]", is written over a horizontal line.

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