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October 29, 2001

FILED³

OCT 29 2001

Missouri Public
Service Commission

Mr. Dale Hardy Roberts, Secretary
Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102-0360

**Re: In the Matter of the Application of Southwestern Bell Telephone
Company
Case No. TO-2002-185**

Dear Mr. Roberts:

On behalf of the Small Telephone Company Group, enclosed for filing in the above-referenced case please find an original and eight (8) copies of Application to Intervene, Response and Request for Hearing of the Small Telephone Company Group. A copy has also been hand-delivered to the Office of the Public Counsel and mailed to all parties of record.

Thank you for your assistance with this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:


Paul A. Boudreau

PAB/aw

Enclosures

cc: Office of the Public Counsel
Parties of Record

FILED³

OCT 29 2001

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

Missouri Public
Service Commission

In the Matter of the Application of Southwestern)
Bell Telephone Company to Transfer Property)
and Ownership of Stock Pursuant to)
Section 392.300 RSMo.)

Case No. TO-2002-185

**APPLICATION TO INTERVENE, RESPONSE AND REQUEST FOR HEARING
OF THE SMALL TELEPHONE COMPANY GROUP**

Comes now the Small Telephone Company Group, which companies are set out in Attachment A, (hereinafter referred to as "Applicants") pursuant to Commission rule 4 CSR 240-2.075 and in support of their Application to Intervene in the above-captioned matter state that:

1. Applicants currently provide telecommunications services to members of the public located in those areas certificated to them by the Missouri Public Service Commission ("Commission"). As is relevant to this case, Applicants provide "basic local telecommunications services" within the exchanges as defined by their respective tariffs which are on file with and approved by the Commission. Applicants are "telecommunications companies" and "public utilities" as those terms are defined by § 386.020, RSMo Supp. 1999, and are, therefore, subject to the jurisdiction, regulation and control of the Commission as provided by law. Applicants also are rural telephone companies and incumbent local exchange carriers as defined by the Federal Telecommunications Act of 1996.

2. All correspondence, communications, orders and decisions in this matter should be addressed to the following:

W. R. England, III
Paul A. Boudreau
Brydon, Swearngen & England P.C.
P.O. Box 456

4

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3. On October 12, 2001, Southwestern Bell Telephone Company ("SWBT"), Southwestern Bell Texas, Inc. and Southwestern Bell Telephone Company, L.P. ("SWBT, L.P.") filed a Joint Application for Authority to Permit a Corporate Restructuring. In summary, SWBT and the Joint Applicants request approval for a transaction which will have the aggregate effect of converting SWBT to a limited partnership organized under the laws of the State of Texas. The Joint Applicants have filed a separate Motion for Expedited Consideration requesting approval of the proposed transaction by no later than December 20, 2001.

4. On October 17, 2001, the Commission issued a Notice Setting Time for Response, pursuant to which the Commission has directed that responses to the Application be filed no later than October 29, 2001.

5. The members of the Small Telephone Company Group have many direct and indirect business relationships with SWBT. Generally, telecommunications traffic originated from SWBT exchanges is terminated on the local exchange networks owned and operated by the members of the Small Telephone Company Group. Conversely, telecommunications traffic originating in local exchanges served by the members of the Small Telephone Company Group is terminated in those exchanges in the State of Missouri owned and operated by SWBT. Moreover, much of the intrastate interexchange telecommunications network is comprised of toll tandems owned and operated by SWBT.

6. It is the understanding of the Small Telephone Company Group that SWBT holds a state corporate charter issued in or prior to the year 1913 and that said charter authorizes SWBT to engage in telecommunications services in the State of Missouri. Additionally, it is the understanding of the Small Telephone Company Group that said state charter pre-dates the enactment of the Public Service Commission Act in 1913. Consequently, SWBT's authority pre-dates those requirements under Missouri law that it file for and obtain certificates of convenience and necessity and/or certificates of service authority to provide the telecommunications services in the State of Missouri in which it is currently engaged. SWBT's authority to provide telecommunications services in Missouri is, thus, "grandfathered" by virtue of these circumstances.

7. SWBT, L.P., is not an entity heretofore certificated by the Commission to provide telecommunications services in the State of Missouri. Should the Joint Application be approved by the Commission, SWBT, L.P., will be SWBT's successor in interest and, presumably, it is contemplated that SWBT, L.P., at the conclusion of the transaction, will carry on the telecommunications business of SWBT currently carried on in the State of Missouri.

