

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

In the Matter of the Proposed Acquisition of) Case No. TM-2005-0355
AT&T Corporation by SBC Communications Inc.)

SOUTHWESTERN BELL TELEPHONE, L.P., D/B/A SBC MISSOURI,
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.,
TCG ST. LOUIS AND TCG KANSAS CITY'S RESPONSE
TO THE COMMENTS OF THE OFFICE OF THE PUBLIC COUNSEL

Come now Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC Missouri"), AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City and, for their Response to the Comments of the Office of Public Counsel ("OPC"), states as follows:

1. On April 6, 2005, OPC filed a pleading entitled: "Comments of the Office of Public Counsel" ("Comments") in the above-referenced proceeding. In its Comments, OPC asks the Missouri Public Service Commission ("Commission") to open a case to conduct an investigation into the effect of the proposed merger of SBC Communications Inc. ("SBC") and AT&T Corporation ("AT&T Corp.") on the telecommunications market in Missouri, the impact on consumers, and the benefits and detriments to the public interest created by the proposed merger. OPC suggests that the Commission could use the results and conclusions of its investigation as the basis for recommendations to the Department of Justice ("DOJ") and the Federal Communications Commission ("FCC") in their review and approval of the proposed merger. OPC's comments also suggest that the Commission has the authority to approve or reject the proposed merger.

2. It would be inappropriate for the Commission to proceed with this case because the Commission does not have the authority to approve the proposed merger under any Missouri statute for the reasons set forth in a letter dated February 28, 2005,

from Mary B. Tribby, on behalf of AT&T Communications of the Southwest, Inc., and Paul Lane, on behalf of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, to The Honorable Dale Hardy Roberts, which is attached hereto and marked as Exhibit A, and as is more fully explained in this pleading (“the Parties’ Letter”).

3. SBC and AT&T Corp. (collectively “the Parties”) have announced an agreement for SBC to acquire AT&T Corp. Pursuant to the Parties’ agreement, a wholly-owned subsidiary of SBC Communications, Inc., Tau Merger Sub Corporation (“Tau”), will be created specifically for the purpose of consummating the transaction. Tau will merge with and into AT&T Corp., with AT&T Corp. being the surviving entity. At the time of the SBC/AT&T merger, shareholders of AT&T Corp. will exchange their stock for SBC stock. Following the merger, AT&T Corp. will become a wholly owned subsidiary of SBC. There is no change in the ownership structure of Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, as a result of the transaction, nor is there a change in the ownership of SBC Long Distance or SBC Advanced Solutions, Inc., the other SBC-affiliated entities subject to the Commission’s regulatory authority. Similarly, the transaction will not result in a change in ownership of those entities affiliated with AT&T Corp., which are subject to the Commission’s authority. The AT&T affiliated entities operating in Missouri, which are comprised of AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City, will continue to be owned by the same entities after the transaction is completed as they are today.

4. As explained in the Parties’ Letter, the SBC/AT&T proposed merger will be scrutinized by both the DOJ and FCC. However, the proposed merger does not require the Commission’s approval. The applicable statutory provision under which

approval might be required, Section 392.300.2, is not implicated with respect to the above-referenced transaction. Section 392.300.2 provides as follows:

Except where stock shall be transferred or held for the purpose of collateral security, no stock corporation, domestic or foreign, other than a telecommunications company, shall, without the consent of the commission, purchase or acquire, take or hold more than ten percent of the total capital stock issued by any telecommunications company organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any telecommunications company may, without the consent of the commission, acquire and hold the remainder of the capital stock of such telecommunications company, or any portion thereof. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent, upon the surrender or exchange of such stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such telecommunications company, or shall be recognized as effective for any purpose.

