

11/12
NW

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 15th
day of July, 1999.

In the Matter of the IntraLATA Toll Dialing)
Parity Implementation Plan of Modern)
Telecommunications Company) Case No. TO-99-529

ORDER REGARDING REHEARING

On June 18, 1999, Modern Telecommunications Company (Modern) filed an Application for Rehearing/Clarification. On June 24, 1999, and June 28, 1999, respectively, MCI Telecommunications Corporation and Southwestern Bell Telephone Company filed responses to, *inter alia*, the application for rehearing filed by Modern.

In its Request for Rehearing, Modern argues that the process the Commission has imposed on LECs seeking revenue neutrality "appears to violate several ratemaking and revenue neutrality principles¹." It goes on to give a laundry list of these principles. The Commission will address each "principle" listed by Modern, and identify the lettered paragraph(s) in which it is listed.

A, L, M. Modern objects to the requirement in the Commission's revenue neutrality mechanism that would require a utility to file a rate

¹ It is ironic that Modern's proposal to be allowed carte blanche to achieve revenue neutrality violates many of its "ratemaking and revenue neutrality principles."

case. The Commission agrees that in most circumstances it would not be appropriate to require a utility to file a rate case. However, here the Commission is not simply imposing the requirement "out of the blue," but rather as a part of a package of conditions imposed on LECs seeking revenue neutrality to protect ratepayers from paying unreasonably high rates. Not all LECs will be required to file a rate case, only those that want to raise rates to achieve revenue neutrality. Given the circumstances, these conditions are fair and reasonable.

Modern states that requiring a LEC to commit to filing a rate case improperly shifts the burden of proof to the LEC to prove that its rates are reasonable. The LECs that file rate increases to implement revenue neutrality should rightly bear the burden of proof to show that such increases are necessary. Because of the time strictures placed upon the Commission by the FCC, there is simply not time to examine all relevant factors to determine whether the increase is warranted before implementing IntraLATA Dialing Parity (ILDPA) and eliminating the Primary Toll Carrier (PTC) plan. Thus the Commission is allowing LECs to raise rates, if they choose, but only if they are willing to prove that the increase was necessary in a subsequent rate case. The time constraint does not mean that the burden of proof should shift away from the LEC that is raising its rates, it simply means that the proof necessarily comes after the surcharge is implemented on a subject to refund basis. If the LEC is unable to prove that the increase was necessary, it will be required to refund it.

B. Modern asserts that it would be unlawful for the Commission to preclude LECs from filing a rate case prior to eight months after October 20, 1999. This was not the Commission's intent, and the Report and Order should not be read as precluding a LEC from filing a rate case at any time.

C. Modern states that the Commission "did recognize that elimination of the PTC Plan would cause a loss of revenues or the incurring of new expenses." The Commission did not make such a finding, and even noted that the LECs themselves found their projections of losses to be questionable.

D. Modern believes that interim rates are not lawful unless ancillary to a permanent rate proceeding initiated by the utility. The Commission agrees, and that is why it ordered any utility that wanted to implement interim rates to achieve revenue neutrality to file a rate case.

E. Modern asserts that subject to refund rates are not lawful. This assertion is without merit. If a surcharge or a rate additive is expressly made subject to refund at the time it is collected, it is not unlawful retroactive ratemaking to require a refund. The Commission has made certain tariffs interim subject to refund pending the resolution of

appeals², and the Purchased Gas Adjustment rate charged by natural gas local distribution companies is collected on an interim subject to refund basis³.

F, G. Modern attempts to enunciate, with only limited success, the principles of single issue ratemaking and retroactive ratemaking. The Commission's revenue neutrality mechanism violates neither.

H, K. Modern asserts that its rates are presumed to be lawful and that it is entitled to the revenue those rates generate; this is the heart of the Secondary Carrier's revenue neutrality argument⁴. While it is true that Commission-approved rates are presumed lawful, a utility is not "entitled" to a certain level of revenues regardless of changes in

2 "Interim rates have been utilized by the Commission to allow public utilities to collect revenues subject to refund pending judicial review after the Commission's order when those orders have been reversed by the circuit court. Although there is nothing to prohibit the Commission from authorizing interim rates, there is no authority for finding that execution of a circuit court judgment is in fact a remand for implementation of interim rates." State ex rel. GTE North, Inc. v. Missouri Public Service Commission, 835 S.W.2d 356 (Mo. App. W.D. 1992), at 368.

3 The lawfulness of the PGA process was recently upheld in State ex rel. Midwest Gas Users' Ass'n v. Public Service Commission, 976 S.W.2d 470, (Mo. App. W.D. 1998) and State ex rel. Midwest Gas Users' Ass'n v. Public Service Commission, 976 S.W.2d 485, (Mo. App. W.D. 1998).

4 Although the Commission is attempting to allow LECs revenue neutrality, it does not necessarily agree that they have a constitutional right to it. A better statement of the concept is that a utility has a right to the opportunity to earn a reasonable return on the investment it has made to serve the public. It could be a "taking" to deprive a utility of this right without due process. It is not a taking to change a piece of the regulatory framework, and incidentally a piece of a utility's revenue stream, unless the change has the effect of denying that utility the opportunity to earn on its investment. There has been no showing, and no attempt to make such a showing, that any LEC will be unable to earn a reasonable return on its investment as a result of the Commission's actions in this case.

circumstance. For example, if a large customer goes out of business, a utility is not "entitled" to be made whole for the revenues it used to receive from that customer. Similarly, while the Commission arguably cannot take actions that deprive a utility of the ability to earn a reasonable return on its investment, it is not required to ensure that every action it takes has no impact on a utility's revenue stream.

I, J. Modern asserts that if a party believes its rates are excessive, it must bear the burden of proof to so demonstrate, and the Commission must make such a finding based on all relevant factors. This is certainly a correct statement of the law, but the issue here is whether Modern can raise rates to achieve revenue neutrality. No party has claimed, and the Commission did not find, that Modern's rates are excessive.

The Commission finds that Modern has not shown sufficient reason to grant rehearing, and will deny its request for rehearing.

IT IS THEREFORE ORDERED:

1. That the application for rehearing filed by Modern Telephone Company on June 18, 1999 is denied.

2. That this order shall become effective on July 15, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray
and Drainer, CC., concur
Schemenauer, C., absent

Mills, Deputy Chief Regulatory Law Judge

RECEIVED
JUL 16 1999
COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION