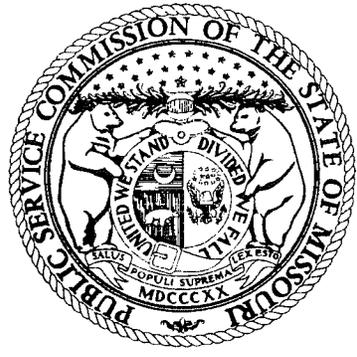


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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Petition of Southwestern)
Bell Telephone Company for a Determination that)
it is Subject to Price Cap Regulation Under)
Section 392.245, RSMo Supp. 1996.)
)

Case No. TO-97-397

REPORT AND ORDER

Issue Date: September 16, 1997

Effective Date: September 26, 1997

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of Southwestern)
Bell Telephone Company for a Determination that) **Case No. TO-97-397**
it is Subject to Price Cap Regulation Under)
Section 392.245, RSMo Supp. 1996.)
)

APPEARANCES

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Carl J. Lumley and **Leland B. Curtis**, Curtis, Oetting, Heinz, Garrett & Soule, P.C., 130 South Bemiston, Suite 200, Clayton, Missouri 63105, for MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc.

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Mark W. Comley, Newman, Comley & Ruth, 205 East Capitol Avenue, Post Office Box 537, Jefferson City, Missouri 65102, for COMPTEL-MO.

Michael F. Dandino, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Penny G. Baker, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY

LAW JUDGE: Elaine E. Bensavage.

REPORT AND ORDER

Procedural History

On March 21, 1997, Southwestern Bell Telephone Company (SWBT) filed a petition for a determination that it is subject to price cap regulation pursuant to Section 392.245, RSMo Supp. 1996.¹ Thereafter, numerous pleadings were filed at different times leading up to the hearing of this case. Only those pleadings and orders necessary to an understanding of the procedural history of this case will be described below.

On April 18, the Missouri Public Service Commission (Commission) issued its Order Giving Notice, Granting Intervention, And Establishing Procedural Schedule. That order granted the application to intervene filed by MCI Telecommunications Corporation (MCI), gave notice of SWBT's petition, set an intervention deadline, and established a procedural schedule. The order also detailed the request for a hearing made by the Office of the Public Counsel (OPC), and the arguments raised by MCI in opposition to SWBT's petition. In addition, the order also stated that the scheduled hearing was for the limited purpose of determining whether the prerequisites of Section 392.245.2 had been met, such as to subject SWBT to price cap regulation.

¹ All statutory references are to the 1996 Supplement to the Revised Statutes of Missouri, unless otherwise noted.

On May 20, the Commission issued its Order Granting Interventions, Granting Protective Order, And Modifying Procedural Schedule. The Commission granted intervention to the following entities: the State of Missouri via the Attorney General of Missouri (the AG); MCImetro Access Transmission Services, Inc. (MCImetro); United Telephone Company of Missouri d/b/a Sprint (Sprint-United); AT&T Communications of the Southwest, Inc. (AT&T); GTE Midwest Incorporated (GTE); Sprint Communications Company, L.P. (Sprint); Birch Telecom of Missouri, Inc. (Birch); Kansas City Fiber Network, L.P. (KC Fiber); and COMPTel-MO. The Commission also modified the procedural schedule at the request of OPC to allow additional time for discovery.

On May 22, the Commission issued its Order Denying Motion To Stay Proceedings, And Denying Motion For Access To Surveillance Reports. The order was in response to a motion filed by MCI, in which OPC and the AG concurred, which requested that the Commission stay this proceeding pending a resolution of MCI's complaint regarding alleged excessive access charges brought against SWBT in Case No. TC-97-303. The order also responded to a motion filed by the AG, which sought access to all surveillance reports filed by SWBT with the Commission from August 31, 1994 through the present.² The Commission refused to reconsider the evidentiary restrictions announced in its order of April 18, or to stay this proceeding until Case No. TC-97-303 was concluded. In so holding, the Commission indicated that it had reviewed Section 392.245.2, and found the language to be clear and unambiguous. Because the AG's request for SWBT's

² The AG later clarified that it was seeking SWBT's monthly financial reports. However, because the parties have for the most part continued to refer to these documents as surveillance reports, the Commission will hereafter use the term "financial surveillance reports" to refer to these documents.

surveillance reports was irrelevant to the factual determinations required by Section 392.245.2, the Commission denied the AG's motion for access.

On June 12, the Commission issued its Order Regarding Motion To Quash, in response to a motion filed by SWBT to quash a Notice Of Oral Deposition issued by the AG. SWBT claimed that the notice was procedurally defective, and that the areas of examination listed in the notice were vague and ambiguous, and beyond the scope of the issues. While the Commission found that the deposition notice had not been shown to be procedurally defective, it treated SWBT's motion as a request for a Protective Order pursuant to Mo. R. Civ. P. 56.01(c), and limited the areas into which the AG could inquire, based upon the irrelevance of certain matters to the factual issues in the case.