5. Section 392.300.2 is not implicated for three reasons. First, Section 392.300.2 only applies to domestic telephone companies and none of the entities involved in the proposed merger are Missouri corporations.

a. The most recent case that addresses this issue is the Commission's *Order Approving the Merger of SBC DataComm into SBC Long Distance, and Finding No Jurisdiction to Review the Transfer of SBC Long Distance Stock, in In the Matter of the Application of SBC Long Distance, Inc., and SBC Telecom, Inc., for Authority to Transfer Stock of SBC Long Distance, Inc. to SBC Telecom, Inc., and Convert SBC Long Distance, Inc. to a Limited Liability Company*, Case No. XM-2005-0219, March 1, 2005. In that case, SBC Long Distance, Inc. and SBC

Telecom, Inc. filed a joint application requesting that the Commission either approve, or decline jurisdiction over, a transaction in which the stock of SBC Long Distance would be transferred from SBC Communications Inc. to SBC Telecom, Inc.

b. The Commission determined that it had no jurisdiction to approve or disapprove the transfer of SBC Long Distance's stock from SBC Communications Inc. to SBC Telecom, Inc. because none of the companies involved in the transaction were organized or existing under the laws of Missouri, and thus were not subject to the requirements of Section 392.300.2, RSMo. 2000.¹

c. Similarly, here, none of the companies involved in the transaction are organized or existing under the laws of Missouri. Specifically, AT&T Corp. is a New York corporation and SBC Communications Inc. is a Delaware corporation. Since none of the companies involved in the transaction are organized or existing under the laws of Missouri, the Commission should dismiss this case as it has no authority to approve the transaction under Section 392.300.2.

¹ See also, *Order Dismissing Application for Lack of Jurisdiction, In the Matter of the Application of Global Crossing Ltd. v. GC Acquisition Limited for Approval of the Transfer of Control of Global Crossing Ltd. (Debtor-in-Possession)'s Missouri Operating Subsidiaries to GC Acquisition Limited*, Case No. TM-2003-0010, November 14, 2002, wherein the Commission dismissed the application for lack of jurisdiction since the applicants were incorporated outside Missouri and Section 392.300 does not require prior approval of a stock transaction if the parties are incorporated outside Missouri. Additionally, see *Order Granting Staff's Motion to Dismiss for Lack of Jurisdiction, In the Matter of the Joint Application of Nextlink Missouri, Inc. and Nextlink Long Distance Services, Inc. for Approval of the Pro Forma Transfers of Control of Nextlink Missouri, Inc. and Nextlink Long Distance Services, Inc. from Nextlink Communications, Inc. to NM Acquisition Corp.*, TM-200-524, March 31, 2000, wherein Staff argued that the Commission did not have jurisdiction in that Section 392.300.2 only applies where applicants are incorporated under Missouri law. The Commission apparently agreed, dismissing the case for lack of jurisdiction over the parties and over the subject matter.

6. Second, Section 392.200.2 does not require Commission approval for stock transactions occurring at the parent company level when there is no merger or consolidation of certificated entities.

a. In *Order Dismissing Application for Lack of Jurisdiction, In the Matter of the Application of Advanced TelCom, Inc. and Shared Communications Services, Inc. and Eschelon Telecom, Inc. for Expedited Approval of a Change in Ownership of Authorized Telecommunications Providers*, Case No. XM-2005-0111, November 18, 2004 (“Advanced TelCom”), Advanced TelCom, Inc., Shared Communications Services, Inc. and Eschelon Telecom, filed a joint application requesting that the Commission grant them authority to consummate a transaction involving the transfer of the ultimate control of Advanced TelCom and Shared Communications Services to Eschelon. Staff filed a Motion to Dismiss Application for Lack of Jurisdiction. The Commission held:

The Commission has consistently found that the Commission does not have jurisdiction over transactions at the holding company level. For example, in a case involving the merger of SBC Communications and Ameritech Corporation, the Commission found that “there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies.” On that basis, the Commission will again find that it has no jurisdiction over the proposed transaction. (Internal citations omitted).

