

Southwestern Bell Telephone

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December 12, 2001

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

FILED²
DEC 12 2001
Missouri Public
Service Commission

Re: Case No. TO-2002-185

Dear Judge Roberts:

Enclosed for filing with the Commission in the above-referenced case is an original and eight copies of Reply Brief of Southwestern Bell Telephone Company, Southwestern Bell Texas, Inc., and Southwestern Bell Telephone, L.P.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Paul G. Lane /tm

Paul G. Lane

Enclosure

cc: Attorneys of Record

FILED²

DEC 12 2001

Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Southwestern Bell)
Telephone Company To Transfer Property and Ownership) Case No. TO-2002-185
of Stock Pursuant to Section 392.300, R.S.Mo.)

**REPLY BRIEF OF SOUTHWESTERN BELL TELEPHONE
COMPANY, SOUTHWESTERN BELL TEXAS, INC. AND
SOUTHWESTERN BELL TELEPHONE, L.P.**

COME NOW Southwestern Bell Telephone Company ("SWBT"), Southwestern Bell Texas, Inc. ("SWBT Texas"), and Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company ("SWBT, L.P.") (collectively referred to as "Joint Applicants"), and for their Reply to the briefs filed in response to the Commission's November 27, 2001 Order Granting Intervention and Directing Filing ("Order Directing Filing"), state as follows:

1. Joint Applicants filed a response to the Order Directing Filing on December 10, 2001 ("Joint Applicants' Brief"). On that same date, the Staff of the Missouri Public Service Commission filed its Brief ("Staff's Brief"), the Office of Public Counsel filed its Preliminary Brief ("OPC's Brief"), the Missouri Independent Telephone Company Group filed its Brief ("MITG's Brief") and the Small Telephone Company Group filed its Preliminary Brief ("STCG's Brief").

2. The Order Directing Filing listed three issues which the Commission sought to address:

- Whether the Commission's oversight would be any different if the reorganization were authorized;
- What would become of the franchise and charter held by SWBT if the reorganization were permitted; and

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- What questions of fact are likely to be in dispute and require a hearing for resolution?

3. The Briefs filed by the STCG, MITG and OPC do not address all of the issues listed in the Order Directing Filing and also re-raise other issues. STCG stated that it was specifically not addressing the question of the Commission's oversight. STCG Brief at 9. Similarly, MITG asserted that it would allow the Staff to address the oversight issues. MITG Brief at 7. OPC's Brief raises a price cap issue. OPC Brief at 2-3. As demonstrated in SWBT's prior filings, however, these purported issues either ignore or misstate the law and the Commission should not give credence to those positions.

SWBT L.P. Is Not Required To Obtain A Certificate Of Service Authority

4. MITG, STCG and OPC each incorrectly assert that SWBT, L.P. is required to apply for and receive a certificate of service authority in order to operate as a telecommunications company under Missouri law. These assertions are clearly incorrect under applicable law.

5. In Joint Applicants' Brief, as well as in their November 8, 2001 Reply to the Applications to Intervene filed by MITG, OPC, STCG and Staff ("Joint Applicants' November 8 Reply"), the Joint Applicants clearly explained that, because SWBT's predecessors received a charter directly from the state prior to the adoption of the Missouri Public Service Commission law, that SWBT is permitted to transfer the rights and privileges associated with the charter to SWBT Texas and ultimately to SWBT, L.P.

6. The purported objections raised by OPC, MITG and STCG are completely without merit. OPC asserts that there is no authority to allow SWBT, L.P. to operate under the original charter grant until it complies with the current statutory certification process. OPC's

Brief at 3. STCG makes a similar assertion that the passage of Section 392.410.1 RSMo in 1987 imposes a requirement on SWBT, L.P. to seek a certificate of service authority. STCG's Brief at 3-4. Finally, MITG asserts that SWBT, L.P. must be subject to the requirement to obtain a certificate of service authority because Joint Applicants are seeking Commission approval for the transfer. MITG's Brief at 3. Each of these contentions is incorrect.

7. OPC contends there is no authority for SWBT, L.P. to operate under the original charter grant. OPC's Brief at 2. OPC provides no support for that assertion, and it is clearly contrary to applicable law. As demonstrated in Joint Applicants' Brief in response to the Order Directing Filing, the charter which was granted by the State to SWBT's predecessors created a valid, binding and enforceable contract. The perpetual charter is a vested property right that cannot be impaired or taken by the legislature as that right is constitutionally protected by both the Missouri and United States Constitutions. *Id.* Just as the passage of the Public Service Commission law in 1913 could not deprive SWBT of its state created charter, the 1987 legislation likewise cannot deprive SWBT of the rights granted under that charter. These contract rights are transferable to SWBT Texas and, in turn, to SWBT, L.P. Joint Applicants' Brief at 9-12.

