Staff MLG

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 18th day of April, 1990.

In the matter of Teleconnect Company for authority to establish rate bands for MAX-SAVE service.) Case No. TR-90-143

ORDER REGARDING MOTION TO VACATE SUSPENSION OF TARIFF

On December 2, 1989, the Teleconnect Company (Teleconnect or Applicant) submitted proposed tariffs for Commission approval for three interexchange services, "MAX-SAVE", "DAYSAVER", and "DAYSAVER PLUS". By virtue of Commission Case No. TO-88-142[1], Teleconnect is a competitive interexchange company offering competitive telecommunications services.

Teleconnect seeks Commission approval of rate bands for all three competitive services, stating that the top of the band for MAX-SAVE will be the existing individual rate and that its DAYSAVER and DAYSAVER PLUS rate bands will extend both below and above the currently tariffed individual rates.

On January 9, 1990, the Commission suspended Teleconnect's proposed tariffs, then stating that the Commission needed to ensure that banded rates for competitive services were "reasonable" before approving same. The Commission also indicated that rate increases inside a rate band could be made without prior notice to either customers or the Commission.

The Commission suspended Applicant's tariffs until May 11, 1990, and requested parties to propose a hearing date by March 26, 1990. On February 9, 1990, Teleconnect moved to vacate the Commission's suspension order and filed suggestions

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[1]*In the matter of the investigation for the purpose of determining the classification of the services provided by interexchange telecommunications companies within the State of Missouri.*

supporting its motion on February 13, 1990. On March 15, 1990, Teleconnect filed supplemental suggestions. Teleconnect's pleadings assert, *inter alia*, that the Commission has no jurisdiction to either suspend its tariffs or to review the reasonableness of its banded rates. Applicant's suggestions address various statutes in Chapter 392, including two which have particular bearing on this matter, Sections 392.500 and 392.510.[2]

On February 28, 1990, MCI Telecommunications Corporation (MCI) filed suggestions supporting Teleconnect's motion to vacate, followed by supplemental suggestions on March 12, 1990 and, on March 15, 1990, additional supplemental suggestions.

On March 2, 1990, the Commission's Office of General Counsel filed suggestions opposing Teleconnect's motion to vacate. Neither Southwestern Bell Telephone Company nor the Office of Public Counsel filed motions or suggestions.

There are no disputed questions of fact before the Commission; the only questions are those of law and statutory construction.

Broadly stated, the question pending involves the differences, if any, between filing an individual fixed rate for a competitive interexchange service and filing a band, or range of rates, for the same service. Teleconnect and MCI argue that banded rates are fundamentally different from individual fixed rates and, in effect, are deserving of less regulatory oversight than individual fixed rates.

The statutes most immediately at issue are Sections 392.500 (individual rates) and 392.510 (banded rates), which provide:

> **392.500. Changes in rates, competitive telecommunication services, procedure.**--Except as provided in section 392.200, proposed changes in rates or charges, or any classification or tariff provision affecting rates or charges, for any competitive telecommunications service, shall be treated pursuant to this section as follows:

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[2]All citations to Missouri statutes are to R.S.Mo. (Cum. Supp. 1989).

(1) Any proposed decrease in rates or charges, or proposed change in any classification or tariff resulting in a decrease in rates or charges, for any competitive telecommunications service shall be permitted only upon the filing of the proposed rate, charge, classification or tariff after seven days' notice to the commission; and

(2) Any proposed increase in rates or charges, or proposed change in any classification or tariff resulting in an increase in rates or charges, for any competitive telecommunications service shall be permitted only upon the filing of the proposed rate, charge, classification or tariff and upon notice to all potentially affected customers through a notice in each such customer's bill at least ten days prior to the date for implementation of such increase or change, or, where such customers are not billed, by an equivalent means of prior notice.

392.510. Tariffs, bands and ranges allowed, when, requirements.--1. Telecommunications companies may file proposed tariffs for any competitive or transitionally competitive telecommunications service, which includes and specifically describes a range, or band, setting forth a maximum and minimum rate within which range a change in rates or charges for such telecommunications service *could be made without prior notice or prior commission approval*. (Emphasis supplied.)

2. The commission may approve such a proposed tariff for a transitionally competitive service only if a noncompetitive or transitionally competitive telecommunications company demonstrates, and the commission finds, that any and all rates or charges within the band or range, are consistent with the public interest and the provisions and purposes of this chapter. To the extent any proposed band or range encompasses rates or charges which are not consistent with the public interest and the provisions and purposes of this chapter, the commission shall have the power, upon notice and after hearing, to modify the level, scope or limits of such band or range, as necessary, to ensure that rates or charges resulting therefrom are consistent with the public interest and the provisions and purposes of this chapter.

3. The provisions of sections 392.220, 392.230, subsections 4 and 5 of section 392.370, and section 392.500 shall not apply to any rate increase or decrease within the band or range *authorized pursuant to this section*. A telecommunications company shall file written notice of the rate change and its effective date with the commission within ten days after the effective date of any increase or decrease authorized pursuant to this section. (Emphasis supplied.)

4. Any tariffs that have been approved by the commission prior to September 28, 1987, which establish a range or band of rates within which range or band of rates a change in rates or charges for such telecommunications service could be made without prior notice or prior commission approval shall be deemed approved by the commission. The provisions of sections 392.220,

> 392.230, subsections 4 and 5 of section 392.370, and section 392.500 shall not apply to any rate increase or decrease within such band or range.

The question before the Commission has its genesis in House Bill (H.B.) 360, passed by the General Assembly in 1987, and the Commission statutes which now specifically provide for competition among certain telecommunications companies. Prior to H.B. 360's effective date, and before the Commission issued its order in TO-88-142[3], there were no "competitive" interexchange telecommunications companies (IXCs). Nor did competitive interexchange telecommunications services exist, at least not as a statutory category contemplating less regulation than other services. The Commission's order in TO-88-142 not only created competitive interexchange companies, but made certain statutory options available to both competitive and transitionally competitive companies. Applicant and MCI, by virtue of TO-88-142, are classified as "competitive" IXCs. AT&T, under the same order, is a "transitionally competitive" IXC.

The record made in the IXC classification case, Case No. TO-88-142, in which both Teleconnect and MCI took part, demonstrates that with few exceptions the rates for most interexchange services, particularly long distance residential services, differ little from one company to the next. Nor can an average customer audit or verify the application of any tariff rate, fixed or banded, by reference to the customer's usage. In combination, these two factors suggest the obvious: most customers, unless told *in advance*, simply will not be able to tell if their rates have been increased. Lacking said knowledge, customers will be unable to fully enjoy one of the fruits of competition, that of a free and knowing choice.

Both Applicant and MCI aver that the Commission has, in effect, no statutory authority to suspend Teleconnect's banded rates for competitive interexchange services. Teleconnect and MCI maintain that once a service has been found "competitive", the purveyor of the service can elect to file either individual rates under

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[3]See footnote 1, *supra*.

Section 392.500 or banded rates under Section 392.510. According to Teleconnect and MCI, the Commission has neither an option nor a choice: once an individual rate or a rate band is filed under either section, the Commission *must* approve it because it is for a "competitive" service.

If, in fact, the Commission has no such authority as contended, the Commission's order of suspension may be unlawful, as stated in *State ex rel. Beaufort Transfer v. Clark*, 504 S.W.2d 216, 217 (Mo. App. 1973). If such authority does exist, it must be found in Chapter 392 and be discernable from the plain and ordinary meaning of the language used therein. *Eminence R-1 School District v. Hodge*, 635 S.W.2d 10, 13 (Mo. 1982). On review, courts are not bound by a finding by the Commission that it has, or does not have, jurisdiction. Nevertheless, courts have traditionally deferred to the Commission's assessment of its own authority to act. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 182 (Mo. App. 1960).

The Commission finds in the assertions of Teleconnect and MCI a narrow and self-serving assessment of the purpose of competition in the state of Missouri. Competition has not been introduced merely to advance the fortunes of Teleconnect, MCI or any other provider of telecommunications service. A more realistic appraisal of the purpose competition is to serve appears in Section 392.530, which provides that Chapter 392 shall be construed to:

1. Promote universally available and widely affordable telecommunications services;

2. Maintain and advance the efficiency and availability of telecommunications services;

3. Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

4. Ensure that customers pay only reasonable charges for telecommunications services;

5. Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services; and

6. Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.

The primary purpose of the amendments to Chapter 392, then, was to allow full and fair competition when that competition is consistent with the protection of ratepayers and the public interest and is sufficient to ensure that customers pay only reasonable rates. To allow full and fair competition, the General Assembly authorized the Commission to classify services as either competitive or transitionally competitive if sufficient competition was found to exist and the concurrent reduced regulation was in the public interest.

The General Assembly provided for a procedure for companies with competitive services to meet competitive pressures through decreased scrutiny of rates. Section 392.500 provides that for competitive services, a company need only give seven days notice to the Commission for proposed rate decreases and ten days notice to customers of any proposed rate increase. Tariffs reflecting the company's rates are required to be filed with the Commission.

Even under this reduced regulatory scheme, the statute requires the Commission to ensure that the rates are just and reasonable. Section 392.500 makes rates for competitive service subject to the provisions of Section 392.200. This section requires the company to only charge the lawful rates filed with the Commission and that those rates be just and reasonable and nondiscriminatory.

Section 392.510 provides an alternative procedure for companies with competitive services to change rates without the normal regulatory scrutiny for each increase or decrease. Subsection 1 allows companies to file "proposed tariffs" for any competitive service, which establish a band or range of rates within which rates may be changed without prior notice and without prior Commission approval.

Teleconnect and MCI would have the Commission believe that it has no jurisdiction over the maximum and minimum rates of any band or range filed for a competitive service under Section 392.510. Under their interpretation, Section 392.510 would remove all regulatory scrutiny and all customer protections

afforded by Chapter 392. This interpretation completely ignores the Commission's regulatory responsibility to protect ratepayers and the public interest, ignores the statutory scheme for reduced regulation, and ignores the specific requirements of Section 392.510.1.

The provisions of Sections 392.530 and 392.200 have already been discussed. It should be noted that Section 392.530 states how the provisions of Chapter 392 "shall be construed." In addition, Section 392.470 authorizes the Commission to impose any condition or conditions that it deems reasonable and necessary upon any company if such conditions are in the public interest and connected with the provisions and purposes of Chapter 392. Nowhere in Chapter 392 is it contemplated or stated that companies may file tariffs without any Commission scrutiny.

Section 392.510 does not contemplate filing tariffs without Commission review as to their justness and reasonableness. First, it could be argued that the inclusion of competitive services in subsection 1 was a legislative oversight or that the failure to include competitive services in subsection 2 was an oversight. If either is correct, competitive services should not have banded rates or the banded rates of a competitive company would be subject to the provisions of subsection 2.

The Commission, though, must take the statute as it is and apply its provisions. It is evident from subsection 1 that Commission regulatory oversight of banded rates is required. Subsection 1 states that telecommunications companies may file "proposed tariffs" for rate bands. The filing of tariffs which are only proposed presupposes the Commission's authority to review those tariffs to see if the proposed rates are just and reasonable.

If the Commission is without authority to review the rate bands of a competitive service, the language of subsection 1 would only provide for filing "notice tariffs" with the Commission and not "proposed tariffs". Use of the term "proposed tariffs" indicates the intent that the Commission has authority to review the rate band to determine whether the rates within the band are just and reasonable,

and to suspend those proposed tariffs if there is a concern that the tariffs are not just and reasonable or not in the public interest.

Notice tariffs would be similar to the provisions of subsection 3 for rates within the approved rate band. "Proposed tariffs", under subsection 1, provide for Commission review and approval of the band. If Teleconnect and MCI were correct in their interpretation of Section 392.510, there would be no need for the language in subsection 3 concerning changing rates within the band.

Section 392.500 does establish a procedure whereby rates may be changed for a competitive service with minimum oversight. Section 392.500 provides the least regulation of a service under Chapter 392. The General Assembly intended that where a service was found to be competitive, the market would provide sufficient regulation of rates to the extent that customers can exercise choice. If rates can be increased without notice, customers have no effective choice and competition suffers.

Rate bands filed pursuant to Section 392.510 are another form of reduced regulation which a company may use. This form allows companies to raise or lower rates within a band without prior notice or approval. Initially, though, to ensure the rates within the band are just and reasonable, the Commission has authority to review the band. It would be completely contrary to the intent of the statute to allow a company to establish a band which has not been determined to be just and reasonable. Section 392.510 is a more restrictive statute than 392.500 and companies which choose this method of setting rates must meet this greater burden.

To hold otherwise would allow rates to be charged without first determining they are just and reasonable and without notice to customers of rate increases. This is inconsistent with the intent of Chapter 392 and the provisions of Section 392.530. In addition, the Commission, pursuant to 392.470, can place any conditions on tariffs which it finds reasonable and in the public interest. Since notice of rate changes is the minimum regulatory requirement for competitive rates, the Commission could order that a notice provision be provided for in a band of rates. If not, IXCs might select and file an extremely broad rate band for a particular service, enroll

customers by advertising the lowest rate in the band, and--without notice to anyone --gradually increase the rate to the top of the band.

Based upon the above discussion, the Commission finds that it has jurisdiction to review proposed tariffs which establish a band of rates and to suspend those tariffs if there is a question the rates are not just and reasonable or not in the public interest. Teleconnect's motion will therefore be denied.

Since the Commission is denying Teleconnect's motion, it will suspend the tariffs an additional six months beyond May 11, 1990, and establish a hearing schedule.

It is, therefore,

ORDERED: 1. That the motion to vacate the Commission's order suspending Teleconnect Company's MAX-SAVE, DAYSAVER and DAYSAVER PLUS tariffs is hereby denied.

ORDERED: 2. That Teleconnect Company's tariffs for MAX-SAVE, DAYSAVER and DAYSAVER PLUS are hereby suspended beyond May 11, 1990 to November 11, 1990.

ORDERED: 3. That the following procedural schedule is hereby established:

Teleconnect direct testimony	May 17, 1990
Staff, Public Counsel and intervenor direct testimony	June 18, 1990
Teleconnect rebuttal testimony	July 13, 1990
Prehearing conference	August 2, 1990 10:00 a.m.
Hearing	August 3, 1990 10:00 a.m.

The prehearing conference and hearing will be held at the Commission's offices on the fifth floor of the Harry S Truman State Office Building, 301 West High Street, Jefferson City, Missouri.

ORDERED: 4. That this order shall become effective on the 1st day of May, 1990.

BY THE COMMISSION

Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller, Rauch, McClure and Letsch-Roderique, CC., Concur.