

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

In the Matter of a Further Investigation of     )  
the Metropolitan Calling Area Service After     )     Case. No. TO-2001-391  
the Passage and Implementation of the     )  
Telecommunications Act of 1996.     )

**SOUTHWESTERN BELL TELEPHONE, L.P. d/b/a SBC MISSOURI'S  
MOTION TO DISMISS FILING OF CONSUMER PETITIONS REQUESTING  
MODIFICATION OF MCA FEES IN GREENWOOD, MISSOURI**

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri") and for its Motion to Dismiss Filing of Consumer Petitions Requesting Modification of MCA Fees in Greenwood, Missouri, states as follows:

1.     On January 6, 2004, the Office of the Public Counsel ("OPC") filed a pleading entitled: "Filing of Consumer Petitions Requesting Modification of MCA Fees in Greenwood, Missouri" ("Greenwood Petition"). In the Greenwood Petition, the OPC requests the Missouri Public Service Commission ("Commission") to eliminate the monthly fee (\$12.35) for optional Tier 3 Metropolitan Calling Area ("MCA") Service in Greenwood, Missouri. OPC also requests the Commission to schedule a public hearing at or near Greenwood, Missouri, to allow the public to comment on existing MCA service and MCA rates.

2.     Dismissal is required: (a) under Section 392.245.11, 2000<sup>1</sup>; (b) under Section 392.200.9; (c) because the reduction and/or elimination of the fee for optional Tier 3 MCA Service in Greenwood, Missouri would be inconsistent with Missouri case law which uniformly holds that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business; and (d) because the issues set forth in the Greenwood Petition are contested issues and, as such, should be raised in a contested case

---

<sup>1</sup> All statutory references are to the Missouri Revised Statutes, 2000, unless otherwise specifically noted herein.

docket, which Case No. TO-2001-391 is not.<sup>2</sup> SBC Missouri will briefly address each of these issues below.

3. First, Section 392.245.11 provides in pertinent part:

The maximum allowable prices for nonbasic telecommunications services of a large, incumbent local exchange telecommunications company regulated under this section shall not be changed until January 1, 1999, or on an exchange-by-exchange basis, until an alternative local exchange telecommunications company is certified and providing basic local service in such exchange, whichever is earlier. Thereafter, the maximum allowable prices for nonbasic telecommunications service of an incumbent local exchange telecommunications company may be annually increased by up to eight percent for each of the following twelve-month periods upon providing notice to the commission and filing tariffs establishing the rates for such services in such exchanges at such maximum allowable prices. This subsection shall not preclude an incumbent local exchange company from proposing new telecommunications services and establishing prices for such new services. An incumbent local exchange telecommunications company may change the rates for its services, consistent with the provisions of section 392.200, but not to exceed the maximum allowable prices, by filing tariffs which shall be approved by the commission within thirty days, provided that any such rate is not in excess of the maximum allowable price established for such service under this section. (Emphasis added).

Section 392.245.3 specifies that: "the maximum allowable prices established for a company under subsection 1 of this section shall be those in effect on December thirty-first of the year preceding the year in which the company is first subject to regulation under this section." SBC Missouri became a price cap company on September 26, 1997.<sup>3</sup> The maximum allowable price for optional Tier 3 MCA Service in Greenwood, Missouri on December 31, 1996, was \$12.35. The only way the price for MCA Service may be reduced and/or eliminated under Section 392.245.11 is if SBC Missouri filed a tariff requesting such reduction and/or elimination. Since SBC Missouri has not filed a tariff requesting a reduction and/or elimination of the price for

---

<sup>2</sup> State v. Public Service Commission, 406 S.W.2d 5, 11 (Mo. 1966); State v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995); State ex rel. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

<sup>3</sup> In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo., Case No. TO-97-397, September 16, 1997, p. 29.

optional Tier 3 MCA Service in Greenwood, Missouri, the Commission has no authority to reduce and/or eliminate the price for such service. Moreover, even if SBC Missouri was not subject to price cap regulation, the Commission does not have the authority to reduce a price for one particular service in one particular geographic area; rather, the Commission would have to consider all relevant factors, including all operating expenses and the utility's rate of return, when determining a rate authorization.<sup>4</sup> Since the forced reduction or elimination of optional Tier 3 MCA Service in Greenwood, Missouri, would violate Section 392.245.11, the Commission must dismiss the Greenwood Petition.<sup>5</sup>

3. Second, if the Commission were to reduce and/or eliminate the price for optional Tier 3 MCA Service in Greenwood, Missouri, without SBC Missouri's agreement, it would violate Section 392.200.9, which provides:

This act shall not be construed to prohibit the Commission, upon determining that it is in the public interest, from altering local exchange boundaries, provided that the incumbent local exchange company or companies serving each exchange for which the boundaries are altered provide notice to the Commission that the companies approve of the alteration of exchange boundaries.

