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December 7, 2001

FILED³
DEC 7 2001

Missouri Public
Service Commission

Mr. Dale Hardy Roberts, Secretary
Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102-0360

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

Dear Mr. Roberts:

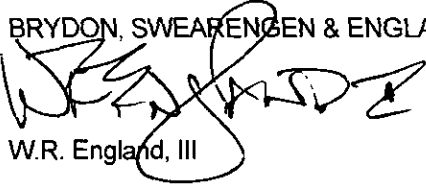
Enclosed please find an original and eight (8) copies of a Preliminary Brief of the Small Telephone Company Group to be filed in the above-referenced matter. I have also hand delivered or mailed a copy of this Brief to Office of the Public Counsel and all parties of record this date. Please file-stamp the receipt copy of this Brief and return it to the messenger delivering same.

Thank you for your assistance in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:


W.R. England, III

WRE/PAB:aw
Enclosures

cc: Michael F. Dandino
William K. Haas
Paul Lane/Mimi McDonald
Craig Johnson/Lisa Chase

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³
DEC 7 2001

In the Matter of the Application of)
Southwestern Bell Telephone Company to)
Transfer Property and Ownership of Stock)
Pursuant to Section 392.300 RSMo.)

Case No. TO-2002-185

Missouri Public
Service Commission

PRELIMINARY BRIEF OF THE SMALL TELEPHONE COMPANY GROUP

By virtue of an Order Granting Intervention and Directing Filing dated November 27, 2001, the Missouri Public Service Commission ("Commission") directed that the parties file briefs concerning the issues implicated by the Application of Southwestern Bell Telephone Company, Southwestern Bell Texas, Inc., and Southwestern Bell Telephone, L.P. d/b/a Southwestern Bell Telephone Company (sometimes hereinafter the "Joint Applicants") to undertake a corporate restructuring.

It is the Small Telephone Company Group's ("STCG") position that Southwestern Bell Telephone, L.P., a Texas limited partnership ("SBWT, L.P."), cannot lawfully conduct business in providing telecommunications services in the State of Missouri without having first obtained a Certificate of Service Authority ("CSA") from the Commission pursuant to §392.410 RSMo. 2000. It does not appear to be disputed that SWBT, L.P., does not hold a CSA to provide telecommunications services in this State and, also, that none has been requested in the context of this Application. Additionally, SWBT, L.P., did not in 1987 (when §392.410 RSMo. was enacted) hold a state charter issued in or prior to the year 1913 which authorized it to engage in the telephone business in the State of Missouri. Consequently, SWBT, L.P. is obligated to obtain the CSA required of all telecommunications corporations in order for it to carry on the business now conducted by Southwestern Bell Telephone Company ("SWBT"). This brief will examine this issue.

I. Key Facts for the Commission's Consideration.

The STCG submits that the fundamental defect in the Application arises out of the following facts:

- SWBT, L.P., currently holds no CSA from the Commission to provide telecommunications services in this State.
- At the conclusion of the proposed restructuring, SWBT, L.P. will be a “telecommunications corporation” as that term is defined at §386.020(51) RSMo 2000.
- No CSA to provide telecommunications services in the State of Missouri has been requested by SWBT, L.P., in this case or in any companion case.
- SWBT, L.P., does not hold a corporate charter from the State of Missouri issued in or prior to 1913. Rather, it will be a business entity (i.e., a Limited Partnership) created by, and existing under and by virtue of, the laws of Texas. (*See, Application*, p. 3, ¶ 1D.)
- SWBT does not hold a certificate of public convenience and necessity (“CCN”) authorizing it to provide telecommunications services in the State of Missouri.
- SWBT does not hold a CSA issued by this Commission authorizing it to provide telecommunications services at specified rates in the State of Missouri. (*See, Reply of SWBT*, p. 4, ¶ 6.)

- SWBT has not requested authority to transfer any CCN or CSA from itself to SWBT, L.P. (*See, Reply* of SWBT, p. 4, ¶ 6).¹
- SWBT, a Missouri corporation, as a result of the proposed transaction will be merged out of existence and will cease doing business in Missouri. (*See, Application*, p. 3, ¶ 1C)

II. The Legal Requirement to Obtain a Certificate of Service Authority

The applicable law is contained in §392.410.1 RSMo. 2000, which states, in pertinent part:

“A telecommunications company not possessing a certificate of public convenience and necessity from the commission at the time this section goes into effect shall have not more than ninety days in which to apply for a certificate of service authority from the commission pursuant to this chapter, unless a company holds a state charter issued in or prior to the year 1913, which charter authorizes a company to engage in the telephone business. No telecommunications company not exempt from this subsection shall transact any business in this state until it shall have obtained a certificate of service authority from the commission pursuant to the provisions of this chapter . . .”²

The STCG’s contention in this case is a straightforward one. The STCG contends that SWBT, L.P., is not exempt from the provisions of §392.410 RSMo. 2000 requiring that a telecommunications company shall not transact business in the State of Missouri until it shall have obtained a CSA from the Commission. In this regard, SWBT, L.P., stands in no special or more privileged position than any other telecommunications company in this State. It will

¹ The lawfulness of any such request is in doubt in any event. *See, Re Cass County Telephone Company*, Case No. TM-95-163. In its *Order Concerning Application* issued on December 28, 1994, the Commission concluded that a CCN cannot be assigned by one business entity to another. The Commission determined that a new provider “must either file a separate application for a certificate of service authority or must amend its joint application” to request one. A copy of this Order was attached to the STCG’s Application to Intervene.

