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December 10, 2001

Mr. Dale Hardy Roberts  
Secretary/Chief Administrative Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

**FILED<sup>3</sup>**

DEC 10 2001

**Re: Case No. TC-2002-185**

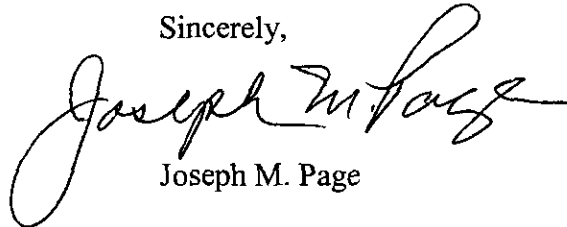
Missouri Public  
Service Commission

Dear Judge Roberts:

Enclosed for filing please find an original and eight (8) copies of MITG's Brief in the above-referenced matter.

Thank you for seeing this filed.

Sincerely,



Joseph M. Page

JMP:tr

Enc.

cc: Missouri Public Service Commission  
Office of Public Counsel  
Paul G. Lane  
Leo J. Bub  
W.R. England, III

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>

DEC 10 2001

Missouri Public  
Service Commission

In the Matter of the Application of )  
Southwestern Bell Telephone Company ) Case No. TO-2002-185  
to Transfer Property and Ownership of )  
Stock Pursuant to Section 392.200 RSMO. )

**BRIEF OF MITG**

Comes now the Missouri Independent Telephone Company Group<sup>1</sup> (MITG) and for its brief regarding Southwestern Bell Telephone Company, Southwestern Bell Texas Inc. and Southwestern Bell Telephone LP's (hereinafter jointly referred to as "Southwestern Bell Telephone Companies") request for Commission approval of corporate restructuring and stock transfer, and states as follows:

**INTRODUCTION**

On November 8, 2001 the Southwestern Bell Telephone Companies involved in this proceeding filed its response to MITG's application to intervene opposing MITG's contention that any new company doing business in the state of Missouri is required to obtain a Certificate of Service Authority.

Southwestern Bell argues that since Bell's predecessor corporations were "Chartered" and incorporated under Article V, Chapter 21 of the Revised Statutes of 1879, prior to the establishment of the Missouri Public Service Commission in 1913, the Commission has no authority to require Southwestern Bell—or any assignee of Southwestern Bell—to apply for a Certificate of Service Authority.

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<sup>1</sup> Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, Modern Telecommunications Company, MoKan Dial Inc., and Northeast Missouri Rural Telephone Company.

On November 27, 2001 this Commission granted the MITG intervention and directed it file its brief in this regard by December 10, 2001. In its order the Commission directed that the parties address the following issues:

- If Southwestern Bell is allowed to reorganize as a Texas limited partnership, will the Commission's oversight over it be any different than if it had remained a Missouri corporation (the parties should pay particular attention to the Commission's oversight over future transfers of property)?
- If Southwestern Bell is allowed to reorganize as a Texas limited partnership, what will become of the franchise and charter granted to the Missouri Corporation?
- What questions of fact (distinct from legal questions) are likely to be in dispute and require a hearing for resolution?

The MITG concurs in the filing STCG will make on December 10.

The MITG here will first address arguments made by Southwestern Bell as to why it is not subject to current state statutes and Commission jurisdiction regarding the issuance of Certificates of Service Authority.

**THE PROVISIONS OF ARTICLE V, SECTION 875 OF THE REVISED STATUTES OF MISSOURI OF 1879 ARE NOT TRANSFERABLE TO SOUTHWESTERN BELL L.P.**

The thrust of the Southwestern Bell Companies' argument is that when it originally incorporated under Article V, Section 875 of the Revised Statutes of Missouri of 1879, that a valid and binding contract was entered into between the state of Missouri and Southwestern Bell Telephone Company which could never be altered or amended because the terms of the contract were binding upon each party as of that date and time. (Southwestern Bell Telephone Companies reply to MITG's request for intervention, paragraphs 1-29). The Southwestern Bell companies

further contend that Southwestern Bell Telephone Company has an absolute right to transfer any rights and privileges that it has accrued, regardless of the requirements of statutes enacted after 1879.

One initial and obviously glaring problem with Bell's argument is that if it were correct, then why has Southwestern Bell Telephone Company ever been subject to the regulatory jurisdiction of the Commission? None of the statutes establishing the Commission or its regulatory jurisdiction were in place in 1879. Yet Missouri regulatory history is replete with decisions regarding the regulation of Southwestern Bell by the Commission.

The MITG believes that Southwestern Bell is in fact subject to later statutes. The MITG believes that this is obvious. Is Southwestern Bell paying income taxes? If so, is it paying only the tax rate in effect in 1879, or is it paying the current tax rate? Is Southwestern Bell not subject to any law passed after 1879? We think not.