The Commission has interpreted Section 392.200.9 to require two conditions before the borders of an exchange can be changed.<sup>6</sup> First, the Commission may change local exchange boundaries only if the ILEC doing business in the exchange for which the boundaries are changed approves

---

<sup>4</sup> State ex rel. Util. Consumers Council, Etc., v. P.S.C., 585 S.W.2d 41, 49 (Mo. 1979); State ex rel. Office of Pub. Coun. v. PSC, 858 S.W.2d 806, 812 (Mo. App. W.D. 1993). The authority to conduct a proceeding to examine the rates of a telecommunications company is provided in Section 392.240.1. Under the price cap statute, the Commission is specifically prohibited from conducting such a proceeding pursuant to Section 392.245.7.

<sup>5</sup> SBC Missouri notes that even if it were not subject to price cap regulation (which it is), the Commission still could not reduce or eliminate the fee for optional Tier 3 MCA service in Greenwood, Missouri. SBC Missouri is entitled to revenue neutrality under both the federal and state constitutions that prohibit a taking without due process of the law. This is true not only with respect to SBC Missouri's rights with regard to the fees that SBC Missouri charges for optional Tier 3 MCA service but is also true with respect to other carriers' rights with regard to toll charges and access fees that they collect which would be impacted if the Commission eliminated the fee for optional Tier 3 MCA service in Greenwood, Missouri. For these reasons, the Commission must dismiss the Greenwood Petition.

<sup>6</sup> Order Dismissing Complaint, The Wood Family v. Sprint and Southwestern Bell, TC-2002-399, July 30, 2002, p. 2.

of the change; and, second, the Commission must then make a finding that changing the borders of the exchange is in the public interest.<sup>7</sup> Since SBC Missouri has not provided notice to the Commission that it approves of an alteration of the MCA boundaries so as to reduce or eliminate the price for optional Tier 3 MCA Service in Greenwood, Missouri, the first requirement in Section 392.200.9 would not be met. The Commission should, therefore, dismiss the Greenwood Petition.

4. Third, reduction or elimination of the fee for optional Tier 3 MCA Service in Greenwood would be unlawful under existing case law. Missouri courts have consistently held that the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.<sup>8</sup> Specifically, the regulatory power of the Commission does not clothe the Commission with general powers of company management incidental to ownership.<sup>9</sup> The utility retains the lawful right to manage its own affairs and conduct business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare.<sup>10</sup> Thus, it is SBC Missouri's decision, not the Commission's, whether to reduce or eliminate the price for optional Tier 3 MCA Service in Greenwood, Missouri. Since SBC Missouri has not made any decision at this time to reduce or eliminate the price for optional Tier 3 MCA Service in Greenwood, Missouri, the Commission must dismiss the Greenwood Petition.

---

<sup>7</sup> Id.

<sup>8</sup> State v. Public Service Commission, 406 S.W.2d 5, 11 (Mo. 1966); State v. Bonacker, 906 S.W.2d 896, 899 (Mo. App. S.D. 1995); State ex rel. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

<sup>9</sup> State ex rel. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980); State v. Public Service Commission of Missouri, 343 S.W.2d 177, 182 (Mo. App. 1960).

<sup>10</sup> State v. Public Service Commission of Missouri, 343 S.W.2d 177, 182 (Mo. App. 1960).

5. Finally, the Commission initiated Case No. TO-2001-391 as an investigatory case, the purpose of which was the formation of a Task Force to investigate issues related to pricing of MCA service, the effects of an expanded MCA on pricing, whether the Local Exchange Routing Guide is the appropriate mechanism to identify the MCA NXX codes in the future, and to bring to the Commission's attention other issues it identifies which may impact MCA service and its continued viability in the future.<sup>11</sup> As such, it is not a contested case. Judge Ruth recently advised that the Commission prefers: "to start a case as a contested or noncontested case and keep it that way."<sup>12</sup> Clearly, whether or not the Commission should eliminate the price for optional Tier 3 MCA service in Greenwood, Missouri is a contested issue in that it affects SBC Missouri's property rights. As such, SBC Missouri is entitled to due process under Article 1, Section 10 of the Missouri Constitution, which provides: "[t]hat no person shall be deprived of life, liberty or property without due process of the law." One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.<sup>13</sup> Section 386.420 also guarantees all parties to a Commission proceeding the right to be heard and to introduce evidence.<sup>14</sup> Another component of the due process requirement is that parties be allowed to cross-examine witnesses.<sup>15</sup> The purpose of cross-examination is to sift, modify, or explain what has been said, to develop new or old facts in a view favorable to the examiner, and to test the correctness of the information from the witness with an eye to discrediting the accuracy or truthfulness of a witness.<sup>16</sup> When the evidence is critical to the issues and necessary to sustain a proponent's burden of proof, cross-examination is essential to testing the reliability of

---

<sup>11</sup> See Order Establishing New Case and Creating an Industry Task Force, Case No. TO-2001-391, January 18, 2001.

<sup>12</sup> T. 231 (Ruth).

<sup>13</sup> State ex rel. James M. Fischer, Public Counsel for the State of Missouri v. Public Service Com'n., 645 S.W.2d 39, 43 (Mo. App. W.D. 1982).