On June 27, the Commission issued its Order Regarding Motion To Strike, in response to a motion filed by SWBT requesting that the Commission strike the testimony of MCI and MCImetro (hereafter collectively referred to as MCI) witnesses Don Price and Lane Kollen in their entirety, and to strike a portion of the testimony of OPC witness Barbara Meisenheimer. The Commission granted SWBT's motion in part and denied it in part, and ordered that the rebuttal and revised rebuttal testimony of Lane Kollen be stricken in its entirety, that portions of the rebuttal testimony of Don Price be stricken, that the cross-surrebuttal testimony of Don Price be stricken in their entirety, and that portions of the rebuttal testimony of Barbara Meisenheimer be stricken. The Commission indicated that the stricken testimony was irrelevant to the factual matters at issue in this case. However, the Commission further indicated that the stricken testimony would nevertheless be preserved pursuant to Section 536.070(7), RSMo 1994.

An evidentiary hearing was commenced on June 30 pursuant to the revised procedural schedule. Simultaneous initial and reply briefs were thereafter filed by the various parties.

Rulings on Late-filed Exhibits

Pursuant to the Commission's order of June 27, only certain portions of the rebuttal testimony of MCI witness Don Price and the rebuttal testimony of OPC witness Barbara Meisenheimer were stricken. At the hearing on June 30, neither MCI nor OPC had copies of the testimony of these witnesses, with the stricken portions deleted. The Commission therefore reserved Exhibit No. 8 for the public version of the redacted rebuttal testimony and schedules of Barbara Meisenheimer; Exhibit No. 8HC for the highly confidential version of the redacted rebuttal testimony and schedules of Barbara Meisenheimer; Exhibit No. 11 for the public version of the redacted rebuttal testimony and schedules of Don Price; and Exhibit No. 11P for the proprietary version of the redacted rebuttal testimony and schedules of Don Price.

Exhibit Nos. 11 and 11P were filed on July 3, and Exhibits 8 and 8HC were filed on July 7. Notice of the receipt of these exhibits was sent to all parties, and the parties were given a deadline by which they could file objections to the admission of these exhibits into evidence. No objections were filed. The Commission will therefore admit Late-filed Exhibit Nos. 8, 8HC, 11, and 11P into evidence.

Ruling on Pending Motion

On June 20, SWBT filed its Motion To Strike MCI's Testimony And To Require The Return Of Southwestern Bell Telephone Company's Confidential Information. SWBT indicated that the testimony of MCI witnesses

Lane Kollen and Don Price contained certain confidential information contained in monthly financial surveillance reports which are filed with the Commission. SWBT alleged that OPC obtained copies of this financial information from the Commission's records pursuant to its authority under Section 386.480, RSMo 1994, which it then disclosed to MCI. In addition, SWBT noted that a confidential document was actually attached as an exhibit to the revised rebuttal testimony³ of Lane Kollen, albeit the testimony was filed under seal with a "Proprietary" designation. SWBT's prayer for relief requested that the Commission issue an order striking the testimony of MCI witnesses Kollen and Price, and requiring all parties to return SWBT's confidential information, together with all copies, notes and analyses stemming from such confidential information, and for such other relief as the Commission might deem just and proper.

OPC and MCI filed written responses to SWBT's motion, and all parties were given an opportunity to orally argue the merits of the motion prior to the commencement of the hearing. Upon issuance of the Commission's Order Regarding Motion To Strike on June 27, the portion of SWBT's motion which requested that the testimony of MCI's witnesses be stricken became essentially moot. At the hearing, the Commission indicated that it would reserve its ruling on the remainder of the motion. However, in order to help maintain the status quo pending the Commission's determination on the merits of the issue, the Commission issued an order on July 11, which directed counsel who were present at the hearing -- and, in the case of Sprint Communications Company, L.P. (Sprint), Sprint's counsel of record

³ In actuality, the document was appended to both the rebuttal and revised rebuttal testimony of this witness.

-- to locate all existing copies of the information and maintain those copies, with access restricted to those particular attorneys.

Certain parties (SWBT and Staff) take the position that OPC violated Section 386.480, RSMo 1994 and the Commission's Protective Order by disclosing to MCI certain financial surveillance reports pursuant to a data request.⁴ The arguments supporting this position may be summarized as follows: Certain financial surveillance reports were informally provided by SWBT to the Commission's Financial Analysis Department. Under the provisions of Section 386.480, RSMo 1994, this information could not be divulged except upon order of the Commission, or by the Commission or a Commissioner in the course of a hearing or proceeding. The reports are the same reports which the AG sought access to in its motion filed on May 14. Although the AG's motion was denied, the AG followed proper procedure by filing its motion, which gave SWBT an opportunity to object to the disclosure of this information. If MCI or OPC had filed a similar motion for a Commission order to open these records, or if OPC had informed SWBT of its intent to disclose the information to MCI pursuant to MCI's data request, SWBT could have protected the confidentiality of its financial surveillance reports by taking appropriate action.