8. STCG's analysis is similarly erroneous. STCG contends that the passage of Section 392.410.1 RSMo in 1987 requires any new company to obtain a certificate of service authority. That statute makes clear, however, that a certificate of service authority is required "unless a company holds a state charter issued in or prior to the year 1913, which charter authorizes a company to engage in a telephone business." SWBT, L.P. will hold a state charter issued in or prior to the year 1913 once this transaction is approved and, accordingly, SWBT, L.P. is not required to obtain a certificate of service authority. Even if Section 392.410.1 RSMo

did not contain a specific exemption for preexisting state charters, SWBT, L.P. would not be required to obtain a certificate of service authority. As previously discussed, the state-granted charter is a constitutionally protected vested property right which subsequent legislation cannot remove. That is the precise holding of the cases cited by Joint Applicants in their Brief in response to the Order Directing Filing. Id. at 9-12. Neither the 1913 legislation nor the 1987 legislation can take away this vested right granted by the state.

9. STCG misinterprets and misapplies State ex rel. Wabash Railway Company v. Roach, 184 S.W. 969 Mo. (1916). As SWBT has explained, the Wabash case makes clear that franchises of a corporation can be divided into two categories: (1) the right of being a body corporate and (2) all other grants of power or privileges. Id. at 972. While the right to be a corporation is not assignable, the rights in the second class of franchises, including the right to continue to operate as a telephone company pursuant to a charter granted by the State, are freely transferable and assignable. Id. STCG is simply wrong in asserting that Wabash provides that the state charter granted to SWBT's predecessors is not assignable.

10. MITG's assertions that SWBT's position is incorrect because it is subject to the regulatory jurisdiction of the Commission, pays income taxes, and has sought approval of this reorganization plan completely misses the mark. The position which the Joint Applicants have presented demonstrates that the charter granted to SWBT's predecessors flows to SWBT, L.P. and eliminates the need for SWBT, L.P. to obtain a certificate of service authority. Joint Applicants make no contention that SWBT, L.P. is immune from other aspects of Commission regulation. The issue is not whether SWBT, L.P. will be subject to regulation by the Commission; the issue is whether SWBT, L.P. is required to obtain a certificate of service

authority. The cases cited by Joint Applicants make clear that it is not necessary and that any attempt to require a certificate of service authority is contrary to law.

11. Staff's Brief is exactly right on this point. As Staff points out, and consistent with Wabash, "because SWBT's predecessors were incorporated before the establishment of the Commission . . . it may assign its right to conduct a telecommunications business in Missouri without a requirement that its successor first obtain a certificate of service authority." Staff Brief at 5. The contentions to the contrary raised by OPC, MITG and STCG are simply wrong.

Price Cap Regulation

12. OPC asserts that SWBT, L.P. cannot acquire the regulatory status of SWBT as a price cap company. OPC Brief at 2-3. OPC is simply incorrect.

13. As Staff points out, SWBT's price cap status does vest in SWBT Texas and then in SWBT, L.P. without any further action by the Commission. Staff's Brief at 2-3. Under Section 351.458 RSMo 2000, a Missouri corporation may merge with a foreign corporation with the foreign corporation surviving the merger. The effect of the merger is the same as with mergers of domestic corporations, except to the extent the foreign law requires otherwise. Pursuant to Section 351.450 RSMo 2000, the surviving corporation possess all of the rights, privileges, immunities and franchises of the merged company. Id. Texas law does not provide to the contrary, and in fact Article 5.06 of the Texas Business Corporation Act specifically provides for a similar effect. Id. Finally, Article 5.17 of the Texas Business Corporation Act authorizes SWBT Texas to convert to SWBT, L.P., while Article 5.20 provides that property rights continue in the converted entity. Id. The Joint Applicants' November 8, 2001 Reply is consistent with Staff's view on this issue. Joint Applicants' November 8 Reply at 13-15.

14. Thus, with regard to the price cap statute, SWBT, L.P. will have the same rights and obligations as SWBT now has. Just as SWBT is subject to price caps pursuant to Section 392.245 RSMo 2000, so SWBT, L.P. will be. Not only is this result required from a legal perspective, it makes perfect sense from a practical perspective. This Commission has previously found that SWBT is subject to price cap regulation pursuant to Section 392.245 RSMo 2000 since an alternative local exchange company operates in SWBT's territory in Missouri. This Commission has confirmed that alternative local exchange companies are operating in SWBT's territory in Case No. TO-99-227. These alternate providers will not be eliminated when SWBT is converted to SWBT, L.P., instead, they will continue to operate as in the past.

The Commission's Regulatory Oversight Over SWBT, L.P.
Will Be The Same As Oversight Over SWBT

15. Joint Applicants have previously explained that the Commission's oversight is no different over SWBT, L.P. than over SWBT. Joint Applicants' Brief at 5-8. STCG did not comment on this issue (STCG Brief at 9) nor did MITG (MITG Brief at 7). Only OPC purported to address this issue, but OPC does not appear to take the position that the Commission's oversight is impacted by the proposed transfer. OPC's Brief at 3. OPC says that effective oversight "is reflected in the rates and quality of service in the final analysis." *Id.* As Joint Applicants have repeatedly noted, there is no change in the rates or quality of service or the Commission's ability to exercise its oversight over either of these matters. Accordingly, there is no reason to find that the Commission's jurisdiction is affected.

If The Reorganization If Permitted, SWBT, L.P. Will
Hold The Charter Now Held By SWBT

16. Neither OPC nor STCG address the Commission's question concerning the status of the charter if the reorganization is submitted. MITG purports to address this issue, by asserting that "Southwestern Bell is abandoning its franchise and charter." MITG Brief at 7. MITG provides no support or legal analysis for the proposition that SWBT is abandoning its charter. It is not.

17. To the contrary, the established law provides that SWBT, L.P. becomes the owner of the charter originally granted to SWBT's predecessors. Joint Applicant Response at 9-12. Staff concurs with this analysis. Staff Brief at 4-5.

There Are No Factual Issues Which Require Resolution

18. STCG concedes that there are no facts in dispute. STCG Brief at 9. OPC concurs with that analysis, pointing out that the issues presented are legal, not factual. OPC Brief at 3.

19. MITG purports to state issues of "fact" which may require a hearing. MITG Brief at 7-8. A review of those purported issues, however, demonstrates that they are not issues in this proceeding, and in any event are legal issues, not factual ones. The purported factual issues which MITG seeks to raise involve (1) the certificate of service authority process if SWBT, L.P. were to provide long distance service in small ILEC territory, (2) whether SWBT, L.P. would be required to obtain a certificate to provide local service in small ILEC territory, and (3) what level of Missouri universal service fund support SWBT, L.P. could receive by serving customers in exchanges of other ILECs. The Joint Application does not raise any of these issues, and does not seek authority or clarification of any rights to provide toll or local service in small ILEC territory, or make any claim whatsoever with regard to Missouri universal service fund support

in serving customers in small ILEC territory. To the extent those are issues at all, they are legal issues for another day in another proceeding as they have nothing to do with the Joint Application in this case.

20. Staff asserts that the question of whether the restructuring is detrimental to the public interest may require a hearing. Staff Brief at 5. The Joint Applicants disagree. If the relevant facts are not in dispute, the Commission may determine whether the proposed restructuring is detrimental to the public interest. Joint Applicants maintain that since it is uncontested that (1) SWBT, L.P. will continue to provide the same services, utilizing the same employees and assets, and maintaining the same quality of service as SWBT would provide, and (2) there is no adverse tax impact on the State of Missouri or any of its political subdivisions, the Commission may determine that the grant of the application is not detrimental to the public interest. No party has shown any fact which requires the Commission to conduct a hearing to determine whether the Joint Application's grant is detrimental to the public interest.

Conclusion

21. In order to fully achieve the tax savings contemplated by the reorganization, it is necessary for the Commission to act on or before December 20, 2001. While Joint Applicants do not believe that any factual or legal issues require any further proceedings, Joint Applicants again offer to the Commission to appear at any forum designated by the Commission to answer any questions which the Commission may have.

WHEREFORE, for the foregoing reasons, Joint Applicants respectfully request the Commission to approve the Joint Application on or before December 20, 2001, together with such other and further relief as the Commission may determine just and appropriate.

Respectfully submitted,

BY Paul G. Lane tm

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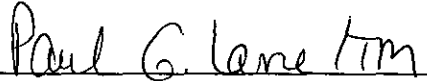
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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail or via hand-delivery on December 12, 2001.



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