

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
SUPPLEMENTAL BRIEF

Comes now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri")
and for its Supplemental Brief, states as follows:

1. How do Case Nos. TO-2001-391, TO-2003-297, and TO-2003-298 overlap and/or intertwine? (T. 197).

The Missouri Public Service Commission ("Commission") initiated Case No. TO-2001-391 by issuing its Order Establishing New Case and Creating an Industry Task Force. The Office of Public Counsel ("OPC") initiated Case No. TO-2003-297 by filing a Motion to Establish Expanded Local Calling Plans for rural areas of Missouri. Finally, OPC initiated Case No. TO-2003-298 by filing a Motion to Establish an Investigation into the Adequacy of the Local Calling Scopes in Certain SBC Exchanges.

The commonality of each of these three cases is that they address the possibility of establishing one or more new expanded local calling plans for Missouri customers. Specifically, Case No. TO-2001-391 addresses the possibility of establishing one or more new expanded local calling plan(s) in the St. Louis, Kansas City, and Springfield metropolitan exchanges. TO-2003-297 addresses the possibility of establishing one or more new expanded local calling plan(s) in rural areas of Missouri. Finally, TO-2003-298 addresses the possibility of establishing one or more new expanded local calling plan(s) in specific rural exchanges in Missouri, namely Washington, Union, St. Clair, Beaufort, and other exchanges adjacent to those exchanges. A

threshold question exists in each of these cases: does the Commission have the authority to establish new expanded local calling plans?

2. Are there any other cases covering similar issues? (T. 197).

At this time, SBC Missouri is not aware of any other case covering similar issues.

3. Would it be appropriate for the Commission to formally stay TO-2003-297 and TO-2003-298 if the Commission issues an order as to whether or not the MCA-2 should be adopted?
Specifically, if the Commission issues an order in the next 30 days, would it be appropriate at that time to stay TO-2003-297 and TO-2003-298 pending the outcome of this case? (T. 198).

At the outset, SBC Missouri notes that these questions potentially imply that the Commission has the authority to issue an order requiring the MCA-2 Plan to be adopted. For the reasons set forth on pages 3 through 7 of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Position Statement in Response to the Missouri Public Service Commission's Order Directing Filing Dated April 7, 2003 ("SBC Missouri's Position Statement"), SBC Missouri adamantly contends that the Commission does not have this authority at this time. Nevertheless, this is a threshold question that has arisen or will arise in each of these cases. For that reason, it is appropriate for the Commission to resolve this issue in TO-2001-391 and, so as to conserve the Commission's as well as all of the parties' resources, formally stay TO-2003-297 and TO-2003-298 until the Commission resolves this issue in TO-2001-391.

Even if the Commission had the authority to require the MCA-2 Plan to be adopted, it could not actually order implementation without conducting an on-the-record proceeding, which complies with all due process and other procedural requirements, and issues a lawful order resolving the myriad of issues, which must be determined in such a proceeding. Accordingly, if the Commission determines that it has the authority to establish new expanded local calling plans (which it does not), it would be appropriate for the Commission to formally stay TO-2003-297 and TO-2003-298 until the Commission reaches a final decision in TO-2001-391 because

resolution of many of the issues that have arisen in TO-2001-391 may resolve issues that will arise in TO-2003-297 and TO-2003-298. For example, at issue in TO-2001-391 is whether incumbent local exchange carriers ("ILECs") are entitled to recovery of all lost revenue and implementation costs and how such amounts would be recovered if the Commission establishes a new local calling plan. Resolution of this issue in TO-2001-391 may impact this issue when it arises in TO-2003-297 and TO-2003-298.

4. Does the Commission have the authority to make the changes that OPC has requested in TO-2003-297 and TO-2003-298? (T. 206).

The Commission does not have the authority to make the changes that OPC has requested in TO-2003-297 and TO-2003-298 for four reasons. First, establishment of a Rural Calling Area Plan ("RCA Plan") would violate SBC Missouri's due process rights, as guaranteed by Article I, Section 10, of the Missouri Constitution. Second, such action would violate Section 392.200.9 RSMo. 2000.¹ Third, such action would violate Section 392.245.11. Finally, such action would be inconsistent with Missouri case law, which uniformly holds the Commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business.² SBC Missouri will briefly address each of these arguments below.

First, if the Commission were to establish a RCA Plan, it would violate SBC Missouri's due process rights under Article I, Section 10, of the Missouri Constitution. Specifically, Article I, Section 10, provides: "[t]hat no person shall be deprived of life, liberty or property without due process of the law."

¹ All statutory references are to the Missouri Revised Statutes, 2000, unless specifically noted otherwise.

² 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 re. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

At the outset, SBC Missouri notes that no pre-filed testimony has been filed in either TO-2003-297 or TO-2003-298, there has been no hearing in either case, and there has been no opportunity for SBC Missouri to cross-examine any witnesses in either case.

The hearings of administrative agencies must be conducted consistently with fundamental principles of due process.³ 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.⁴ Section 386.420 also guarantees all parties to a Commission proceeding the right to be heard and to introduce evidence.⁵

Another component of the due process requirement is that parties be allowed to cross-examine witnesses.⁶ 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 the witness.⁷ When the evidence is critical to the issues and necessary to sustain a proponent's burden or proof, cross-examination is essential to testing the reliability of evidence.⁸

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.

³ 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); State ex rel. Util. Consumers Council v. Pub. Serv. Com., 562 S.W.2d 688, 693 (Mo. App. 1978).

⁴ 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).

⁵ Id. at 42.

⁶ State ex rel. Util. Consumers Council v. Pub. Serv. Com., 562 S.W.2d 688, 693 (Mo. App. 1978).

⁷ Id. at 694.

⁸ Id.

Thus, if the Commission were to establish a RCA Plan based on this instant record, it would be violating SBC Missouri's due process rights since SBC Missouri has not had a meaningful opportunity to be heard, including the right to know all of the claims against it, and the right to confront and cross-examine opposing witnesses and to rebut their testimony with its own evidence.

Furthermore, even if the Commission allowed pre-filed testimony and held a hearing thereby affording SBC Missouri the right to cross-examine witnesses, if the Commission approved a RCA Plan without allowing revenue neutrality, such action would constitute a taking of SBC Missouri's property in violation of both Missouri's and the federal constitution.

Second, if the Commission were to establish a RCA Plan without the agreement of the affected telecommunications companies, 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 telecommunications 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.⁹ First, the Commission may change local exchange boundaries only if the ILEC doing business in the exchange for which the boundaries are changed approves of the change; and, second, the Commission must then make a finding that changing the borders of the exchange is in the public interest.¹⁰

If the Commission establishes a RCA Plan, the Commission would effectively alter exchange boundaries. Since SBC Missouri has not provided notice to the Commission that it approves of any alteration of rural exchange boundaries, the first requirement in Section

⁹ Order Dismissing Complaint, The Wood Family v. Sprint and Southwestern Bell, TC-2002-399, July 30, 2002, p. 2.

¹⁰ Id.

392.200.9 would not be met. Moreover, the second requirement in Section 392.200.9 would not have been met because the Commission has not made any finding that changing the exchange boundaries is in the public interest. Thus, it would be unlawful under Section 392.200.9 for the Commission to establish an RCA Plan.

Third, it would be unlawful for the Commission to establish a RCA Plan under Section 392.245.11, which 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).

On September 16, 1997, SBC Missouri became subject to price cap regulation.¹¹ The express terms of Section 392.245.11 provide that an ILEC, such as SBC Missouri, not the Commission, may propose new telecommunications services and establish prices for such services.

At the current time, SBC Missouri does not propose any additional rural calling plan(s). Further, SBC Missouri has not established prices for any additional rural calling area plan(s). Thus, it would be unlawful under Section 392.245.11 for the Commission to establish a RCA Plan.

¹¹ See Report and Order, Case No. TO-97-397, September 16, 1997, p. 29.

Finally, it would be unlawful for the Commission to establish an RCA Plan 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.¹² Specifically, the regulatory power of the Commission does not clothe the Commission with general powers of company management incidental to ownership.¹³ 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.¹⁴ Thus, it is SBC Missouri's decision, not the Commission's, whether to offer any RCA Plan. SBC Missouri has not made any decision at this time to offer additional rural calling area plans. For all of these reasons, it would be unlawful for the Commission to establish an RCA Plan.

5. What procedure should be applied in TO-2003-297 and TO-2003-298? (T. 206).

As SBC Missouri previously indicated, it adamantly believes the Commission does not have the authority to order a new service or calling plan that changes the calling scopes of SBC Missouri's existing service(s). For that reason, SBC Missouri believes that the Commission should dismiss Case Nos. TO-2003-297 and TO-2003-298. If the Commission does not dismiss these cases, the Commission should formally stay Case Nos. TO-2003-297 and TO-2003-298 until all of the issues in Case No. TO-2003-391 have been resolved. Thereafter, if there are any issues that remain ripe for resolution in Case Nos. TO-2003-297 and TO-2003-298, the Commission should establish a Procedural Schedule, including dates for the filing of Direct

¹² 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 re. Laclede Gas Company v. Public Service Commission, 600 S.W.2d 222, 228 (Mo. App. W.D. 1980).

¹³ State ex re. 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).

¹⁴ State v. Public Service Commission of Missouri, 343 S.W.2d 177, 182 (Mo. App. 1960).

Testimony, Rebuttal Testimony, and Surrebuttal Testimony, as well as hearing dates. All due process requirements must be observed, as well as all requirements under the Commission rules.

6. What would the timeline be for the procedure outlined in Question 5? (T. 206).

This question should not be addressed until the Commission has fully resolved all issues in Case No. TO-2001-391.

7. What is the likelihood that changes to the MCA Plan may result in the collapse of the MCA Plan? Is there anything that can be done to minimize that risk? (T. 206-207).

It is SBC Missouri's position that if the Commission rescinds the MCA Plan and orders the telecommunications industry to implement the MCA-2 Plan, there is a substantial likelihood that such action will result in the collapse of the MCA Plan because there is a substantial likelihood that one or more reviewing court(s) would determine that the Commission did not have the authority to order the MCA-2 Plan and/or any new service or calling plan that changes the calling scopes of SBC Missouri's existing service(s). There is nothing that can be done to minimize this risk.

8. Does the Commission have the authority to order MCA-2? (T.207-208).

No, the Commission does not have the authority to order the MCA-2. See SBC Missouri's Position Statement, pages 3-7.

9. If the record in TO-2001-391 is not adequate for the Commission to take action, what is necessary for an adequate record? (T. 220).
Could pre-filed testimony be filed in this case or is it necessary to start a new case? (T. 227)
Should the Commission spin off a separate docket and have a contested case focused on whether to adopt the MCA-2? (T. 228)

For the reasons set forth on pages 3 through 7 of SBC Missouri's Position Statement, the Commission does not have the authority to implement MCA-2 at this time. However, if the Commission believes that it does have the authority to implement Staff's MCA-2 Plan, OPC's proposed geographic expansion of the current MCA Plan, or any other proposal that might be

offered by the parties in this case, the Commission should take the following action to ensure that the record in this docket is adequate.¹⁵ First, the Commission should order the Industry Task Force to hold additional meetings to discuss pricing proposals for such service(s) as the parties have not fully explored this issue.¹⁶ Although Staff envisions that if its MCA-2 proposal were implemented, the price that each ILEC's customer would pay for MCA-2 service would be the amount its customer currently pays for MCA service plus an additional amount to ensure revenue neutrality, Staff's proposal is just one alternative.¹⁷ As numerous parties expressed during the Prehearing Conference that was held on May 29, 2002, and during the On-The-Record Presentation that was held on July 15, 2002, other pricing proposals have yet to be considered.¹⁸ Specifically, the discussions to date have largely focused on the revenue impact of implementing MCA-2 and the development of the Final Status Report of the Industry Task Force.¹⁹ The parties have not engaged in any significant discussion of specific pricing proposals or any alternative plans that may be proposed.²⁰ Since, under MCA-2, all MCA-2 subscribers would have the same calling scope, another pricing proposal that could be considered is establishing a uniform price (per LEC) for all MCA-2 subscribers.²¹ SBC Missouri strongly believes that if the Commission is interested in exploring the possibility of implementing MCA-2, the Commission should direct the Industry Task Force to hold additional meetings to discuss alternative pricing proposals that may lead the industry to reach a consensus.²² Such Industry Task Force meetings would also

¹⁵ SBC Missouri's Initial Brief, p. 1.

¹⁶ SBC Missouri's Initial Brief, p. 1; SBC Missouri's Reply Brief, p. 1.

¹⁷ SBC Missouri's Initial Brief, pp. 1-2.

¹⁸ Id. at 2-3.

¹⁹ Id. at 3.

²⁰ Id. at 3.

²¹ Id. at 2-4.

²² Id. at 2 -3.

provide an opportunity to discuss any potential plans being considered by the parties to this docket.²³

SBC Missouri also believes that the Commission should require pricing proposals to consider the cross-elastic impacts of changing MCA service from a two-way calling plan to a one-way calling plan on other services.²⁴ Customers may no longer wish to subscribe to MCA service and/or may subscribe to other services in place of MCA service (e.g. 800 service).²⁵ These impacts were not considered in the Final Status Report of the Industry Task Force and there has been no significant discussion among participants to this case to date.²⁶

Finally, SBC Missouri believes that the Commission must allow ILECs full recovery of all lost revenue and implementation costs.²⁷ The parties to this docket have not reached agreement on resolution of this issue and, therefore, further consideration of it should ensue.

Once the Commission has this information, local public hearing should be held to determine whether there is any public interest in the proposed new calling plans that would warrant implementation. Thereafter, the Commission should conduct a proceeding consistent with the requirements of due process and the Commission's Rules. The proceeding should include allowing the parties to file Direct Testimony, Rebuttal Testimony, and Surrebuttal Testimony. Finally, the Commission should hold a hearing on this matter.

Judge Ruth recently advised that the Commission prefers: "to start a case as a contested or noncontested case and keep it that way."²⁸ Thus, pre-filed testimony should not be filed in this case; rather, the Commission should open a new docket, a contested case proceeding, in

²³ Id. at p. 2.

²⁴ Id. at 4.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ T. 231 (Ruth).

which to consider whether the MCA-2 or any other plan proposed by the parties should be adopted.

10. Does the Commission need pricing information before it can make any type of decision as to whether or not it should go forward in TO-2001-391? (T. 221).

The Commission does not need pricing information before it resolves the two threshold questions in this case. First, does the Commission have the authority to order a new service or calling plan that changes the calling scope of existing calling plans or services? Second, if the Commission does have the authority to order a new service or calling plan that changes the calling scope of existing calling plans or services, is the Commission interested in the possibility of implementing Staff's MCA-2 Plan, OPC's proposed geographic expansion of the MCA Plan, or any other proposal that might be offered by the parties in this case? If the answer to each of these questions is yes, the Commission should order the Industry Task Force to hold additional meetings to discuss pricing proposals for such services as the parties have not fully explored this issue. If the answer to either question is in the negative, the case should be closed.

11. Should the Commission wait to render a decision until after it has had local public hearings? (T. 222)

The Commission should wait to render a decision until such time as the Industry Task Force has held meetings to discuss pricing proposals for such services, various parties have been offered the opportunity to propose prices, and those proposed prices have been presented to the public at local public hearings.

12. Is part of the reason that there is not adequate support in the record for approval of the MCA-2 Plan because the Commission has not held local public hearings? (T. 223)

As an initial matter, the Commission must determine whether it has jurisdiction to modify or alter the existing MCA plan. For the reasons set forth on pages 3 through 7 of SBC Missouri's Position Statement, the Commission does not have the authority to implement MCA-2 at this

time. However, even if the Commission did have the jurisdiction to modify or alter the existing MCA plan, the parties have not engaged in any significant discussions of significant pricing proposals or alternative plans that may be proposed. These discussions must take place and the parties must propose pricing proposals or alternative plans before the Commission could hold public hearings. Once significant pricing proposals or alternative plans have been proposed, those need to be presented to the public at public hearings. Finally, the Commission must allow the filing of testimony, hold a hearing, and give all parties the right to cross-examine witnesses. Only after all of these steps are taken would there potentially be adequate support in the record upon which the Commission could consider adoption of the MCA-2 Plan.

13. On Page 7 of SBC's May 19th Position Statement, SBC states that it would be unlawful for the Commission to modify or alter the existing MCA plan under existing case law. Since May, 2003, has the Commission or any court rendered any decision that would affect SBC's position on this issue? (T. 215 and 226)

No. SBC Missouri notes that the Commission did issue its Order Approving Tariffs in In the Matter of the Tariff Filing of Sprint Missouri, Inc., d/b/a Sprint to Increase the Rate for Metropolitan Calling Area Plan, Case No. IT-2003-0292, November 4, 2003. In that Order, the Commission determined that whether the price cap statute creates a rebuttable or an unrebuttable presumption that a properly calculated price cap increase is just and reasonable, the increase proposed by Sprint should be approved. Id. at 1. In that case, Sprint filed a tariff sheet to increase the residential and business monthly rate for optional MCA service in Tiers 3 through 5 by an amount up to or equal to eight percent over the rates set in 1994, which remained in effect at the time of Sprint's filing. In the above-captioned case, no price cap regulated company proposes to modify or alter the existing MCA plan and/or MCA rates. Thus, Case No. IT-2003-0292 is not instructive.

14. If the MCA Plan should be left as is, is the reason the Plan should be left as is because SBC Missouri is happy with the MCA Plan and does not think any changes need to be made to it or is it because SBC Missouri would rather have the MCA Plan that it now has rather than risk the Commission expand it, perhaps be found not be have the authority to do so, and have the MCA unravel? (T. 236).

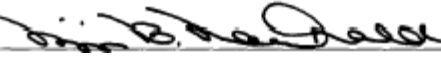
The reason that the MCA Plan should be left as is that the Commission does not have the authority to order the MCA-2 Plan and/or any new service or calling plan that changes the calling scopes of SBC Missouri's existing service(s) for the reasons set forth on pages 3 through 7 of SBC Missouri's Position Statement. It is SBC Missouri's position that if the Commission rescinds the MCA Plan and orders the telecommunications industry to implement the MCA-2 Plan there is a substantial likelihood that such action will result in the collapse of the MCA Plan because there is a substantial likelihood that one or more reviewing court(s) would determine that the Commission did not have authority to order the MCA-2 Plan and/or any new service or calling plan that changes the calling scopes of SBC Missouri's existing service(s).

15. On pages 5 and 6 of SBC Missouri's May 19th filing, SBC Missouri states that the Commission does not have the authority to modify the existing MCA Plan as to local exchange boundaries. Are there any circumstances under which SBC Missouri believes the Commission could order that the MCA Plan be altered or modified? (T. 239-240).

The only circumstance under which SBC Missouri believes the Commission could order the MCA Plan be altered or modified is if SBC Missouri (and any other affected telecommunications company) agrees to such alteration or modification and such alteration or modification is in the public interest. These requirements (i.e. agreement of affected telecommunications companies and that the alternation or modification be in the public interest) are explicitly set forth in Section 392.200.9. Moreover, since an alteration or modification of the existing MCA Plan would result in a new service, SBC Missouri would have to establish the price for such service pursuant to Section 392.245.11.

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CERTIFICATE OF SERVICE

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