If it were the intention of the Missouri Legislature of 1879 to allow Southwestern Bell to conduct its business in perpetuity under the laws of 1879 solely, without any future oversight, then, taken to its logical conclusion, why are the Southwestern Bell Companies even before the Commission at this time. The Southwestern Bell Companies, by their own argument, should never have to come before this Commission for approval of the merger. There was no statute in place in 1879 giving the Commission the right to approve mergers. Since the Southwestern Bell Companies are before the Commission and asking it to approve this reorganization plan it apparently believes that the Commission does have some regulatory authority over it.

A close look at the case law cited by Southwestern Bell shows that they miss the mark. Southwestern Bell cites them for.

For example, in Russell v. Sebastian, 233 U.S. 195, 205-208 (1914) the City of Los Angeles tried to take away the right of a gaslight corporation to serve customers within a particular territory. Presently, the only thing that MITG seeks is for the subsequently chartered, *out of state, Texas limited partnership*, to conduct its business within Missouri under the same rules and on the same playing field as all other telecommunications providers doing business in the state of Missouri have had to do. The jurisdiction and power of the Commission is an exercise of the police power of the state granted by the lawmaking power and overrides all contracts, privileges, franchises, charters or city ordinances. State ex rel City of Kirkwood v. Public Service Commission of Missouri, 50 SW2d 114, 118, 330 Mo. 507, (1932).

Southwestern Bell also cites TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785,793-97, (E.D. Mich. 1998) wherein the City of Dearborn was precluded from imposing a franchise agreement and fee upon a telecommunications provider that had originally been organized under a state enabling provision. It is difficult to see the analogy between that situation, where a City wants to exact a fee from a telecommunications provider, to the present situation where the Commission tells a foreign corporation that it must conduct its business under the same laws and regulations as every other telecommunications provider. Case law is abundantly clear that the state of Missouri has the right to prescribe the conditions upon which it will permit a foreign corporation to do business within this state even if those conditions were so onerous as to be prohibitive. State ex inf. McKittrick ex rel. Maloney v. Fidelity Assurance Association, 179 SW2d 67 (1944), State ex rel. Atlantic Horse Insurance Co. v. Blake, 144 SW 1094 (1912), Missouri Pacific Railroad Co. v. Kirkpatrick, 652 SW2d 128 (1983).

Another case cited by Southwestern Bell in support of its argument that it has a contract with the state of Missouri under Article V, Section 875 that is inalienable and untouchable by the

Commission is State ex inf. McKittrick, v. Southwestern Bell Telephone Co., 92 SW2d 612, 338 Mo. 617, (1936). This case can be easily distinguished from the present matter. In McKittrick v. Southwestern Bell, the Attorney General of Missouri sought to oust Southwestern Bell from the use of the right-of-way of the public roads. The Court enjoined the Attorney General from doing so and reasoned that Southwestern Bell's right to occupy the right-of-way was previously granted to it in the original enabling legislation for telegraph companies, and, that its right to use the right-of-way could not be later rescinded.

The reason this case can be so easily distinguished from the present matter is that in *McKittrick* we are dealing with a tangible property right that is being denied, in other words, the state was trying to take away something it had previously given to Southwestern Bell. Asking a *foreign* corporation to file an application for a certificate of service authority is completely different than taking away a right previously granted to the *same* company. *McKittrick* does not support the argument that Southwestern Bell has an unconditional right to assign its "grandfathered rights" to an out of state entity.

The present situation is unlike all of the cases cited by Southwestern Bell where a tangible property right was being denied. Presently, the only thing that is being asked is that Southwestern Bell LP, a Texas entity, apply for a certificate of service authority. There are no property rights that are being denied, only the requirement that it conduct its business the same way as every other telecommunications provider in the state.

Southwestern Bell has claimed that it should be governed by the provisions set forth in Article V, Section 875 et seq, but when one looks closely at the subsequent provisions of this Chapter, particularly, Section 890 one can see the fallacy of this reliance. Section 890 provides that telegraph and telephone companies "may consolidate with other companies . . . and that such

consolidated companies may hold, use and enjoy all the rights and privileges conferred by the laws of Missouri on companies separately organized under the provisions of this article, and be subject to the same liabilities”.

The Statute of 1879, relied upon so heavily by Southwestern Bell in its brief, allows telegraph and telephone companies to reorganize but also recognizes that companies that do so are subject to the same laws as companies that are separately organized under the provisions of this article. The current counterpart to section 890 is Section 392.070 which states:

Any telegraph company now organized, or which may hereafter be organized, under the laws of this state, may at any regular meeting of the stockholders thereof, by vote of persons holding a majority of the shares of the stock of such company, unite or consolidate with any other company or companies now organized, or which may hereafter be organized, under the laws of the United States, or of any state or territory, by consent of the company with which it may consolidate or unite, and such consolidated company so formed *may hold, use and enjoy all the rights and privileges conferred by the laws of Missouri on companies separately organized under the provisions of sections 392.010 to 392.170, and be subject to the same liabilities. (emphasis added).*

Southwestern Bell should not be allowed to use the provisions of Article V as a sword in the one hand and a shield in the other. If it is subject to the provisions of Article V it should be subject to all of its provisions. And, giving the above-quoted passages their plain and ordinary meaning, consolidated companies that are formed under the statutory provisions of telegraph and telephone companies must abide by the laws that were intended to regulate such entities.

