

JAMES M. FISCHER, P.C.

ATTORNEY AT LAW
REGULATORY CONSULTANT

101 WEST McCARTY, SUITE 215
JEFFERSON CITY, MO 65101

TELEPHONE (573) 636-6758
FAX (573) 636-0383

September 23, 1999

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 3660
Jefferson City, Missouri 65102

FILED²
SEP 23 1999
Missouri Public
Service Commission

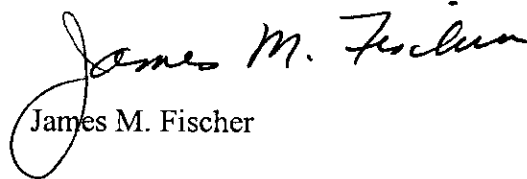
RE: Case Nos. TO-99-615 and TO-2000-16

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matters are the original and fourteen (14) copies of GTE Midwest Incorporated's Response to Public Counsel's Motion to Compel Answers to Data Requests. A copy of the foregoing Response has been hand-delivered or mailed this date to parties of record.

Thank you for your attention to this matter.

Sincerely,


James M. Fischer

/jr
Enclosures

cc: Dan Joyce
Michael F. Dandino
Craig S. Johnson
Paul S. DeFord
William R. England, III
Leo J. Bub

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED²
SEP 23 1999

Missouri Public
Service Commission

In the matter of the request of AT & T)
Communications of the Southwest, Inc.)
to terminate carrier of last resort)
obligations.)

Case No. TO-99-615

and

In the matter of the Motion to Establish a)
Docket Investigating the IntraLATA Toll)
Service Provisioning Practices of Missouri)
Interexchange Carriers, Public Utility or)
Common Carrier Duties of Interexchange)
Carriers, Motion to Show Cause, Request)
for Emergency Hearing, and Alternative)
Petition for Suspension and Modification)

Case No. TO-2000-16

**GTE MIDWEST INCORPORATED'S RESPONSE
TO PUBLIC COUNSEL'S MOTION
TO COMPEL ANSWERS TO DATA REQUESTS**

COMES NOW GTE Midwest Incorporated (GTE) and respectfully responds to the Motion to Compel Answers to Data Requests filed by the Office of the Public Counsel (Public Counsel) on September 9, 1999, in the above proceedings:

1. Public Counsel served eight (8) Data Requests on GTE on July 16, 1999. For the most part, these Data Requests sought information about interexchange carriers (IXCs) providing intraLATA toll services to residence and business customers in GTE exchanges, whether any IXCs might have requested that they not be identified as providing intraLATA toll services in GTE exchanges, and the percentage of GTE customers who have AT&T, MCI or Sprint as their interLATA provider. (Data Request Nos. 1-6). In addition, Public Counsel sought the number of

customer complaints received by GTE concerning intraLATA presubscription in its exchanges along with copies of any such complaints or writings pertaining to such complaints (Data Request No. 7); and a description of the training, instructions and information GTE may have provided to its customer service representatives concerning the intraLATA toll presubscription process, along with copies of any such materials. (Data Request No. 8).

2. Although GTE has voluntarily answered Data Request Nos. 1-6, GTE objected to answering Data Request Nos. 7 and 8 on the grounds that they were neither relevant nor reasonably designed to lead to the discovery of admissible evidence, and that they were unduly burdensome and onerous since GTE is not a party to the dockets and would have to undertake a significant investment of time to identify the documents and otherwise answer the request.

3. GTE is not presently a party to either Case No. TO-99-615 or TO-2000-16.¹ Case No. TO-99-615 focuses upon a request by AT&T to be relieved of its carrier of last resort obligations. Case No. TO-2000-16 involves a request by Mid-Missouri Group (MMG) and the Small Telephone Company Group (STCG) for the Commission to establish a docket to investigate the intraLATA toll service provisioning practices of AT&T and other interexchange carriers. Neither matter directly involves GTE, and GTE should be not required to participate in the discovery process over its objection.

