

STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION

At a Session of the Public Service  
Commission held at its office  
in Jefferson City on the 22nd  
day of August, 1995.

The Office of the Public Counsel	)	
	)	
Complainant,	)	
	)	
vs.	)	<u>CASE NO. TC-95-426</u>
	)	
Southwestern Bell Telephone Company,	)	
	)	
Respondent.	)	

ORDER APPROVING SATISFACTION OF COMPLAINT

On June 22, 1995, the Office of the Public Counsel (OPC) filed a complaint against Southwestern Bell Telephone Company (SWB) pursuant to Section 392.370.2, RSMo 1994<sup>1</sup>. The Commission in *In the Matter of Southwestern Bell Telephone Company's Application for Classification of Certain Services as Transitionally Competitive*, Case No. TO-93-116, Report and Order issued December 31, 1992, classified certain services of SWB as transitionally competitive. The initial three-year period for the transitionally competitive classification is due to expire on January 10, 1996. Pursuant to Section 392.370.1, services which have been classified as transitionally competitive would become classified as competitive at the end of the three-year period. OPC's complaint seeks to have the transitionally competitive classification for the services of SWB which are currently so designated extended for an additional period of three years pursuant to Section 392.370.2. A Notice of Complaint was sent to SWB on

---

<sup>1</sup>All statutory references are to Revised Statutes of Missouri 1994.

June 27, 1995, and on July 27, 1995, SWB filed a document entitled Southwestern Bell Telephone Company's Satisfaction Of Complaint And In The Alternative Answer.

SWB indicated in its response to OPC's complaint that it was willing to extend the transitionally competitive status for its current transitionally competitive services for one additional year, which was not acceptable to OPC. SWB also indicated that it did not believe its participation in this docket would be profitable, given current federal and state statutory and regulatory activities. However, SWB did state that it would be willing, by way of satisfaction of the complaint, to extend the transitionally competitive classification of its current transitionally competitive services for a period of three years, provided that SWB's right to file for competitive classification under Section 392.361 is expressly reserved, subject only to the restriction in Section 392.361.8 that a petition be filed no more frequently than once every two years. In addition, OPC and the Staff of the Commission (Staff) could not use SWB's voluntary three-year extension of the transitionally competitive classification pursuant to the satisfaction of this complaint as an argument against classification of these same services as competitive in the event SWB would file a petition for competitive classification at any time in the future. SWB states that it has been advised by both OPC and Staff that the terms of the proposed satisfaction are acceptable.

On August 2, 1995, Staff filed a document entitled Staff's Response To "Satisfaction Of Complaint And In The Alternative Answer". Staff essentially agrees with the basic provisions and interpretations set out in SWB's satisfaction of complaint, specifically that the transitionally competitive status of SWB's current transitionally competitive services would be extended for an additional three years, and

SWB's right to file a petition under Section 392.361 to reclassify any or all of the transitionally competitive services as competitive at any time during the extension period, subject only to the statutory limitation on filing such petitions no more often than every two years, would be acknowledged by the Commission. Staff also maintains that in the event the Commission adopts SWB's satisfaction of complaint, it is not necessary to set a procedural schedule for submission of evidence or hold a hearing prior to issuing an order extending the transitionally competitive status of the services in issue for an additional three-year term, as SWB is the only party with an interest in obtaining competitive status-for its transitionally competitive services, and SWB's offer of satisfaction effectively waives its right to a hearing.

On August 2, 1995, MCI Telecommunications Corporation (MCI) filed an application to intervene, alleging that the Commission's decision regarding the complaint may affect MCI's interest as a purchaser of access services, as well as its interest as a provider of intrastate interexchange services, and that its interests are different from those of the general public. MCI adds that it supports OPC's complaint. On August 4, 1995, MCI filed a reply to Staff's response, stating that Section 392.370 requires the Commission to provide notice prior to issuing an extension order; that Section 392.361 makes it clear that members of the Missouri telecommunications industry are interested parties in such matters and entitled to such notice; and that the Commission should follow these procedures and not approve the proposed resolution of this matter without first giving full notice and making the required finding. On August 8, 1995, Midwest Independent Coin Payphone Association (MICPA) filed an application to intervene, stating that it is a not-for-profit corporation devoted to promoting and protecting the interests of private pay phone

providers, and it has an ongoing interest in any docket which has as its focus competition, competitive safeguards, and other competitive issues, since the results of those proceedings could have direct or indirect impact on pay telephone competition, and thus MICPA's interest is different from the interest of the general public. On August 11, 1995, the Commission issued a Notice to OPC to file a response to SWB's satisfaction of complaint. On August 15, 1995, OPC filed a document entitled Response Of The Office Of Public Counsel To Southwestern Bell Telephone Company's Satisfaction Of Complaint And, In the Alternative, Answer.