² Section 392.410 RSMo was enacted by the 84th General Assembly in 1987 as part of House Bill (“HB”) 360.

not acquire by legal osmosis SWBT's status as a pre-1913 chartered telephone corporation.³ SWBT, L.P., will be a new company offering telecommunications services in the State of Missouri. It should be required to comply with all the same regulatory requirements with which any other new entrant into the business in this State is required to comply.

Certainly, this requirement should impose no unreasonable burden or hardship on SWBT, L.P. Moreover, the public interest would be served by more specific definition on a going-forward basis of which services will be provided by SWBT's successor in interest and in which specific telephone exchanges or areas throughout the State.

The STCG's observation is not intended to cause the Commission to prevent the transfer of SWBT's business rights to conduct business in Missouri to SWBT, L.P. It is simply intended that the transferee conduct business in the same manner as, and on an equal footing with, all other similarly situated telecommunications providers. This is a much different set of circumstances than those confronted in the *Wabash* case.

III. The Commission has Jurisdiction over the Subject Matter of the Application.

There is no question that the Commission has jurisdiction over the subject matter of the Application filed by the Joint Applicants. The Commission has jurisdiction over the proposal pursuant to §392.300 RSMo. 2000 requiring that any telecommunications corporation obtain an order from the Commission authorizing it to merge, directly or indirectly, with any other corporation, public person or public utility. The transaction described in the Joint Application contemplates a merger between SWBT with Southwestern Bell, Texas, a Texas corporation. See, Application ¶ 1C.

³ To the contrary, the case upon which SWBT places primary reliance, *State ex rel. Wabash Railway Company v. Roach*, 184 S.W. 969 (Mo. 1916), states that the right to be a body corporate is *not* transferable. *Id.* at 972.

The Commission also has jurisdiction over the proposed transaction pursuant to §392.340 RSMo. 2000 requiring that a “reorganization” of a telecommunications company is subject to the supervision and control of the Commission and that no such reorganization shall be had without the authorization of the Commission. The transaction which is the subject of the Application contemplates a corporate restructuring as generally described in ¶ 1 of the Application.

The jurisdiction of the Commission does not appear to be in dispute. This is evidenced by the fact that the Joint Applicants have filed an Application with the Commission for approval of the transaction therein described.

IV. The Proposed Transaction Should be Approved by the Commission Absent a Showing that the Transaction is Detrimental to the Public Interest.

The standard for the Commission’s review of the corporate restructuring described in the Application is well known to the Commission. Specifically, the law requires that the restructuring be approved absent a showing that the transaction is detrimental to the public interest. *See, State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. 1980). The standard adopted in the *City of St. Louis* case balances the property rights of shareholders to dispose of property dedicated to the public service with the interests of the customers served by those properties.

SWBT, relying on the Missouri Supreme Court’s 1916 *Wabash* case, contends that its right to conduct the business of telecommunications in the State of Missouri is one that is assignable, a general observation with which the STCG does not necessarily disagree.⁴ SWBT,

⁴ The STCG, however, does not agree that SWBT’s “grandfathered” status under the Public Service Commission Law is transferable to another entity. *See*, fnt. #1.

however, contends that the *Wabash* case establishes the right to assign, or otherwise convey, this privilege is absolute. The *Wabash* case does not stand for this proposition.

To the contrary, the *Wabash* case specifically recognizes that the operations of a regulated entity *are* subject to the police power of the state. The fact that a corporate franchise creates a contract between the State of Missouri and a telecommunications corporation is not unique to SWBT. All Missouri corporations enjoy this privilege. Nevertheless, telecommunications corporations other than SWBT routinely file for approval to merge or to transfer regulated properties or operations, notwithstanding the constitutional protections afforded to the utilities, and the Commission routinely approves such transactions. The *City of St. Louis* case, as noted above, establishes the balance between the constitutional property rights of a regulated company and the interests of the customers served by that company. The *Wabash* case does not carve out a special exemption for SWBT.

V. The Commission Exercises the Police Power of the State to Regulate the Operations of Telecommunications Corporations.

The police power of the State to guard against abuses by telecommunications corporations is embodied in the Public Service Commission Law (the "PSC Law"). That law created the Commission, granting it broad powers to oversee the operations of telephone utilities and to safeguard the public interest. The proper role of the Commission in this regard cannot be seriously disputed.