Similarly, see *Order Granting Motion to Dismiss, In the Matter of the Application of Business Telecom, Inc., d/b/a BTI for Approval of a Pro Forma Transfer of Control Through a Merger of Its Corporate Parent*, Case No. TM-2004-0043, September 11, 2003, wherein the Commission determined that it had no

jurisdiction over the merger since the proposed transaction involved realigning BTI as a subsidiary of companies and limited partnerships that the Commission does not regulate. *See also Order Closing Case, In the Matter of the Notification Regarding the Transfer of Ultimate Control of Comcast Corporation to AT&T Comcast Corporation*, Case No. TM-2002-403, April 1, 2003, wherein the Commission determined that it did not have jurisdiction under Section 392.300 because the transaction was occurring at the non-regulated parent company level and not at the level of any entity regulated by the Missouri regulated utility. Additionally, *see Order Dismissing Application for Lack of Jurisdiction, In the Matter of the Application of Global Crossing Ltd. v. GC Acquisition Limited for Approval of the Transfer of Control of Global Crossing Ltd. (Debtor-in-Possession)'s Missouri Operating Subsidiaries to GC Acquisition Limited*, Case No. TM-2003-0010, November 14, 2002, wherein the Commission dismissed the application for lack of jurisdiction based on its determination that Commission approval is not necessary for stock transactions occurring at the holding company level when there is no merger or consolidation of certificated entities. The Commission stated:

The authority granted to the Commission under *Section 392.300* is quite broad. However, in balance it appears that the transaction in this case will not result in the direct or indirect merger, or consolidation of any of the companies involved. Also, none of the stock of the Missouri-regulated entities is being transferred. After the transaction is complete, the Missouri-regulated utilities will continue to provide service to their respective customers under existing service arrangements and under their respective certificates. All that is really changing is the identity of the indirect owner of these corporations. Under the circumstances of this application, it appears that the Commission does not have jurisdiction over

GC Acquisition Limited's purchase of all shares of stock of Global Crossing, Ltd.

Finally, *see also Order Granting Staff's Motion to Dismiss, In the Matter of the Joint Application of Nextlink Missouri, Inc. and Nextlink Long Distance Services, Inc. for Approval of the Pro Forma Transfers of Control of Nextlink Missouri, Inc. and Nextlink Long Distance Services, Inc. from Nextlink Communications, Inc. to NM Acquisition Corp.*, TM-200-524, March 31, 2000, wherein the Commission dismissed the case for lack of jurisdiction over the parties and over the subject matter, finding that there is nothing in the statutes that confers jurisdiction to examine a merger of non-regulated parent corporations, even though they may own Missouri-regulated telecommunications carriers.

b. As explained above, the transaction here involves the merger of AT&T Corp. (the parent company of the regulated entities which are subject to the Commission's regulated authority) and Tau. Specifically, Tau will merge with and into AT&T Corp. with AT&T Corp. being the surviving entity. At the time of the merger, shareholders of AT&T Corp. will exchange their stock for SBC stock. Following the merger, AT&T Corp. will become a wholly owned subsidiary of SBC. There is no change in the ownership structure of SBC Missouri as a result of the transaction, nor is there a change in the ownership of SBC Long Distance or SBC Advanced Solutions, Inc., the other affiliated entities subject to the Commission's regulated authority. Similarly, the transaction will not result in a change in ownership of those entities affiliated with AT&T Corp. which are subject to the Commission's regulated authority. The AT&T affiliated

entities operating in Missouri (AT&T Communications of the Southwest, Inc., TCG Kansas City, and TCG St. Louis) will continue to be owned by the same entities after the transaction is complete.

c. Thus, since this merger involves the merger of non-regulated parent corporations, the Commission does not have jurisdiction to approve this merger under Section 392.300.2.

7. Third, the Commission waived the applicability of Section 392.200.2 in the course of its approval of certificates of interexchange and/or local exchange service for the AT&T entities as is permitted by Section 392.420.1.

a. The most recent case that addresses this issue is the Commission's *Order Approving the Merger of SBC DataComm into SBC Long Distance, and Finding No Jurisdiction to Review the Transfer of SBC Long Distance Stock, In the Matter of the Application of SBC Long Distance, Inc., and SBC Telecom, Inc., for Authority to Transfer Stock of SBC Long Distance, Inc. to SBC Telecom, Inc., and Convert SBC Long Distance, Inc. to a Limited Liability Company*, Case No. XM-2005-0219, March 1, 2005. In that case, SBC Long Distance, Inc. and SBC Telecom, Inc. filed a joint application requesting that the Commission either approve, or decline jurisdiction over, a transaction in which the stock of SBC Long Distance would be transferred from SBC Communications Inc. to SBC Telecom, Inc. The Commission determined that it had no jurisdiction over the transfer of SBC Long Distance Stock since it waived application of Section

392.300.2 in its order granting SBC Long Distance a certificate of service authority.²

b. Similarly, here, the Commission granted AT&T Communications of the Southwest, Inc., TCG Kansas City, and TCG St. Louis a waiver of Section 392.300.2 in the course of its approval of certificates of interexchange and/or local exchange service as is permitted by Section 392.420.1. The Commission granted a waiver of Section 392.300.2 to each of the AT&T regulated entities. *See In the Matter of the Application of TCG Kansas City, Inc. for Approval of Transfer of Assets for Certificate of Service Authority*, Case No. TM-98-253, June 17, 1998. *See Report and Order, In the Matter of the Application of AT&T Communications of the Southwest Inc., for a Certificate of Service Authority to Provide Basic Local Exchange And Local Exchange Services*, Case No. TA-96-322, February 21, 1997, where the Commission granted AT&T Communications of the Southwest, Inc. a waiver of Section 392.300.2. Finally, *see also Report and Order, In the Matter of the Application of TCG St. Louis for a Certificate of Service Authority to Provide Basic Local Telecommunications Services in Those Portions of St. Louis LATA No. 520 Served by Southwestern Bell Telephone Company*, Case No. TA-96-345, February 11, 1997, wherein the Commission granted TCG St. Louis a waiver of Section 392.300.2.

² *See also, Order Granting Motion to Dismiss for Lack of Jurisdiction, In the Matter of the Application of D2R2, Inc. for Authority to Acquire all of the Outstanding Stock of ExOp of Missouri, Inc., or in the Alternative a Request for Finding that the Requirement of Approval has been waived*, Case No. LM-2004-0063, September 18, 2003 (“ExOp”), wherein the Commission granted a motion to dismiss for lack of subject matter jurisdiction on the basis that it waived Section 392.300.2 when it granted ExOp its certificate of service authority.

c. Thus, as in *ExOp*, the Commission does not have authority to approve the SBC/AT&T Corp. proposed merger and the Commission should dismiss this proceeding for lack of jurisdiction.

8. Not only do SBC Missouri and AT&T Communications of the Southwest, Inc. contend that the Commission does not have the authority to approve the SBC/AT&T proposed merger, OPC essentially concedes this point in its Comments. Specifically, in paragraph 6 of its Comments, OPC states that it: “is aware that the Commission has previously declined to find jurisdiction in mergers such as this.”³ For all of these reasons, the Commission should dismiss this case for lack of jurisdiction.

Wherefore, Southwestern Bell Telephone Company, L.P., d/b/a SBC Missouri, AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City pray that the Commission considers their Response to Comments of the Office of the Public Counsel, and dismiss this case for lack of jurisdiction, together with any additional and further relief the Commission deems just and proper.

³ Additionally, in paragraph 10 of its comments, OPC appears to concede that the Commission does not have authority to approve the SBC/AT&T proposed merger. OPC states: “Rather than conduct an extensive debate on whether or not the PSC has jurisdiction to approve the merger. . . .” In other words, OPC does not appear to contend that the Commission has jurisdiction to approve the SBC/AT&T proposed merger, it envisions opening this case so that the Commission could make a recommendation to the DOJ and/or FCC regarding the proposed merger. Such a proceeding would be expensive for taxpayers and is unnecessary as it would be duplicative of the extensive review that is currently taking place at the federal level.

Respectfully submitted,

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AT&T COMMUNICATIONS OF THE
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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties via e-mail on April 12, 2005.


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