8. Generally, any business entity providing telecommunication services in the State of Missouri is required to have a certificate of service authority to provide basic local exchange or interexchange telecommunications services in this state. See, Section 392.410 RSMo. 2000. The Joint Application, however, contains no request that any such certificate or certificates be issued on behalf of SWBT, L.P.

9. It is the Small Telephone Company Group's position that SWBT's grandfathered status cannot be transferred to a new and separate business organization. Moreover, even if

SWBT's grandfathered status were to be considered to be equivalent to a certificate of convenience and necessity or a certificate of service authority, that such certificate may not be capable of being transferred to the surviving entity. This Commission has previously held that a start-up business organization must either file a separate Application for a certificate of service authority or must amend the transaction Application to incorporate those allegations necessary under Commission Rule 4 C.S.R. 240-2.060(6). See, Re GTE Midwest Incorporated and Cass County Telephone Company, Case No. TM-98-163 (copies of relevant orders in that case attached for the Commission's consideration as Attachment B hereto).

10. SWBT, L.P., has not sought any authority to provide telecommunications services in the State of Missouri. Consequently, it is unclear what the Joint Applicants' intentions may be with respect to requesting the appropriate and necessary certification for SWBT, L.P., under Missouri law. The Small Telephone Company Group is of the opinion that the Joint Application is, therefore, deficient and raises a number of important questions about whether the public interest would be served by approving the Joint Application.

11. The Small Telephone Company Group files its Application to Intervene and Request for Hearing in this proceeding on the grounds that the granting of the Joint Application may directly and adversely affect the interests of the member companies as providers of telecommunications services in the State of Missouri. Specifically, the Small Telephone Company Group has an interest in making sure that the SWBT's successor in interest identifies those services and service areas sought to be provided or served in the State of Missouri and that it has all requisite authority from this Commission to conduct business in this State as the largest single provider of telecommunications services in the State of Missouri. This will ensure that there is

no interruption of critical telecommunications services as a consequence of the proposed transaction. As it now stands, the Small Telephone Company Group believes that the Commission's approval of the Joint Application would be detrimental to the public interest for the reasons set forth above.

12. The Small Telephone Company Group also has not had an opportunity to consider other regulatory or business consequences, if any, which may come about as a result of the corporate restructuring addressed in the Joint Application. Consequently, the Small Telephone Company Group reserves the right to bring to the Commission's attention any other matters that may bear on the public interest after the member companies have had an opportunity to fully consider the implications of the relief requested in the Joint Application.

13. The members of the Small Telephone Company Group have an interest in this proceeding that is different from that of the general public. In addition, their expertise in and perspective on the provision of telecommunications services in the State of Missouri will aid the Commission in resolving the issues related to this proceeding. Consequently, their intervention and participation will serve the public interest.

14. The Small Telephone Company Group requests that the Commission hold a hearing with respect to the Joint Application in this case.

WHEREFORE, the Small Telephone Company Group requests that the Commission issue an order authorizing it to intervene in the above-captioned proceeding, and to schedule a hearing to consider the public service issues implicated by the requested corporate restructuring.

Respectfully submitted,



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Attorneys for
The Small Telephone Company Group

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was hand delivered or mailed, United States Mail, postage prepaid, this 29th day of October, 2001, to:

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

Dan Joyce
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Mimi B. MacDonald
Southwestern Bell Telephone
One Bell Center
Room 3510
St. Louis, MO 63101



Paul A. Boudreau

SMALL TELEPHONE COMPANY GROUP

BPS Telephone Company,
Cass County Telephone Company,
Citizens Telephone Company of Higginsville, Missouri, Inc.,
Craw-Kan Telephone Cooperative, Inc.,
Ellington Telephone Company,
Farber Telephone Company,
Goodman Telephone Company, Inc.,
Granby Telephone Company,
Grand River Mutual Telephone Corporation,
Green Hills Telephone Corporation,
Holway Telephone Company,
KLM Telephone Company,
Kingdom Telephone Company,
Lathrop Telephone Company,
Le-Ru Telephone Company,
Mark Twain Rural Telephone Company,
McDonald County Telephone Company,
Miller Telephone Company,
New Florence Telephone Company,
New London Telephone Company,
Orchard Farm Telephone Company,
Oregon Farmers Mutual Telephone Company,
Ozark Telephone Company,
Peace Valley Telephone Company,
Rock Port Telephone Company,
Seneca Telephone Company,
Steelville Telephone Exchange, Inc.
Stoutland Telephone Company

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 28th
day of December, 1994.