Other parties (OPC, MCI, the AG, AT&T, Birch, and KC Fiber) take the position that OPC did not violate Section 392.480, RSMo 1994, or the Protective Order, in providing certain information to MCI in response to a data request propounded upon it by MCI. The arguments supporting this position may be summarized as follows: Section 392.480, RSMo 1994 does not apply, because the financial surveillance reports were required to be open

⁴ Sprint-United, GTE, and COMPTTEL-MO did not take a position regarding SWBT's motion, but Sprint-United and GTE did generally concur in the interpretation given to Section 386.480, RSMo 1994 by SWBT and Staff.

to the public pursuant to Section 392.380, RSMo 1994, and pursuant to Chapter 610 of the Missouri Revised Statutes. Section 392.480 is expressly subordinate to the above-cited statutes. In particular, Sections 610.011 and 610.015, RSMo 1994 require that these records be open. Further, the information was not divulged to the public, but was given to counsel for MCI, who as attorneys are officers of the court. The information was provided in response to a data request and pursuant to the Commission's Protective Order. MCI protected the confidentiality of the financial surveillance reports by filing the testimony of those witnesses who utilized the information under seal with a "Proprietary" designation.

The nature of the issue raised by SWBT in its motion requires a finding of facts, a determination of the applicable law, and an application of the facts to the law. The Commission finds that the financial surveillance reports were not formally filed in any docketed case, but were informally submitted by SWBT to the Commission's Financial Analysis Department. The information in question was obtained by OPC pursuant to its authority under Section 386.480, RSMo 1994. On May 16, copies of SWBT's response to the AG's motion for access to the surveillance reports were mailed to all parties of record, including OPC. Thus, OPC should have been on notice that SWBT objected to the opening of these records. The Commission further finds that OPC received a data request from MCI on May 20, and a revised data request on May 21, which OPC then responded to on the same day. OPC did not inform SWBT of its intent to disclose certain information to MCI pursuant to a data request. MCI subsequently used the information in its testimony and appended a copy of a financial surveillance report to the rebuttal and revised rebuttal testimony of Lane Kollen. Kollen signed a Nondisclosure Agreement, and his testimony

and the testimony of Don Price were filed with a "Proprietary" designation.⁵

The issue of the proper interpretation to be given to Section 386.480, RSMo 1994 is not a new one. Section 386.480 provides as follows:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

§ 386.480, RSMo 1994. The interplay of Section 386.480, RSMo 1994, with Section 386.380, RSMo 1994, and Chapter 610, commonly referred to as the "Sunshine Law," has been previously considered at length in a written opinion authored by the General Counsel of the Commission. See Op. Gen. Counsel No. 83-1, Fraas, 12-13-82.⁶ The Commission finds that opinion to still be of great value in interpreting these statutes.

In addition, the Circuit Court of Cole County has had two opportunities to consider the applicability of Chapter 610 in the context of claims that either Section 386.480 or the Commission's standard

⁵ The Nondisclosure Agreement states, "I, Lane Kollen, have been presented a copy of this Protective Order issued in Case No. TO-97-397 on the 16th day of May, 1997 . . . I hereby certify that I have read the above-mentioned Protective Order and agree to abide by its terms and conditions." The Commission notes that it did not issue a Protective Order in this case until four days later, on May 20.

⁶ The Commission notes that Section 610.027.5, RSMo 1994, explicitly permits a public governmental body to seek a formal opinion of an attorney for that body regarding the legality of closing a particular record.

Protective Order protected certain material from disclosure. In The Kansas City Star Co. v. Public Serv. Comm'n., Case No. CV187-472cc, Findings Of Fact And Conclusions Of Law (May 2, 1988), the Circuit Court held that Section 386.480, RSMo 1986 is an exception to Chapter 610 as recognized in Section 610.025.4, RSMo 1986, which permits public records to be closed if the law otherwise provides.⁷ *Id.* at 2-3. *Accord*, State ex rel. Miller v. Crist, 579 S.W.2d 837, 838 (Mo. App. 1979) (holding that the secrecy provisions of Sections 361.070 and 361.080 are an exception to the Sunshine Law).

In Southwestern Bell Telephone Co. v. McClure, Case No. CV193-502cc, Findings Of Fact And Conclusions Of Law And Judgment (June 21, 1993), the Circuit Court held that the Commission has the right and obligation to honor the constitutionally protected property interests that persons coming before it have in their confidential business data, and that the "Sunshine Law" does not allow or require the Commission to abrogate such property interests. The Court noted that Section 610.021(14), RSMo Supp. 1992, specifically exempts information "otherwise protected by the law" from public disclosure. *Id.* at 9.

The Commission finds that the interpretation to be given to Section 386.480, RSMo 1994 implicates policy concerns such as the free flow of information between utilities and the Commission. In the past the Commission has received requests for access to information protected by Section 386.480, RSMo 1994, such as the motion filed by the AG, and has used a balancing test and a case-by-case approach in deciding whether to release information. *See, e.g., The Staff of the Missouri Public Serv.*

⁷ Section 610.021 is the functional equivalent of Section 610.025, which was repealed in 1987.

Comm'n. v. Laclede Gas Co., 28 Mo. P.S.C. (N.S.) 129 (1986), and Katherine E. Rich, Movant on Behalf of Richard McCracken and Paula Feurt for Release of Commission Documents Relative to Commission Case No. ES-92-297, Case No. EO-95-75, Order Denying Release Of Documents (October 28, 1994).