In its response, OPC states that the statements in SWB's satisfaction of complaint regarding the positions of OPC, Staff, and SWB on the extension of transitionally competitive status are true and accurate reflections of those positions. OPC also states that it is willing to accept the terms of SWB's satisfaction of complaint, in which SWB agrees to the extension of the transitionally competitive classification of its current transitionally competitive services for a period of three years, and that it agrees and concurs with SWB that the company has a right to file a petition for competitive classification of those services under Section 392.361 during that three-year extension. OPC also agrees that it will not use SWB's agreement to the extension in this complaint case to argue against classification of the same services as competitive should SWB file such a petition under Section 392.361 and at any time in the future.

In addition, OPC also commented on the responses filed by Staff and MCI, specifically Staff's assertion that because SWB is the only party with an interest in obtaining competitive status for its services and is the only party with an interest that could be protected through a hearing on the appropriateness of extending the transitionally competitive status, no hearing is required on the satisfaction of complaint, and MCI's claim

that full notice to the telecommunications industry is required, as well as a hearing and findings under Section 392.370. OPC maintains that while Staff's position is not unreasonable given the interests at stake in the continued classification of the services in question, due to the potential jurisdictional nature of the notice and hearing requirement in Section 392.370, a more cautious approach would be to provide notice and an opportunity for hearing. OPC suggests that this could be accomplished through an expedited notice and hearing process, which could provide that any objections to the extension of the classification or to the satisfaction of the complaint be filed in writing a reasonable amount of time prior to the time scheduled for hearing. Thus, OPC requests that the Commission provide notice and a hearing, at which time the Commission would receive the stipulated satisfaction of complaint from OPC, Staff, and SWB and hear objections from any interested parties to such satisfaction of complaint.

The Commission has reviewed the entire case file in this proceeding, and the applicable statutory provisions, and determines that the proposed satisfaction of complaint is reasonable, and should be approved as modified by the Commission. The essence of the proposed satisfaction of complaint is an agreement between SWB, OPC, and Staff that SWB will consent to a three-year extension of the transitionally competitive classification for the services which were previously classified as transitionally competitive in Case No. TO-93-116, on condition that SWB be allowed to file a petition for competitive classification of these services under Section 392.361 at any time. OPC and Staff further agree that neither will use SWB's consent to the extension in this complaint case as an admission against SWB in the event

the company seeks a reclassification of these services to competitive status in the future.

However, the Commission is of the opinion that Section 392.361 no longer applies once a company or service has been classified as competitive or transitionally competitive under the procedures provided for in this section, thus SWB would not have a right to file a petition under Section 392.361 with respect to those services which have already been classified as transitionally competitive under this section. Nonetheless, the spirit and intent of the proposed satisfaction of complaint may still be honored, as SWB may still seek the conversion of its current transitionally competitive services to competitive status under Section 392.370.2. Section 392.370.2 states that the Commission may extend or reinstate a transitionally competitive service classification for two periods in addition to the initial three-year period, with each additional period "not to exceed three years." Since the statute provides that each additional extension of a transitionally competitive service classification may not exceed three years, the Commission finds that it has inherent authority to shorten the time period for the transitionally competitive classification at any time during the three-year period. Thus, SWB could at any time apply to the Commission to have the three-year period of the extension shortened pursuant to the provisions of Section 392.370.2. In such a case, SWB would have the burden to prove that its current transitionally competitive services are competitive, as provided in Section 392.370.2.

As the Commission has found that the provisions of Section 392.361 do not apply to this case, the provisions of 392.361.2 requiring notice to the Missouri telecommunications industry are also inapplicable. Thus, neither MCI nor MICPA is entitled to notice under Section 392.361.

Nor are they entitled to notice under Section 392.370.2. Appropriate notice was given when the Commission issued its Notice Of Complaint on June 27, 1995. Generally a complaint involves the complainant and the respondent, and notice to other persons and entities, and an intervention period, is not usually provided for unless the complaint involves the establishment of a formal rate case.

The Commission finds that neither MCI nor MICPA is entitled to notice or intervention in this proceeding. The Commission also observes that neither MCI nor MICPA is likely to be prejudiced by the inability to intervene in this proceeding. MCI states in its application to intervene that it supports OPC's complaint. The proposed satisfaction of complaint offers exactly the relief requested by OPC in its complaint, i.e., the extension of the transitionally competitive status of SWB's current transitionally competitive services for an additional three-year period. Commission approval of the proposed satisfaction of complaint also does not, and could not, grant to SWB any rights which it does not already have under the applicable statutes. MICPA's application to intervene, on the other hand, does not state its position or whether it supports or opposes the relief sought in this proceeding, contrary to the provisions of Rule 4 CSR 240-2.110(13), and could be denied on that basis alone. In addition, nothing in the proposed satisfaction of complaint affects or can affect the right of MCI, or possibly MICPA, to file a complaint under Section 392.370.2 at any time to extend or reinstate a transitionally competitive service classification to any services provided by SWB.