4. The Commission's rules of practice and procedure limit the use of discovery to parties to a proceeding. See 4 CSR 240-2.090(1). With regard to the use of data requests, 4 CSR 240-2.090(2) also specifically states: "**Parties** may use data requests as a means of discovery before

¹On August 10, 1999, GTE filed a Motion to Participate Without Intervention in Case No. TO-2000-16, but this motion has not yet been granted. Even if the Commission grants GTE's request, GTE arguably will not be a full party subject to normal discovery procedures.

the commission." (emphasis added) The Commission rule limiting the use of data requests to parties to a proceeding is also consistent with Missouri's Civil Rules of Practice and Procedure which limit the use of written interrogatories to parties to civil litigation. See Rule 56.01 (Supreme Court).

5. In its Motion to Compel, Public Counsel cites Section 386.450, RSMo. 1994,² and an "Order Compelling Answers to Data Requests" in Re Raytown Water Company, Case No. WO-94-192, for authority to compel a non-party to answer data requests. Neither citation is supportive of Public Counsel's position. First, Public Counsel's reliance upon Section 386.450 is misplaced since Section 386.450 does not give Public Counsel statutory authority to use discovery procedures to obtain information from a non-party. Section 386.450 instead requires that the Public Counsel demonstrate "upon good cause shown by him" that the Commission should require the production of records of a public utility within the state. In this case, Public Counsel has not properly invoked the procedures contained in Section 386.450 by first demonstrating to the Commission "good cause" for the issuance of an order from the Commission directing GTE to compile and produce the requested information. Instead, Public Counsel has used the traditional discovery methods (*i.e.*, data requests) designed for the exchange of information among parties to a proceeding. Even in its Motion to Compel, Public Counsel has failed to demonstrate that there is "good cause" for GTE to produce the requested information in cases that do not involve GTE, where the information is of no relevance, and where it would be burdensome for GTE to produce. Citing GTE's "unique and longstanding relationship with customers," Public Counsel has asserted that this information would lead to evidence related to "IXC practices and the public interest of maintaining

² All statutory references are to Revised Statutes of Missouri 1994, unless otherwise noted.

an interLATA carrier of last resort." This is not sufficient "good cause" for the Commission to compel GTE to produce information which is not relevant or readily available.

6. The Public Counsel's reliance upon the Commission's "Order Compelling Answers to Data Requests" in Raytown Water Company, supra, is also misplaced since this case did not involve a non-party to the proceeding. In that proceeding, Public Counsel was conducting an earnings investigation of Raytown Water Company, and the Commission held that it was proper for Public Counsel to propound data requests to the public utility, even though a formal complaint had not yet been filed. However, in the case at hand, Public Counsel has propounded data requests to a non-party in a case not involving or otherwise directly affecting that non-party. Therefore, the Commission should deny Public Counsel's Motion to Compel in this instance.

7. Even if GTE may be subjected to discovery even though it is not a party to the proceedings, the Commission should nevertheless deny Public Counsel's Motion to Compel since Data Request Nos. 7 and 8 are not relevant to these proceedings, nor designed to lead to admissible evidence. Clearly, information pertaining to any complaints GTE might have received concerning intraLATA presubscription, and any training materials it may have provided to its customer service representatives concerning the intraLATA presubscription process, has no relation to AT&T's request to be relieved of its interLATA carrier of last resort obligation. In addition, the Commission established Case No. TO-2000-16 at the request of the MMG and STCG following AT&T's refusal to accept requests from customers in MMG and STCG exchanges for 1+ intraLATA toll service. To GTE's knowledge, AT&T has not refused to provide 1+ intraLATA toll services to customers in GTE exchanges, and neither MMG nor STCG made such a claim. Rather, the focus of the investigation MMG and STCG sought pertained to IXC toll service provisioning practices in Secondary Carrier (SC) exchanges, not those served by GTE. The Commission further narrowed

the relevant inquiry in its August 10, 1999, Order Directing Notice, Directing Reports, and Requiring Record Collection stating:

Although the Commission does not believe that the allegations raised by MMG require an investigation into the business office practices of all IXCs, the Commission is concerned with AT&T's refusal to offer 1+ intraLATA service to customers who request it.