Against this backdrop of the history of the Commission's interpretation of Section 386.480, RSMo 1994, and the Circuit Court's application of the same statute, comes the claim of OPC and MCI that all records of the Commission are required to be open to the public. The Commission finds that this interpretation of Section 386.480, RSMo 1994 is not reasonable since all of the statutes cited must be reconciled and given meaning. County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487, 490 (Mo. banc 1995). The interpretation of OPC and MCI would render Section 386.480, RSMo 1994 a nullity since if all records of the Commission were open records, whether pursuant to Section 386.380, RSMo 1994, or Chapter 610, there would be no need to specifically provide that Public Counsel shall have full access to Commission records, nor would there be a need to provide that any officer or employee of the Commission or the Public Counsel who divulges "any such information" shall be guilty of a misdemeanor. The legislature is not presumed to enact meaningless provisions. Boyd v. Bd. of Registration for Healing, 916 S.W.2d 311, 315 (Mo. App. 1995).

Section 386.380, RSMo 1994, states that "All proceedings of the commission and all documents and records in its possession shall be public records." The statute does not say that these public records shall be open public records, and Chapter 610, read in its entirety, does not indicate that the term "public records" is synonymous with the term "open records."

Chapter 610 in general espouses the public policy that records of governmental bodies be open to the public. The term "public record" is broadly defined in Section 610.010(6), RSMo 1994, but the definition does not indicate that a public record is a record that is open to the public. Rather, the requirement that public records be open is found in other statutory sections within the chapter.

However, even these sections include exceptions. For example, Section 610.011.2, RSMo 1994 states that all public records shall be open to the public "except as otherwise provided by law." Likewise, Section 610.015, RSMo 1994 also states that public records shall be open to the public "except as provided in section 610.021, and except as otherwise provided by law." Section 610.021 lists 15 categories of records which may be closed. This includes the broad category "records which are protected from disclosure by law" found in Section 610.021(14), RSMo 1994.⁸ Finally, Section 610.024 anticipates that public records may contain both exempt and nonexempt material, and requires public governmental bodies to facilitate a separation of these categories of information within a public record, so that nonexempt material may readily be available for disclosure. Taken as a whole, it is clear that Chapter 610 does not intend that all public records be open to the public.

In addition, while the Commission recognizes that Chapter 610 adopts a policy favoring the openness of governmental records, the Commission also notes that Chapter 610 is a general statute, while Section 386.480 is specific. "[W]here one statute deals with a subject in

⁸ The Commission notes that there is a broad array of information which may be protected under federal or state statutes or case law. For example, law pertaining to trade secrets, patents, and copyright may protect certain information from disclosure or dissemination. See Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

a particular way, and a second statute deals with the same subject in a more detailed way, the more general yields to the more specific." Shepard Well Drilling v. St. Louis County, 912 S.W.2d 606, 609 (Mo. App. 1995). See also State ex rel. Miller v. Crist, 579 S.W.2d 837, 838 (Mo. App. 1979). Chapter 610 must yield to the specific dictates of Section 386.480.

The Commission finds that the actions of OPC did not comport with the requirements of Section 386.480, RSMo 1994. The Commission also finds that OPC violated the terms of the Protective Order issued in this case. Paragraph W of the Protective Order specifically provides that Staff and Public Counsel are subject to the nondisclosure provisions of Section 386.480, RSMo 1986. In addition, paragraph F of the Protective Order provides, "If material or information to be disclosed in response to a data request contains material or information concerning another party which the other party has indicated is confidential, the furnishing party shall notify the other party of the intent to disclose the information." (Emphasis added). The financial surveillance report, which was appended to the rebuttal and revised rebuttal testimony of Lane Kollen, is clearly stamped "Confidential" in the upper left-hand corner, and centered in the bottom of the page is the legend "PROPRIETARY -- Not for Use or Disclosure Outside the Southwestern Bell Telephone Company Except Under Written Agreement." Taken either individually or together, these markings leave little doubt that SWBT indicated the information in question was considered confidential.

Thus, the Commission finds that OPC as the furnishing party had a duty to notify SWBT of the intent to disclose the information. The language in the Protective Order is mandatory rather than permissive. Paragraph F goes on to state that, "The other party may then choose to

designate the material or information as HIGHLY CONFIDENTIAL or PROPRIETARY under the provisions of this Protective Order." However, as a practical matter the mandatory nature of the notification also allows the owner of the confidential information to take other steps, such as filing objections to the data request, to protect its interests.

Finally, the Commission notes that the argument that the information was not disclosed to the "public" is specious at best. MCI is a competitor of SWBT. Competitors are the very members of the public from which a business would seek to protect itself against the disclosure of its confidential business information. The provision of utility services, particularly in the telecommunications area, has become and will continue to become increasingly competitive. Given this reality, the protections of Section 386.480, RSMo 1994, become concomitantly important.

Thus, since the Commission finds that certain confidential information of SWBT's was improperly divulged, the Commission will order the return of that information, together with all copies, notes, and analyses stemming from such information. MCI is directed to return to SWBT all copies of whatever information was provided to it by OPC, together with all copies, notes, and analyses. All parties are directed to return to SWBT all copies of the proprietary versions of the rebuttal and revised rebuttal testimony of Lane Kollen and the rebuttal testimony of Don Price, together with all copies, notes, and analyses.