The courts of the State have long recognized the police powers exercised by the Commission in the regulation of public utilities.⁵ The *Wabash* case, upon which the Joint Applicants place primary reliance, expressly states that "the control of common carriers under

⁵ *State ex rel. City of Sedalia v. Public Service Commission*, 204 S.W. 497, 498 (Mo. 1918); *State ex rel. Doniphan Telephone Company v. Public Service Commission*, 369 S.W.2d 572, 575 (Mo. 1963); *State ex rel. State Highway Commission v. Public Service Commission*, 471 S.W.2d 249, 251 (Mo. 1971).

and by virtue of the police power is a totally different question” than the grant of right of a corporation to conduct business. 184 S.W. at 973. It further states that “matters of regulation under a proper exercise of the police power do not cover the right of the State to grant the privileges to conduct and operate a railroad in this State and to do intrastate business.” *Id.* In other words, the Court in that case distinguished the ministerial role of the Secretary of State (not a police power) from the ongoing regulatory oversight exercised by the Commission (a legitimate exercise of the police power of the sovereign).

Moreover, the *Wabash* case is factually distinguishable from the circumstances confronted by the Commission by virtue of the Application in this case. In the *Wabash* case, the Secretary of the State of Missouri refused to issue papers permitting an Indiana corporation to conduct the business of a railroad company in the State of Missouri. This would have been an absolute bar to that corporation operating its business and properties in Missouri. Consequently, the Supreme Court found that the Secretary of State was required to accept and receive the business license fees tendered by the Indiana corporation.

In contrast, the Joint Applicants in this case have specifically invoked the police power of the Commission to permit SWBT, L.P., to provide in Missouri particular telephone services at particular rates; that is, the services now provided, and rates now charged, by SWBT. The requirement under the PSC Law to file for and obtain a CSA will not bar SWBT, L.P., from doing business in this State, so long as it complies with that law’s affirmative obligations. Consequently, the *Wabash* case does not, as SWBT contends, require this Commission to approve the Application, regardless of any non-compliance with the PSC Law. Indeed, reading the *Wabash* case in the same manner as suggested by SWBT would render this Commission’s oversight of the proposed transaction a mere formality. Surely, the fact that SWBT was

incorporated prior to the enactment of the PSC Law does not mean that the provisions of the PSC Law are not now applicable to SWBT, L.P.

The Commission exercises the police power of the State by controlling the activities engaged in, and the charges made, by telecommunications corporations. The Commission's powers are expressed in the Commission's enabling legislation; in this case, in Chapters 386 and 392, RSMo. Along with the right to exist (that cannot be transferred), SWBT's corporate charter also gives it a privilege and right to conduct business in the State that, admittedly, may be transferred or assigned by merger or otherwise. This, however, can only take place if it is shown that doing so will not be detrimental to the public interest. Under the facts of this case, the Joint Applicants have failed to make this minimal threshold showing.

The STCG believes §392.410 RSMo. requires that SWBT, L.P. obtain a CSA to provide telecommunications services in the State of Missouri. The STCG contends that there is no conflict between §392.410 RSMo. and the 1916 *Wabash* decision. To the extent of any conflict, however, §392.410 RSMo., passed in 1987, supercedes any prior inconsistent case law. It is well recognized that the Missouri General Assembly can pass laws changing the effect or consequence of prior case law decisions. See, Searcy v. Seedorff, 8 S.W.3d 113 (Mo. banc 1999) [statutory child custody presumption overrules prior conflicting case]. In this case, the General Assembly in 1987 evidenced its intentions that any non-exempt telecommunications company file to be certificated by this Commission. To the extent that SWBT suggests that the *Wabash* case mandates a different outcome, it has been overruled by the more recent legislation contained in HB 360 passed by the 84th General Assembly.

VI. Changes in Commission Oversight.

The STCG is not in a position to speak authoritatively on what, if any, changes would occur with regard to the Commission's ongoing oversight over a Texas limited partnership (as opposed to that of a Missouri corporation). This is not an issue that was raised by the STCG in its Application to Intervene. Consequently, it is one that is better left to be examined and briefed by the Commission's Staff and the Office of the Public Counsel.

VII. Disputed Facts.

The underlying facts with respect to the issue raised by the STCG may not be in dispute (*See, §I, supra*). Therefore, the facts may be conducive to stipulation, whether oral or written, upon which legal arguments may be premised. In the event that all relevant facts can be agreed to, there may be no purpose in holding an evidentiary hearing on this issue.

VIII. Conclusion.

The STCG's primary interest in this case is to ensure that SWBT's successor in interest, SWBT, L.P., operates lawfully in this State so as to avoid the possibility of business interruptions in an important public service. This matter should be given due consideration by the Commission during the course of its deliberations.

Respectfully submitted,



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Certificate of Service

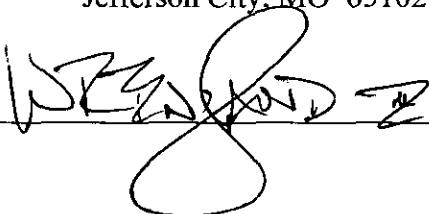
I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 7th day of December 2001, to:

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A handwritten signature in black ink, appearing to read 'W. K. Haas', is written over a horizontal line.