Order, p. 5.

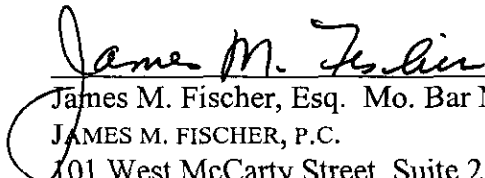
Accordingly it directed AT&T to file a verified report stating, by exchange, the number of requests for 1+ intraLATA service it has received, the number it has accepted and the number it has declined. Ibid. The Commission also ordered Staff to investigate AT&T's refusal to serve customers in SC exchanges and to address several issues pertaining to AT&T's obligation to serve. (Order, p. 6). The Commission has not ordered any investigation into AT&T's provisioning practices in GTE exchanges (and to the extent AT&T may have refused customers in those exchanges -- which GTE believes has not occurred -- that information will in any event be captured in what AT&T has been required to provide). Given the scope of inquiry defined by the Commission, information Public Counsel seeks pertaining to complaints GTE might have received concerning the intraLATA presubscription process in its exchanges and GTE's customer service representative training materials about intraLATA presubscription have no relevance here.

8. Finally, the Commission should deny Public Counsel's motion since Data Request Nos. 7 and 8 seek information that is not readily available and would be burdensome for GTE to locate and produce. Data Request No. 7 would require that GTE investigate the nature of all complaints concerning the implementation of intraLATA 1 + presubscription, and locate and produce all documents relating to those complaints. Similarly, Data Request No. 8 would require GTE to describe the training, instructions and information GTE has provided to its customer service

representatives to answer customer inquiries about the intraLATA toll carrier process and provide all written manuals, instructions, frequently asked questions, scripts, talking points and other guides to the Public Counsel. Even if a discovery request is not objectionable on the grounds of relevancy, privilege or work product (which Data Request Nos. 7 and 8 clearly are), it may nevertheless not be enforced if it is found to be unduly burdensome, especially when a non-party is affected. State ex rel. Anheuser v. Nolan, 692 S.W.2d 325 (Mo.App. E.D. 1985).

WHEREFORE, for all the foregoing reasons, GTE Midwest Incorporated respectfully requests that the Commission deny Public Counsel's Motion to Compel Answer to Data Requests, filed on September 9, 1999.

Respectfully submitted,


James M. Fischer, Esq. Mo. Bar No. 27543
JAMES M. FISCHER, P.C.
101 West McCarty Street, Suite 215
Jefferson City, Missouri 65101
Telephone: (573) 636-6758
Fax: (573) 636-0383

Attorney for GTE Midwest Incorporated

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by hand delivery or by first-class, postage prepaid, U.S. Mail on September 23, 1999.

Dan Joyce
Missouri Public Service Commission
301 W. High Street, Suite 530
Jefferson City MO 65101

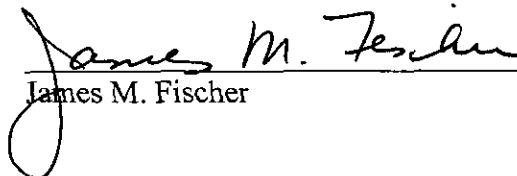
Michael F. Dandino
Office of the Public Counsel
301 W. High Street, Suite 250
Jefferson City MO 65101

Craig S. Johnson
Andereck, Evans, Milne, Peace, Baumhoer
301 E. McCarty Street
P.O. Box 1438
Jefferson City MO 65102

Paul S. DeFord
Lathrop & Gage
2345 Grand Blvd. Suite 2500
Kansas City MO 64108

William R. England, III
Brydon, Swearengen & England
P.O. Box 456
Jefferson City MO 65102

Leo J. Bub
Southwestern Bell Telephone Company
One Bell Center, Room 3518
St. Louis MO 63101


James M. Fischer