Counsel of record for each party may keep one copy of the proprietary versions of the revised rebuttal testimony of Lane Kollen and the rebuttal testimony of Don Price for use during any judicial review process, but must return all proprietary copies of the rebuttal testimony of Lane Kollen, since this testimony was not offered into the record. As

indicated at the hearing, copies of the above testimony which were offered into the record by MCI have been preserved pursuant to Section 536.070(7), RSMo 1994, and can be provided to a reviewing court along with the record in this case, as necessary. The parties are also reminded that they must comply with paragraph V of the Protective Order after the completion of this proceeding, including any judicial review thereof.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

As with the Commission's ruling on SWBT's pending motion, the Commission must make findings of fact, determine the applicable law, and apply the law to the facts. However, in this instance it is necessary to determine the applicable law first, in order to know what factual issues must be decided to resolve the ultimate issue in this case.

The ultimate issue in this case is whether SWBT may convert from rate base/rate of return regulation to price cap regulation. SWBT claims that it is authorized to convert to price cap regulation by virtue of Section 392.245.2, and that it has met the prerequisites contained therein. Section 392.245.2 states as follows: "A large incumbent local exchange telecommunications company shall be subject to regulation under this section upon a determination by the commission that an alternative local exchange telecommunications company has been certified to provide basic local telecommunications service and is providing such service in any part of the large incumbent company's service area."

Certain parties (OPC, MCI, the AG, AT&T, Birch, KC Fiber, and COMPTel-MO) oppose SWBT's petition for a determination that it is subject

to price cap regulation. The arguments in opposition to SWBT's price cap petition may be summarized as follows: Section 392.245.1 authorizes but does not compel the Commission to employ price cap regulation. This subsection also gives the Commission discretion to review SWBT's earnings to ensure that SWBT's rates are just, reasonable, and lawful. The evidence regarding the service being provided by Communications Cable-Laying Company, Inc. d/b/a Dial U.S. (Dial U.S.) demonstrates that the level of competition which Dial U.S. represents is trivial, and that effective competition does not exist in any of SWBT's exchanges. Further, Dial U.S. is not an active, facilities-based competitor, but merely resells SWBT's services. Moreover, Sections 392.450.1 and 392.451.1 both make a distinction between a certificate "to provide basic local telecommunications service or for the resale of basic local telecommunications service," thus as a reseller Dial U.S. is not "providing" basic local telecommunications service. Under these circumstances, allowing SWBT to escape from rate base/rate of return regulation to price cap regulation would be absurd and unjust. At the very least, SWBT's earnings should be reviewed and its rates rebalanced prior to conversion to price cap regulation.

In addition, MCI argues that Section 392.245 is unconstitutional. MCI contends that the statute violates the equal protection clause of U.S. CONST. amend. XIV, in that it creates two classifications for similarly situated entities, incumbent local exchange telecommunications companies and alternative local exchange telecommunications companies, which are treated disparately under the statute, and which bear no rational relationship to a legitimate state interest. In support of its constitutional argument, MCI maintains that the statute offers monopoly incumbent local exchange companies such as SWBT greater freedom from

regulation than competitive alternative local exchange companies such as MCImetro.

MCI points to Section 392.245.7, which states that companies regulated under price cap shall not be regulated under Section 392.240.1. MCI asserts that because the Commission has not waived Section 392.240.1 for alternative local exchange telecommunications companies, and since only incumbents are eligible for price cap regulation, this demonstrates that incumbents will be regulated more lightly. MCI also asserts that the Commission has treated alternative local exchange telecommunications companies differently because of the constraints it has placed on access pricing. Finally, MCI asserts that the constitutional question is properly before the Commission under the doctrine of primary jurisdiction, citing State ex rel. Kansas City Transit, Inc. v. PSC, 406 S.W.2d 5, 7 (Mo. banc 1966).

The Commission has thoroughly reviewed the entire record, Senate Bill 507, and in particular Section 392.245, and finds that none of the parties has provided the Commission with persuasive legal argument demonstrating that the Commission's initial assessment of the applicable law, as stated in its orders of April 18 and May 22, is incorrect. Under the arguments raised by those opposing SWBT's petition, the initial question becomes whether there is statutory authority which gives the Commission discretion to order an earnings investigation of SWBT prior to making a determination under Section 392.245.2 which would authorize SWBT to switch from rate base/rate of return regulation to price cap regulation. The Commission has reviewed Section 392.245.2, and finds the language to be clear and unambiguous. Where the language of the statutory provision is clear and unambiguous, the rules of statutory construction do not apply.

See Brownstein v. Rhomberg-Haglin & Assoc., 824 S.W.2d 13, 15 (Mo. banc 1992).

In reviewing Section 392.245 in its entirety, along with the remainder of Senate Bill 507, the Commission finds nothing in either which would create an ambiguity in Section 392.245.2, or which would authorize an earnings investigation of SWBT in this context. To the contrary, a reading of Section 392.245 in its entirety suggests otherwise. If the legislature had intended the conversion to price cap regulation to be contingent on the existence of "effective competition," it could have included such language in Section 392.245.2, as it did in Section 392.245.5. Similarly, if the legislature had intended to either require or to allow the Commission discretion to conduct "one final rate case" in order to rebalance rates prior to conversion to price cap regulation, it could have included such a provision as part of Section 392.245.2.

Section 392.245.1, relied upon by some of the intervening parties, merely provides statutory authorization for the use of price cap regulation as a method of ensuring just and reasonable rates. This provides a legislative imprimatur for the use of price cap regulation, which was not previously authorized by the legislature. While the parties opposing SWBT's petition try to imply that the reference to "just, reasonable and lawful" rates in Section 392.245.1 somehow means that the Commission has discretion to rebalance SWBT's rates prior to employing price cap regulation, such an interpretation is neither compelled nor reasonable. The parties apparently equate "just, reasonable and lawful" rates with rate base/rate of return regulation. But the premise of price cap regulation is that the focal point should be on the reasonableness of a company's

prices for its services, generally in relationship to some economic indicator, but without relationship to a company's earnings. The concept of "overearnings" is peculiar to rate base/rate of return regulation and has no relevance to price cap regulation. Both regulatory schemes have advantages and disadvantages, and the Commission finds that the legislature chose to require the use of price cap regulation for large incumbent local exchange telecommunications companies upon the occurrence of certain events.

The reasonableness of the parties' interpretation of Section 392.245.1 is further diminished when Section 392.245.3 is considered. Section 392.245.3 requires that the maximum allowable prices established for a company under *subsection 1* of Section 392.245 shall be those in effect on December 31 of the year preceding the year in which the company is first subject to price cap regulation. Both Section 392.245.2 and Section 392.245.3 contain the mandatory imperative "shall." See Citizens For Rural Preservation v. Robinett, 648 S.W.2d 117, 132 (Mo. App. 1982) (holding that use of the word "shall" generally imposes a mandatory duty upon those entrusted with the implementation of a statute, particularly where use of the word "shall" is contrasted with use of the word "may" in the same statutory section). Thus the Commission's discretion to set maximum allowable prices for price cap regulation under Section 392.245.1 is limited by Section 392.245.3.

Additionally, given the dictates of Section 392.245.3, if the Commission were to follow the suggestion that SWBT's rates be rebalanced prior to implementation of price cap regulation, as a practical matter it would have to stay this proceeding at least until 1998, and Case No. TC-97-303 or any rate case proceeding would have to be concluded by

December 31, 1997, in order for there to be any possibility that SWBT's rates could be capped at rates lower than the current rates. (This assumes that SWBT would be found to be overearning under rate base/rate of return regulation.) If either Case No. TC-97-303 or a rate case proceeding could not be concluded by December 31, 1997, the Commission would be required to stay this case until 1999.

Such lengthy stays are not contemplated by Section 392.245, as Section 392.245.4 provides that except under certain circumstances, the maximum allowable prices of a large incumbent local exchange telecommunications company for basic local telecommunications service and exchange access service shall not be changed prior to January 1, 2000. This provision could not be given realistic effect given the time required for a full rate proceeding, and is further suggestive that "one final rate case" was not contemplated by the legislature. If Staff or OPC believed that SWBT was overearning, either could have filed a complaint at an earlier point in time. The Commission agrees with the parties opposing SWBT's petition that it has general authority to ensure just and reasonable rates under Section 392.240.1. However, in this case there was no properly filed rate case before the Commission prior to the filing of SWBT's petition. While the Commission may be willing to stay a proceeding in an appropriate case, this is not such a case because a rate case was not timely filed.⁹ Nevertheless, the Commission will not speculate as to whether it would or could have stayed SWBT's petition in the event that a major rate proceeding was underway but uncompleted at the time the petition was filed.

⁹ As indicated in the Commission's Report And Order in Case No. TC-97-303, MCI's complaint could not proceed because of the matter of single-issue ratemaking.

The lawfulness of a Commission order depends on whether there exists statutory authority for its issuance. State ex rel. Gulf Transp. v. Public Serv. Comm'n, 658 S.W.2d 448, 452 (Mo. App. 1983). At this point, in the absence of some indication that the Commission has the discretion to rebalance SWBT's rates prior to the company's conversion to price cap regulation, the Commission finds that it must proceed with a resolution of SWBT's petition and determine whether SWBT has met the statutory requirements for price cap regulation.

With respect to the prerequisites of Section 392.245.2, the parties opposing SWBT's petition appear to want to imprint upon that statute requirements that are not there. "Provisions not plainly written in the law, or necessarily implied from what is written, should not be added by a court under the guise of construction to accomplish an end that the court deems beneficial. 'We are guided by what the legislature says, and not by what we think it meant to say.'" Wilson v. McNeal, 575 S.W.2d 802, 809 (Mo. App. 1978) (citations omitted). As previously indicated, nowhere in Section 392.245 is there a requirement that "effective competition" precede price cap regulation. Conversely, such a requirement must be met before an incumbent can be classified as competitive in a given exchange, per Section 392.245.5.

Likewise, nowhere in Section 392.245 is there a requirement that the alternative local exchange telecommunications company be facilities-based rather than a reseller before price cap regulation can be employed. "[C]ourts must construe a statute as it stands, and must give effect to it as it is written. [A] court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other language in the statute." *Id.* at 810 (citations omitted). The parties' argument

that the language in Sections 392.450.1 and 392.451.1 constitutes such an implication is not persuasive. These sections describe the certification process for the provision of basic local telecommunications service. Significantly, the statutes make no distinction in the requirements for facilities-based competitors and resellers. More importantly, Section 386.020(46) defines the resale of telecommunications service as "the offering or providing of telecommunications service primarily through the use of services or facilities owned or provided by a separate telecommunications company . . ."¹⁰ Thus there is nothing to suggest that a reseller does not provide service to its customers.

All of the arguments raised above, both with respect to the Commission's discretion to rebalance SWBT's rates prior to conversion to price cap regulation, and with respect to how the requirements of Section 392.245.2 should be interpreted, require a strained rather than a natural reading of the statute's text, and introduce speculative possibilities in place of a straightforward reading of that text. A more natural reading of the statute's text must prevail over a mere suggestion to disregard or ignore duly enacted law by hinting at legislative inadvertence or oversight. United Food and Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1996). "The plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." State ex rel. Doe Run Co. v.

¹⁰ Interestingly, the Commission notes that the existence of facilities-based competition is not included in Section 386.020(13), which lists the factors which the Commission should rely upon in determining whether "effective competition" exists. However, the Commission may consider the existence of this type of competition as one of the "other factors deemed relevant by the commission . . ." § 386.020(13)(e).

Brown, 918 S.W.2d 303, 306 (Mo. App. 1996). Thus, the parties' attempt to create ambiguity where none exists must fail.

With respect to MCI's constitutional challenge, the Commission initially notes that it does not have authority to pass upon the constitutionality of a law. "Administrative agencies lack the jurisdiction to determine the constitutionality of statutory enactments. Raising the constitutionality of a statute before such a body is to present to it an issue it has no authority to decide." Duncan v. Missouri Bd. For Architects, 744 S.W.2d 524, 531 (Mo. App. 1988) (citation omitted). Moreover, if a constitutional challenge is substantial rather than merely colorable, exclusive jurisdiction vests in the Missouri Supreme Court. *Id.* at 530, 531. However, if a constitutional claim concerns the application of a statute, then an administrative body has the authority to apply the statute in a constitutional manner. *Id.* at 531 n. 3.

It is unclear to the Commission whether MCI intends a facial challenge to the constitutionality of Section 392.245, or a challenge to the constitutionality of the statute as applied. However, the Commission points out that both MCI and MCImetro have been granted classification as competitive companies. As such, they are subject to a lesser degree of regulation, and have substantial pricing flexibility pursuant to Section 392.500, RSMo 1994. MCI has not alleged that the Commission has threatened to apply rate base/rate of return regulation to either MCI or MCImetro, or that the Commission has ever attempted to apply rate base/rate of return regulation to any telecommunications company which has been classified as competitive. Given the number of telecommunications companies which have been classified as competitive in the State of Missouri, it would be an impossible strain on the Commission's resources

to employ rate base/rate of return regulation, even if the Commission had the inclination to do so.

Because the Commission has not threatened to apply rate base/rate of return regulation to MCI or MCImetro, the Commission questions whether they have standing to challenge Section 392.245 on constitutional grounds. In order to raise such a claim, generally a party must show not only that a statute is invalid, but that the party has sustained or is immediately in danger of sustaining some direct injury as the result of its application. State ex rel. City of Springfield v. Public Serv. Comm'n, 812 S.W.2d 827, 833 (Mo. App. 1991).

The Commission also questions the ability of MCImetro to claim as unconstitutional the Commission's actions in failing to waive Section 392.240.1 at a time when no incumbent local exchange telecommunications company was subject to price cap regulation. Moreover, MCImetro signed a Stipulation And Agreement in Case No. TA-96-355, which listed the waivers which the parties to that case agreed would be conferred in connection with the grant of a certificate of service authority to provide basic local telecommunications service. The Commission's Report And Order in that case was based upon the Stipulation And Agreement. If MCImetro believed a waiver of Section 392.240.1 was important, it could have litigated the issue in Case No. TA-96-355.

Similarly, the constraints on access pricing of which MCImetro complains were also part of the Stipulation And Agreement which it signed in Case No. TA-96-355. It is somewhat ironic that MCImetro would complain of having its access rates capped at the same level as SWBT's, given its contention in Case No. TC-97-303 that those rates are too high. Further, the maximum access rates of MCImetro are allowed to be increased if they

are cost-justified. In any event, the Commission has articulated the rationale for access pricing constraints in depth in In Re the Application of Dial & Save of Missouri, Inc. d/b/a Dial & Save, for a Certificate of Authority to Provide Basic Local Telecommunications Service, Case No. TA-97-7, Report And Order (May 27, 1997).

Finally, the Commission stresses that the application of price cap regulation under Section 392.245.2 will not exempt a company so regulated from the jurisdiction and oversight of this Commission. Price cap regulation is a method of regulating the maximum prices charged by a company. See § 392.245.1. While it is true that a complaint based upon Section 392.240.1, RSMo 1994, which hinges on allegations of overearnings under rate base/rate of return regulation, will no longer be cognizable, this Commission will retain its ability to appropriately regulate such companies and to entertain complaints on a basis other than Section 392.240.1. The Commission finds that the application of Section 392.245.2 will not result in the unconstitutionally disparate treatment of similarly situated entities.¹¹

The statutory prerequisites for price cap regulation are not onerous. With regard to those prerequisites, the Commission finds as facts the following:

(1) SWBT is a local exchange telecommunications company which has been authorized to provide and has provided basic local telecommunications services in specific geographic areas of the State of Missouri prior to

¹¹ For purposes of its analysis, the Commission has not considered the question of whether incumbent local exchange telecommunications companies and alternative local exchange telecommunications companies are, in fact, similarly situated, and expresses no opinion thereon.