<sup>14</sup> Id. at 42.

<sup>15</sup> State ex rel. Util. Consumers Council v. Pub. Serv. Com., 562 S.W.2d 688, 693 (Mo. App. 1978).

<sup>16</sup> Id. at 694.

evidence.<sup>17</sup> The right to cross-examination is explicitly set forth in Section 536.070.2 which provides that in any contested case:

Each party shall have the right to call and cross-examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

Thus, SBC Missouri's right to due process requires a hearing during which it will have the opportunity to cross-examine witnesses. The appropriate forum for a hearing is a contested case proceeding, not an investigatory proceeding as is the case in Case No. TO-2001-391. Thus, the Commission should dismiss the Greenwood Petition.

Wherefore, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri prays that the Commission dismisses OPC's Filing of Consumer Petitions Requesting Modification of MCA Fees in Greenwood, Missouri, together with any further or additional relief the Commission deems just and proper.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a SBC  
MISSOURI

By: 

PAUL G. LANE #27011

LEO J. BUB #34326

ANTHONY K. CONROY #35199

MIMI B. MACDONALD #37606

Attorneys for Southwestern Bell Telephone, L.P., d/b/a SBC  
Missouri

One Bell Center, Room 3510

St. Louis, Missouri 63101

314-235-4094 (Telephone)

314-247-0014 (Facsimile)

[mimi.macdonald@sbccom](mailto:mimi.macdonald@sbccom) (E-mail)

---

<sup>17</sup> Id.

**CERTIFICATE OF SERVICE**

Copies of this document were served on the following parties by e-mail on January 16, 2004.

  
Mimi B. MacDonald

LISA CREIGHTON HENDRICKS  
SPRINT MISSOURI, INC.  
6450 SPRINT PARKWAY  
KSOPHN0212-2A253  
OVERLAND PARK, KS 66251  
[Lisa.C.CreightonHendricks@mail.sprint.com](mailto:Lisa.C.CreightonHendricks@mail.sprint.com)

MICHAEL DANDINO  
OFFICE OF THE PUBLIC COUNSEL  
P. O. BOX 7800  
JEFFERSON CITY, MO 65102  
[mdandino@ded.state.mo.us](mailto:mdandino@ded.state.mo.us)

STEPHEN F. MORRIS  
MCI TELECOMMUNICATIONS CORP.  
701 BRAZOS, SUITE 600  
AUSTIN, TX 78701  
[stephen.morris@wcom.com](mailto:stephen.morris@wcom.com)

NANCY KRABILL  
XO MISSOURI, INC.  
1300 W. MOCKINGBIRD LANE, STE. 200  
DALLAS, TX 75247  
[Nancy.krabill@xo.com](mailto:Nancy.krabill@xo.com)

MARY ANN YOUNG  
MCLEOD USA TELECOMMUNICATIONS  
2031 TOWER DRIVE  
P.O. BOX 104595  
JEFFERSON CITY, MO 65102-4395  
[MYoung0654@aol.com](mailto:MYoung0654@aol.com)

JAMES F. MAUZE  
VERIZON WIRELESS  
112 SOUTH HANLEY  
ST. LOUIS, MO 63105  
[JFMAUZE@EMAIL.MSN.COM](mailto:JFMAUZE@EMAIL.MSN.COM)

REBECCA B. DECOOK  
1875 LAWRENCE STREET  
SUITE 1575  
DENVER, CO 80202  
[decook@att.com](mailto:decook@att.com)

CARL LUMLEY  
LELAND B. CURTIS  
CURTIS OETTING HEINZ GARRETT  
& SOULD, P.C.  
130 S. BEMISTON, STE. 200  
ST. LOUIS, MO 63105  
[clumley@cohgs.com](mailto:clumley@cohgs.com)



BRIAN T. MCCARTNEY  
CASS COUNTY TELEPHONE CO.  
BRYDON, SWEARENGEN & ENGLAND  
PO BOX 456  
JEFFERSON CITY, MO 65102  
[trip@brydonlaw.com](mailto:trip@brydonlaw.com)

J STEVE WEBER  
101 W. MCCARTY, SUITE 216  
JEFFERSON CITY, MO 65101  
[jsweber@att.com](mailto:jsweber@att.com)

JAMES M. FISCHER  
LARRY DORITY  
ALLTEL MISSOURI, INC.  
FISCHER & DORITY PC  
101 MADISON STREET, SUITE 400  
JEFFERSON CITY, MO 65101  
[jfischerpc@aol.com](mailto:jfischerpc@aol.com)

MARC POSTON  
MISSOURI PUBLIC SERVICE COMMISSION  
P. O. BOX 360  
JEFFERSON CITY, MO 65102  
[mposton@mail.state.mo.us](mailto:mposton@mail.state.mo.us)

CRAIG S. JOHNSON  
ANDERECK, EVANS, MILNE, PEACE  
& JOHNSON, LLC  
P. O. BOX 1438  
JEFFERSON CITY, MO 65102  
[cjohnson@aempb.com](mailto:cjohnson@aempb.com)