In the matter of the Joint Application of)
GTE Midwest Incorporated and Cass County)
Telephone Company for authority to transfer) CASE NO. TM-95-163
and acquire part of GTE Midwest Incorporated's)
Missouri franchise, facilities or system located)
in the State of Missouri.)

ORDER CONCERNING APPLICATION

On November 14, 1994, GTE Midwest Incorporated (GTE) and Cass County Telephone Company (Cass) filed a joint application for Commission approval of the acquisition by Cass of part of GTE's franchise, facilities and system, including appropriate certificates of public convenience and necessity, pursuant to § 392.300, RSMo Supp. 1993. Cass apparently seeks to offer local exchange service in GTE's stead, with respect to the area now served by GTE through this portion of GTE's system. It has come to the Commission's attention that Cass does not possess and has not applied for a Certificate of Service Authority, either separately or as part of its joint motion in this case. Assuming that Cass is permitted to acquire part of GTE's system, Cass could not provide telecommunications service in Missouri absent a Certificate of Service Authority. See, e.g., § 392.410, RSMo Supp. 1993.

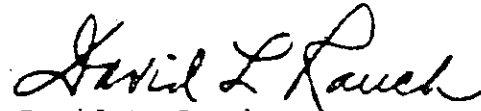
The Commission is of the opinion that in order to obtain a Certificate of Service Authority, Cass must either file a separate application for Certificate of Service Authority or must amend its joint application to reflect that it is also seeking a Certificate of Service Authority. In addition, Cass must comply with the requirements of 4 CSR 240-2.060(2).

IT IS THEREFORE ORDERED:

1. That Cass County Telephone Company be and is hereby ordered to file a separate Application for Certificate of Service Authority or amend its joint application to specifically reflect that it is also seeking a Certificate of Service Authority; to describe the type of service it seeks to offer; and to comply with 4 CSR 240-2.060(2); to the extent that Cass County Telephone Company seeks to offer telecommunications services within the State of Missouri.

2. That this order shall become effective on the date hereof.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
Kincheloe and Crumpton, CC., Concur.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 1st
day of February, 1995.

In the matter of the Joint Application)
of GTE Midwest Incorporated and Cass)
County Telephone Company for authority to)
transfer and acquire part of GTE Midwest)
Incorporated's Missouri franchise,)
facilities or system located in the State)
of Missouri.)

CASE NO. TM-95-163

ORDER GRANTING RECONSIDERATION

On December 28, 1994, the Commission issued an Order Concerning Application with respect to the Joint Application of GTE Midwest Incorporated (GTE) and Cass County Telephone Company (Cass) for Commission approval of the acquisition by Cass of part of GTE's franchise, facilities, and system. The Commission noted in its Order that Cass does not possess and has not applied for a Certificate of Service Authority, and that Cass could not provide telecommunication service in Missouri absent a Certificate of Service Authority. The Commission also stated: "The Commission is of the opinion that in order to obtain a Certificate of Service Authority, Cass must either file a separate application for Certificate of Service Authority or must amend its Joint Application to reflect that it is also seeking a Certificate of Service Authority. In addition, Cass must comply with the requirements of 4 CSR 240-2.060(2)."
Re the joint application of GTE Midwest Incorporated and Cass County Telephone Company, Case No. TM-95-163, Order Concerning Application, issued December 28, 1994, at 1.

On January 11, 1995, GTE and Cass jointly filed a Motion for Reconsideration of the Commission's decision in its Order Concerning Application. GTE and Cass make a number of arguments in support of their

Motion for Reconsideration, which the Commission will paraphrase for the sake of brevity. The joint movants first trace the history of GTE's Certificate of Service Authority, from the merger of Contel of Missouri, Inc. (Contel) and the other operating subsidiaries of the GTE Corporation into GTE Midwest Incorporated, back to the point in time during which Contel was known as Continental Telephone Company of Missouri. Attached to the Motion are two prior Orders of the Commission reflecting the above-stated history, *Re Continental Telephone Company of Missouri*, Case No. TA-88-78, Order, issued September 18, 1987, and *Re the application requesting authority (a) for GTE North Incorporated to transfer certain assets to GTE Midwest Incorporated, (2) for the merger of Contel of Iowa, Inc., Contel of Missouri, Inc., Contel of Minnesota, Inc., The Kansas State Telephone Company, Contel of Kansas, Inc., and Contel Systems of Missouri, Inc., into GTE Midwest Incorporated, and (3) for the transfer of certificates of public convenience and necessity*, Case No. TM-93-1, Report and Order, issued December 8, 1992.

GTE and Cass also quote from the latter Report and Order in Case No. TM-93-1, stating that it is identical to the instant case, and that the Commission's Order Concerning Application is inconsistent with Chapter 392 of the Missouri Revised Statutes and with the decision in Case No. TM-93-1. In addition, movants quote § 392.410.4, RSMo 1994 for the proposition that telephone companies possessing "old" Certificates of Public Convenience and Necessity need not reapply for "new" Certificates of Service Authority, and cite § 393.300, RSMo 1994 for the proposition that transfer of all or part of a company's franchise, which would include "certificates," is permitted. In contrast to this statutory authority, movants contend that 4 CSR 240-2.060 (2) is inapplicable to the present case, both because the appropriate standards of review are different in sales cases and cases requesting certificates, and because the rule appears

to apply to new or "start-up" operations, and contains provisions which do not apply to the instant case.

The Commission has reviewed movants' Motion for Reconsideration, and determines that the Motion raises issues of sufficient concern to warrant reconsideration. Upon reconsideration, the Commission has reviewed its Order Concerning Application; movants' Motion for Reconsideration and the statutes, cases, and rule cited therein; the Joint Application originally filed by movants; and other applicable authority, and finds as follows.

The Commission has reviewed the statutes cited by movants, and finds that movants' argument with respect to § 392.410.4, RSMo 1994 is not applicable, as no one has challenged the validity of GTE's current Certificate, which would include the portion of its system sought to be sold and transferred to Cass. Movants' citation of § 392.300, RSMo 1994 is also inapposite. Section 392.300.1 states as follows:

1. No telecommunications company shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, facilities or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such line or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it to do so. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void....

§ 392.300.1, RSMo 1994. Movants interpret the term "franchise" to include the term "certificates." Such an interpretation is not, however, supported by a close reading of the statutory language.

The third sentence of § 392.300.1 states:

The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer,

mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture.

§ 392.300.1, RSMo 1994.

It is an axiom of statutory construction that the same interpretation be given to a term when that term is used in different parts of the same statute. *United States v. Brunett*, 53 F. 2d 219, 234 (W.D. Mo. 1931). The third sentence of § 392.300.1, RSMo 1994, quoted above, appears to limit the Commission's authority with respect to franchises: the Commission may not make valid an invalid franchise, nor validate a lapsed franchise, nor enlarge or add to the powers granted by a franchise, nor waive any forfeiture. If the term "franchise" is synonymous with the terms "certificate of convenience and necessity" or "certificate of service authority", then taken to its logical extension the Commission would have no authority to grant, cancel, or transfer a certificate in the event a sale and transfer of assets took place in such a way that either a technical or substantive noncompliance with the Commission's procedures on sales occurred, rendering the sale either void or voidable. For example, if a sale took place prior to obtaining the Commission's approval, which would render the sale void under § 392.300.1, RSMo 1994, while the Commission might subsequently approve or ratify the sale, the Commission would be unable to take similar action with respect to a certificate in the event a certificate lapsed as a result of a void sale, or in the event the buyer sought to "add" the seller's certificate to the buyer's existing certificate.

Another postulate of statutory construction states that the construction of statutes should be harmonized with reason to avoid unreasonable or absurd results. *State v. Bern*, 322 S.W.2d 175, 177 (Mo.

App. 1959). The Commission is of the opinion that an interpretation of the term "franchise" in § 392.300, RSMo 1994, in a way which includes the term "certificate", could very well lead to unreasonable or absurd results. The converse, however, is not true. If a franchise excludes a certificate issued by this Commission, then the term franchise would appear to refer mainly to grants of permission or privileges by municipalities. Section 71.520, RSMo 1994, *et seq.* is suggestive that this is the case. This definition of franchise also harmonizes with the third sentence of § 392.300.1, RSMo 1994, as it would make sense for limitations to be placed on the Commission's authority with respect to franchises if the source of the permission or privileges granted by a franchise is a municipality and not the Commission.