With regard to the hearing requirement contained in Section 392.370.2, the Commission finds that since neither SWB, OPC, nor Staff has requested a hearing, under *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496 (Mo.App. 1989), no

hearing is necessary. In addition, Rule 4 CSR 240-2.070(8) provides as follows: "If the respondent desires to satisfy the complaint, s/he may submit to the commission, within the time provided, a statement of the relief which s/he is willing to offer. If the complainant accepts the offers, upon approval by the commission, no further proceedings will be held."

The Commission has reviewed the proposed satisfaction of complaint, and with the exception that SWB's ability to seek the conversion of its transitionally competitive services to competitive status at any time within the three-year extension flows from Section 392.370.2, rather than 392.361, the Commission finds that the proposed satisfaction of complaint is reasonable and should be approved. While no rationale or evidence has been presented from which to find a competitive classification for SWB's current transitionally competitive services is or is not in the public interest at this time, the Commission finds that approval of the proposed satisfaction of complaint is not inconsistent with the purposes and policies of Chapter 392. Section 392.361 and 392.370 provide for a gradual evolution of telecommunication companies and services toward competitive status. By extending the transitionally competitive classification for SWB's current transitionally competitive services, the Commission retains more protection and regulatory oversight than would be available if the status of the services was changed to competitive. This is not inconsistent with the purposes and policies of Chapter 392 under the unique circumstances presented in this case, where all of the parties are in agreement that the transitionally competitive service classification should or may be extended for a period of three years, especially given the fact that SWB will have an opportunity, if it chooses, to seek to shorten the time period for the transitionally competitive classification.



The Commission therefore determines that approval of the proposed satisfaction of complaint is warranted, and the Commission will so approve the proposed satisfaction of complaint, subject to the modification that SWB's ability to request a shortening of the time period for the transitionally competitive status of its services at any time during the agreed-to three-year extension period emanates from Section 392.370.2 rather than Section 392.361. The transitionally competitive status of SWB's current transitionally competitive services will thus be extended from the current expiration date of January 10, 1996 to January 10, 1999. In addition, neither OPC nor Staff may use SWB's agreement to the three-year extension as an admission against SWB in the event the company seeks to shorten the time period for its transitionally competitive services.

**IT IS THEREFORE ORDERED:**

1. That the application to intervene filed by MCI Telecommunications Corporation on August 2, 1995, be and is hereby denied.
2. That the application to intervene filed by Midwest Independent Coin Payphone Association on August 8, 1995, be and is hereby denied.
3. That the proposed satisfaction of complaint agreed to by Southwestern Bell Telephone Company, the Office of the Public Counsel, and the Staff of the Missouri Public Service Commission be and is hereby approved.
4. That pursuant to the satisfaction of complaint, the transitionally competitive status of Southwestern Bell Telephone Company's services which were previously classified as transitionally competitive in Case No. TO-93-116 is hereby extended for a period of three years, from the current expiration date of January 10, 1996 to January 10, 1999.

5. That Southwestern Bell Telephone Company may at any time apply to the Commission for a shortening of the three-year extension of the transitionally competitive status of its current transitionally competitive services under Section 392.370.2, RSMo 1994.

6. That this Order shall become effective on September 1, 1995.

BY THE COMMISSION



David L. Rauch  
Executive Secretary

(S E A L)

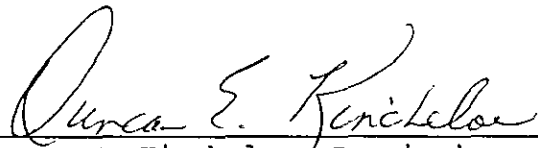
Mueller, Chm., McClure, Crumpton,  
and Drainer, CC., Concur.  
Kincheloe, C., Concurs with  
Concurring Opinion.

CONCURRING OPINION OF COMMISSIONER DUNCAN E. KINCHELOE  
The Office of Public Counsel, Complainant,  
vs. Southwestern Bell Telephone Company, Respondent.  
Case No. TC-95-426

While concurring in the Commission's Order, I do not join in the conclusion that Section 392.361 fails to apply after a transitionally competitive classification has been achieved. I am unable to detect statutory grounds for that conclusion. Moreover, insofar as variance exists between the notice requirements of 392.361 and 392.370, the broader provisions of the former appear crafted more suitably to a reclassification request.

I agree, however, that the Commission enjoys authority to shorten any time period it may establish for a transitionally competitive classification. This enables me to concur in the Order of the Commission, which I am pleased to do.

Respectfully submitted,



Duncan E. Kincheloe, Commissioner

Dated at Jefferson City, Missouri,  
on this 22nd day of August, 1995.