December 31, 1995, and thus is an incumbent local exchange telecommunications company as defined in Section 386.020(22).

(2) SWBT has at least 100,000 access lines in the State of Missouri, and thus is a large local exchange telecommunications company as defined in Section 386.020(30).

(3) Dial U.S. received a certificate of service authority to provide basic local telecommunications service on December 20, 1996 in Case No. TA-96-347. That certificate became effective simultaneously with the effective date of the company's tariff, which was approved on December 31, 1996, to become effective for service on and after January 31, 1997.

(4) Dial U.S. received its certificate of service authority to provide basic local telecommunications service subsequent to December 31, 1995, and thus is an alternative local exchange telecommunications company as defined in Section 386.020(1).

(5) Dial U.S. has been providing basic local telecommunications service on a resale basis to both residential and business customers in the Springfield and Joplin exchanges, and in other areas of southwest Missouri, since at least February of 1997.

(6) The Springfield and Joplin exchanges are part of SWBT's service area.

The Commission finds that SWBT has met the conditions contained in Section 392.245.2, and thus is subject to price cap regulation. The Commission further finds that the initial maximum allowable prices which SWBT may charge for its telecommunications services are the prices which were in effect on December 31, 1996. Moreover, the maximum allowable prices for basic local telecommunications service and exchange access

service may not be changed prior to January 1, 2000, except as otherwise provided in Section 392.245.4.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

OPC was created by the Missouri legislature to represent the public in proceedings before the Commission. §§ 386.700 and 386.710, RSMo 1994. OPC has full and complete access to the Commission's files and records pursuant to Section 386.480, RSMo 1994. That statute also provides that no information furnished to the Commission by a public utility shall be divulged except in certain situations. Section 386.480, RSMo 1994 is a specific statute which controls over the more general statute, Section 386.380, RSMo 1994. Further, records protected under Section 386.480, RSMo 1994, are "[r]ecords which are protected from disclosure by law" under Section 610.021(14). Based upon the record and the Commission's findings of fact, the Commission concludes that OPC violated Section 386.480, RSMo 1994, and the Commission's Protective Order.

SWBT is a telecommunications company and public utility as defined in Sections 386.020(51) and 386.020(42), and as such is subject to the jurisdiction of the Commission pursuant to Chapters 386 and 392 of the Missouri Revised Statutes. SWBT is also an incumbent local exchange telecommunications company as defined in Section 386.020(22), and a large local exchange company as defined in Section 386.020(30). Dial U.S. is an alternative local exchange telecommunications company as defined in Section 386.020(1).

Section 392.245.2 mandates that a large incumbent local exchange telecommunications company be subject to price cap regulation upon a

finding that an alternative local exchange telecommunications company has been certificated and is providing basic local telecommunications service in any part of the incumbent's service area. Based upon the record and the Commission's findings of fact, the Commission concludes that the prerequisites of Section 392.245.2 have been met, and that SWBT is subject to price cap regulation.

Section 392.245.3 provides that the maximum allowable rates for a company subject to price cap regulation are those in effect on December 31 of the year preceding the year in which the company is first subject to price cap regulation, except as otherwise provided in the statute. Based upon the record, the Commission concludes that the initial maximum allowable prices which SWBT may charge for its telecommunications services are the prices which were in effect on December 31, 1996.

Section 392.245.4 also provides that the maximum allowable rates for basic local telecommunications service and exchange access service shall not be changed prior to January 1, 2000, except in certain circumstances. Based upon the record, the Commission concludes that SWBT is prohibited from changing the maximum rates for those services before January 1, 2000, until such time as one of the statutory exceptions may apply.

IT IS THEREFORE ORDERED:

1. That Late-filed Exhibit Nos. 8, 8HC, 11, and 11P are received into evidence.

2. That MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. are directed to return to Southwestern Bell Telephone Company all copies of any information they received from the Office of the Public Counsel in response to a data request propounded to

the Office of the Public Counsel on May 21, 1997, as instructed in the body of this order, within 10 days of the effective date of this order.

3. That all parties are directed to return to Southwestern Bell Telephone Company all copies of the proprietary versions of the rebuttal and revised rebuttal testimony of Lane Kollen and the rebuttal testimony of Don Price, as instructed in the body of this order, within 10 days of the effective date of this order.

4. That Southwestern Bell Telephone Company has met the prerequisites of Section 392.245.2, RSMo Supp. 1996, and may therefore convert from rate base/rate of return regulation to price cap regulation.

5. That the maximum allowable prices which may be charged by Southwestern Bell Telephone Company are the prices which were in effect on December 31, 1996.

6. That Southwestern Bell Telephone Company may not change the maximum allowable prices for basic local telecommunications service or exchange access service prior to January 1, 2000, unless otherwise authorized by Sections 392.245.8, 392.245.9, or 392.248, RSMo Supp. 1996.

7. That this Report And Order shall become effective on September 26, 1997.

BY THE COMMISSION



(S E A L)

**Cecil I. Wright
Executive Secretary**

Lumpe, Ch., Crumpton, Drainer
and Murray, CC., concur and
certify compliance with the
provisions of Section 536.080,
RSMo 1994.

Dated at Jefferson City, Missouri,
on this 16th day of September, 1997.