Therefore, using the legal authority cited by Southwestern Bell, the Commission has proper jurisdiction to require Southwestern Bell L.P. to submit an application for service authority.

**COMMISSION OVERSIGHT OVER FUTURE TRANSFERS OF PROPERTY  
AND THE RESULTING CHANGE IN SOUTHWESTERN BELL'S ORIGINAL  
CHARTER**

In its Order granting intervention by the MITG the Commission directed that the parties involved in this proceeding look at whether the Commission's oversight over Southwestern Bell L.P. would be any different than if Southwestern Bell had remained a Missouri corporation. Given the limited amount of time that the parties have had in answering and researching the complicated issues involved in this proceeding MITG will allow the staff for the Commission to address the oversight issues. As to the issue concerning Southwestern Bell's original charter and franchise it seems clear that pursuant to prior Commission practice that Southwestern Bell's decision to reorganize as a Texas limited partnership which should be subject to complete Commission oversight and regulation, that Southwestern Bell is abandoning its franchise and charter.

**QUESTIONS OF FACT REQUIRING A HEARING**

Questions of fact that would require a hearing in this matter relate to those services that Southwestern Bell has historically offered and subsequently discontinued but retained authority, through its "grandfather" status to re-offer at some point in the future. A determination of those services over which Southwestern Bells retains its grandfather status and could assign to the Texas limited partnership is a question of fact that requires clarification.

For example during the hearing regarding termination of the Primary Toll Carrier Plan, there was an issue as to where SWBT was the carrier of last resort. The lack of a certificate setting forth SWBT's certificated service area complicated that determination. Likewise there was an issue that, if SWBT were allowed to exit as a toll provider in MITG company exchanges, whether SWBT would ever be allowed to return, and what certificate or tariffing process would



be required. This too was complicated by SWBT's claim that, due to its "grandfather" status, it was authorized to provide any type of service it wanted to anywhere in the state of Missouri, without having to obtain a Certificate of Service Authority.

In the most recent hearing in the Missouri Universal Service Fund docket, TO-98-329, SWBT's "grandfather" status again showed the potential for unnecessary complications. There was an issue of whether SWBT, if it wanted to compete for basic local service in the exchange of another ILEC, had to obtain a certificate to do so. There were questions raised, and are questions that would be raised, as to whether SWBT has to utilize an affiliate alternative local exchange company (CLEC), whether SWBT could compete in rural LEC exchanges without first having been certificated to do so, and whether and what levels of MoUSF support SWBT could receive by serving customers in the exchanges of other ILECs.

All of the uncertainties listed above, and perhaps more than listed above, would disappear if SWBT's "grandfather" status is eliminated and replaced by a Certificate of Service Authority spelling out exactly where SWB LP will be authorized to serve, and what services SWB LP will be authorized to provide. This is no more and no less than required of any other company. As previously set forth by the SMTG, no other company has been allowed to "transfer" its certificate via a reorganization into a new legal entity. SWBT should not be allowed to transfer its "grandfather" status via a reorganization into a new legal entity.

### CONCLUSION

Southwestern Bell has sought Commission approval to reorganize and assign its grandfather status to a foreign entity. The fact that the Commission, through the police power granted it by the legislature, retains jurisdiction to approve or disapprove such a reorganization is

clear. § 392.340 RSMo makes it mandatory for reorganizations to be approved by the Commission. In the past the Commission has required that the survivor of a reorganization apply for and have approved a certificate of service authority. This is no different here. In fact it is more imperative here in order to eliminate the uncertainties attendant with SWBT's "grandfather" status. The public interest is best served by eliminating any such uncertainties. The fact that the Commission may condition such a transfer on terms and conditions set forth in both the laws of 1879 and the laws of today is also clear. The Commission should approve the transfer but condition such approval on the submission of an application of service authority.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was mailed, U.S. Mail, postage pre-paid, this 10 day of December, 2001, to all parties of record.

**Missouri Public Service Commission**

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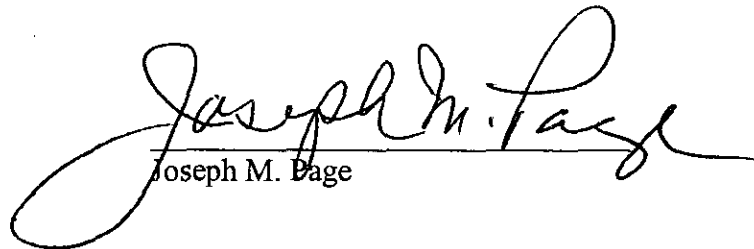
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