In addition, § 295.180(2), RSMo 1994 separately refers to "franchise" and "certificate of necessity" in the conjunctive, which seems to indicate that the statute is referencing two distinct documents. Finally, the Commission's own rules treat the terms "franchise" and "certificate" as distinct, as 4 CSR 240-2.060(2)(A)10 requires that franchise approval be shown by either a certified copy of the document granting the franchise, or by affidavit of the applicant that the requisite consent has been acquired, as a *condition precedent* to the approval of an application for a certificate. To the extent that the term "franchise" is ambiguous, the Commission's treatment of it in its rules as separate from the term "certificate" is persuasive, as courts will look to the construction placed upon statutory provisions by the entities assigned by law to administer those provisions. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 28 (Mo. banc 1975).

Movants' citation of Case No. TM-93-1 is likewise unhelpful, as the facts in the present case are distinguishable. Here the Commission is presented with a situation where a company which is not presently a public

utility and which has never previously operated as a public utility seeks to purchase a portion of the system of an existing utility. It is true as movants claim that GTE Midwest was at the time of Case No. TM-93-1 not authorized to provide telecommunications services in the state of Missouri, and that certificates of public convenience and necessity held by the joint applicants in that case were transferred to GTE Midwest. However, the purpose of Case No. TM-93-1 was the *intracompany* merger of various operating companies of an existing public utility. The GTE Corporation had previously purchased part of the system of Contel, and GTE Midwest was set up as a wholly-owned, newly-formed subsidiary for the purpose of company consolidation. This purpose was evident in the requirement that GTE Midwest take steps to file a consolidated tariff designed to replace the separate tariffs of the merging companies within a reasonable time. Hence the merger did not involve an unknown entity, and no issues were raised with respect to the technical expertise or financial wherewithal of GTE Midwest. Instead, the Commission in effect had a "track record" that it could assess.

The Commission also does not find 4 CSR 240-2.060(2) to be inapplicable, as suggested by movants. While portions of the Commission's rule appear to focus on the building of plant by a company as opposed to the acquisition of plant by purchase, the vast bulk of the rule's requirements are pertinent to the question of whether a certificate should be issued in this type of situation. Even the part of the rule referenced by movants in support of their position that the rule is not applicable -- the requirement of a feasibility study -- is not as irrelevant as may appear at first glance. Though no "installations" are anticipated for which plans, specifications, and cost estimates would be needed, Cass's plans for financing its purchase of a portion of GTE's system may still be relevant in relation to the rates and charges proposed, and estimated

revenues and expenses. For example, movants state in their Joint Application that Cass proposes no immediate changes in the rates, terms, and conditions under which GTE's customers are currently being served, and that Cass intends to accelerate GTE's current modernization program for the six exchanges involved in the proposed transaction. Thus Cass's revenues should remain about the same as GTE's revenues, but Cass's expenses may be very different, depending on factors such as costs related to the financing of its purchase, costs related to accelerated network modernization, and so forth.

In addition, movants point out in their joint motion that the standards of review are different for cases involving the sale and transfer of assets, and those involving the grant of a certificate. However, it is precisely because the standards of review are different that these two application procedures must be separately undertaken; they are not synonymous or interchangeable.

Upon reconsideration, the Commission concludes that its original Order Concerning Application issued on December 28, 1994 is correct and should be reaffirmed. The Commission also concludes that Cass should be ordered to comply with the directives of the Order Concerning Application within a reasonable time, by filing a separate Application for Certificate of Service Authority or amending its Joint Application to specifically reflect that it is also seeking a Certificate of Service Authority; describing the type of service it seeks to offer; and complying with 4 CSR 240-2.060(2).

Although the Commission finds movants' arguments to be unpersuasive and their citations to be distinguishable, the Commission is concerned that a continuation of the practice of granting the transfer of certificates under certain circumstances may cause confusion in the future in relation to its decision herein. The Commission is not strictly bound

by its past practices as precedent. See, e.g. Re Kansas City Power and Light Company, 28 Mo. P.S.C. (N.S.) 228, 376 (1986). The Commission therefore determines that the more appropriate procedure to be utilized in the future in sales and merger cases is to cancel the "old" certificates of the seller or merging companies, and to grant "new" certificates to the buyer or surviving company.

IT IS THEREFORE ORDERED:


1. That the joint Motion for Reconsideration filed by GTE Midwest Incorporated and Cass County Telephone Company on January 11, 1995 be and is hereby granted as specified herein.

2. That the Order Concerning Application issued on December 28, 1994 be and is hereby reaffirmed.

3. That Cass County Telephone Company be and is hereby directed to comply with this order and the Order Concerning Application issued on December 28, 1994, within sixty (60) days from the effective date of this order.

4. That this order shall become effective on the date hereof.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
Kincheloe and Crumpton, CC., Concur.